

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DELILAH GUADALUPE DIAZ,)
)
 Petitioner,)
)
 v.) No. 23-14
)
 UNITED STATES,)
)
 Respondent.)

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-14, Diaz versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit holds that Rule 704(b) prohibits only explicit opinions that the "particular defendant had the state of mind required to convict." The government appears unwilling to endorse that full test. It seems to agree, contrary to Ninth Circuit precedent, that Rule 704(b) forbids an expert from testifying that people in the defendant's position always have the requisite mens rea.

Such testimony never explicitly mentions the defendant, of course, but as the government seems to recognize, it is clearly in the rules of -- in the words of Rule 704(b) an opinion about whether the defendant had the requisite state of mind. In other words, it

1 establishes a class of individuals including the
2 defendant, and it assigns a mens rea to that
3 class.

4 Agent Flood's testimony here was no
5 different. He testified that in "most
6 circumstances," people like the defendant know
7 they have drugs in the car when they cross the
8 border. The only difference between that
9 testimony and absolute class-wide testimony is
10 that he posited that people like the defendant
11 usually, instead of always, have the requisite
12 mens rea.

13 But any such distinction is
14 immaterial. Imagine an expert took the stand
15 and said: I believe the defendant in this case
16 probably or maybe 80 percent of the time -- or
17 maybe there's an 80 percent likelihood had the
18 requisite mens rea. Obviously, Rule 704(b)
19 would prohibit that testimony.

20 And the testimony here is exactly the
21 same. It expresses an opinion, a probabilistic
22 opinion instead of an absolute opinion, but an
23 opinion about whether the defendant had the
24 requisite -- requisite mens rea.

25 So that leaves the government's final

1 objection, that Rule 704(b) should not be
2 construed to prohibit what the government calls
3 inferentially relevant testimony.

4 And we agree with that proposition.
5 The rule that I'm advocating today has been
6 employed by the Fifth Circuit for over 20 years,
7 and it makes clear that modus operandi evidence,
8 for example, things like drug traffic
9 organizations use couriers to transport drugs
10 across the border, that they -- that drugs are
11 extremely valuable, are perfectly legitimate.

12 The rule in the Fifth Circuit is that
13 testimony from which a jury might infer mens rea
14 is perfectly permissible, but testimony that
15 assigns a mens rea to the defendant or people in
16 her class is not okay. And that's what Agent
17 Flood did here, and for that reason, we'd ask
18 the Court to reverse.

19 JUSTICE THOMAS: Mr. Fisher, you put
20 quite a bit of weight -- of -- of weight in your
21 argument on the preposition -- on "about." And
22 that was a stylistic change, certainly
23 non-substantive.

24 Do we normally put that much emphasis
25 or that much weight on stylistic changes to

1 statutes?

2 MR. FISHER: Well, I think what I
3 would say, Justice Thomas, is the Court
4 obviously puts a lot of weight on the text of
5 the statute. And so I start with the current
6 text of the statute that is current law.

7 JUSTICE THOMAS: Okay. So, even with
8 that, it says "about defendant." It doesn't say
9 "about" someone else. So you're saying that
10 even if it's indirect, it's about this
11 defendant?

12 MR. FISHER: Let me say two things,
13 Justice Thomas. First, to finish my answer
14 about the word "about," what we say is that
15 preposition is important, just like the prior
16 preposition, "as to," before the stylistic
17 amendment --

18 JUSTICE THOMAS: Yeah.

19 MR. FISHER: -- because it makes clear
20 the Ninth Circuit's clear statement rule
21 requiring an explicit opinion is too narrow. So
22 that's what the preposition "about" does.

23 Now you also asked me about "the"
24 defendant. And our position there is very
25 simple. It is that that word covers either a

1 direct statement about the particular defendant
2 or a statement about a class of people,
3 including the defendant.

4 I don't think the government disagrees
5 that the rule covers a statement covering -- I'm
6 sorry, that the rule covers a class of people
7 including the defendant as long as it's stated
8 in absolute terms. So, if I understand the
9 government's position correctly, it agrees you
10 need not mention the explicit defendant. If you
11 talk about a class of people that includes the
12 defendant and say those people always have the
13 requisite mens rea, I think the government
14 agrees, contrary to the Ninth Circuit, that Rule
15 704(b) applies.

16 JUSTICE THOMAS: Well, I thought
17 the --

18 MR. FISHER: And all we're saying --
19 sorry.

20 JUSTICE THOMAS: Well, I thought the
21 argument there was that if you say "all
22 defendants," all people in this class do this,
23 then it obviously would include the defendant.

24 MR. FISHER: I think that's exactly
25 right, Justice Thomas. So the only move left

1 from there is to say, if the expert were to
2 testify people like this almost always,
3 virtually always, 99 percent of the time,
4 probably, in most circumstances, all of those
5 are still opinions about whether the defendant
6 had the mens rea. They're just not absolute
7 opinions.

8 But they're still stating an opinion
9 about whether a class of people including this
10 defendant have the requisite mens rea. And I
11 think that's why the text of the rule, opinions
12 about whether the defendant had the mens rea,
13 covers this exact case.

14 JUSTICE JACKSON: But I guess I don't
15 --

16 CHIEF JUSTICE ROBERTS: But --

17 JUSTICE JACKSON: -- understand -- oh,
18 sorry.

19 CHIEF JUSTICE ROBERTS: I was just
20 going to ask, but the defense counsel would, of
21 course, know that this witness is going to
22 testify, right?

23 MR. FISHER: Yes.

24 CHIEF JUSTICE ROBERTS: And could make
25 appropriate inquiries about the nature of his

1 testimony before. And so, after he has
2 testified, he could presumably stand up and ask
3 the expert, Mr. Expert, are you saying that in
4 every case, someone knows that the drugs are in
5 the car? He, presumably, would say no. And are
6 you saying -- are you stating an opinion about
7 whether this individual had -- knew she had
8 drugs in the car? He would have to say no,
9 right?

10 So I don't understand -- I mean,
11 obviously, you would like a case in which this
12 was a very rare occurrence, but all he's saying
13 is that it's not. It's whatever he wants to
14 say, in the majority of cases or whatever, and
15 you can challenge that and you can particularly
16 make clear that what the concern was about in
17 drafting this rule, you can make clear that he
18 is not telling you anything about this
19 particular individual.

20 MR. FISHER: Let me say two things
21 about that, Mr. Chief Justice. First of all, I
22 just want to return to the thing I said in the
23 opening, which is, if the expert were to testify
24 that I think there's an 80 percent chance this
25 particular defendant had the mens rea, the same

1 kind of cross-examination could occur. You
2 would say, Mr. Expert, you're not sure, are you?
3 It's possible he didn't have it? Only -- you
4 know, it's only you're saying probably? And I
5 think it would be very hard to argue Rule 704(b)
6 would not cover that testimony.

7 CHIEF JUSTICE ROBERTS: Well, I don't
8 think --

9 MR. FISHER: And the reason why --

10 CHIEF JUSTICE ROBERTS: Go ahead.

11 MR. FISHER: Oh. I think the reason
12 why is because what the drafters of the rule
13 cared about was not an absolute versus
14 probabilistic opinion. What they cared about
15 was the expert assigning a mens rea to the
16 defendant or a class of people like the
17 defendant. In other words, it's the subject of
18 mens rea that's off limits, not --

19 CHIEF JUSTICE ROBERTS: Well, I don't
20 know that --

21 MR. FISHER: -- absolute testimony.

22 CHIEF JUSTICE ROBERTS: I -- I
23 certainly don't have experience in -- in trials,
24 but -- but I don't know that -- could he really
25 say there's an 80 percent chance that this

1 individual had drugs? I think he would have to
2 say more generally that 80 percent of the people
3 that I've studied or whatever have drugs. I
4 don't know that he can ascribe -- maybe he
5 shouldn't be able to ascribe a number to this
6 individual.

7 MR. FISHER: Well -- well --

8 CHIEF JUSTICE ROBERTS: Because there
9 may well be situations where -- and, again, the
10 defense counsel can bring them up -- why this
11 person would not be like the typical individual
12 that the expert --

13 MR. FISHER: Right.

14 CHIEF JUSTICE ROBERTS: -- is
15 testifying about.

16 MR. FISHER: Well, after Rule 704(b),
17 of course, the expert couldn't, but I think,
18 before Rule 704(b), an expert could say -- for
19 example, an expert could say, absolutely, as
20 happened in the Hinckley trial, I believe this
21 defendant did not have the capacity to tell
22 right from wrong, so, therefore, he is insane.

23 And I think after -- and I think
24 Congress would have prohibited that in Rule
25 704(b) just like it would prohibit the expert

1 from saying I think most likely Mr. Hinckley was
2 insane and couldn't tell right from wrong.

3 And whether you say that in terms of a
4 percentage or just a verbal locution that's
5 "probably," "usually," "most of the time,"
6 "almost certainly," any of those things would be
7 covered by the rule because they're all an
8 opinion about whether the defendant had that
9 mens rea.

10 JUSTICE JACKSON: But, Mr. --

11 JUSTICE ALITO: Mr. --

12 JUSTICE BARRETT: Mr. Fisher --

13 JUSTICE ALITO: -- Mr. Fisher, your --
14 the -- the Ninth Circuit's rule is clear. Your
15 rule, to my mind, is unclear. I still don't
16 understand it. If you don't think that anything
17 from which the jury could infer mens rea is
18 barred by 704, then I don't know where you draw
19 the line.

20 MR. FISHER: Well, Justice Alito, I
21 think it might help to understand what you have
22 to decide in this case if I give you a quick
23 preface to that answer.

24 JUSTICE ALITO: Well, just give me
25 what the rule should be.

1 MR. FISHER: The rule should be that
2 any testimony that the jury would naturally
3 understand as expressing an opinion about the
4 defendant's mens rea is covered by Rule 704(b).

5 JUSTICE ALITO: So that -- if it's --

6 MR. FISHER: That raises --

7 JUSTICE ALITO: -- if it's relevant --
8 all right. Suppose the -- suppose the -- the
9 expert is -- is asked, how many cases do you
10 have personal familiarity with in which a person
11 drove across the border with a large quantity of
12 drugs hidden in the car? Eighty-three cases.
13 And how many of those cases did the person
14 driving the car know that the drugs were there?
15 Eighty-three.

16 Is that barred?

17 MR. FISHER: I think that would be
18 barred because it would be equivalent of saying
19 defendants in this position always have the
20 requisite mens rea.

21 JUSTICE ALITO: Well, it's just a
22 statement of fact about his -- about his -- what
23 he has personal knowledge of.

24 MR. FISHER: Well, remember, the state
25 -- the expert testimony here -- and this is at

1 Pet. App. 13A -- was admitted as an expert
2 opinion about whether the defendant had the
3 requisite mens rea. It's opinion evidence --

4 JUSTICE ALITO: All right. Well, this
5 isn't --

6 MR. FISHER: -- not facts evidence.

7 JUSTICE ALITO: Okay. So it would be
8 okay if it's not opinion evidence?

9 MR. FISHER: Well, I think it
10 functionally would be opinion evidence
11 regardless of whether you characterized it.

12 But, Justice Alito, let me -- I think it might
13 help the conversation if I explained the Ninth
14 Circuit's rule raises really two questions.

15 One is, is the expert testimony about
16 mens rea and is it about the defendant? And --
17 and -- and we agree with the -- with the Fifth
18 Circuit rule that if you -- if the expert gives
19 testimony that -- from which the jury can merely
20 draw an inference about mens rea, that's
21 perfectly fine, and there might be borderline
22 cases about what's mens rea, but that's not this
23 case because the expert used the word "know."
24 The expert used the word "aware."

25 JUSTICE KAGAN: Well, can I test

1 that --

2 MR. FISHER: So the only question --

3 JUSTICE KAGAN: -- that question about
4 inference? So suppose that the expert gets on
5 the stand and says: In my experience, drug
6 traffickers always inform their carriers before
7 they head out about the nature of the scheme.

8 MR. FISHER: Right.

9 JUSTICE KAGAN: Would that come under
10 your rule or would it not?

11 MR. FISHER: I think it would probably
12 barely fall outside of our rule, Justice Kagan,
13 and that's -- but you have identified an edge
14 case, but the reason --

15 JUSTICE KAGAN: Yeah, it's -- it's --

16 MR. FISHER: -- why it wouldn't fall
17 in --

18 JUSTICE KAGAN: -- very much like --
19 I -- I sort of expected --

20 MR. FISHER: Yeah.

21 JUSTICE KAGAN: -- you to say that --

22 MR. FISHER: Right.

23 JUSTICE KAGAN: -- because it's very
24 much like the example in your reply brief --

25 MR. FISHER: Yeah.

1 JUSTICE KAGAN: -- about tax lawyers
2 being --

3 MR. FISHER: Right.

4 JUSTICE KAGAN: -- taught something.
5 So this is drug couriers are being informed --

6 MR. FISHER: Right.

7 JUSTICE KAGAN: -- about the nature of
8 the scheme.

9 MR. FISHER: So --

10 JUSTICE KAGAN: If you say that, I
11 don't really understand what the point of your
12 rule is.

13 MR. FISHER: Well --

14 JUSTICE KAGAN: I mean, it just
15 suggests that all the expert has to do is, you
16 know, tweak the way he says something and the
17 exact same testimony can come in.

18 MR. FISHER: So let me say the rule
19 and the reason why I gave you the answer I did.
20 Remember, the rule talks about not just any
21 mental state or not facts that might lead to a
22 mental state, but it talks about the mental
23 state of the crime -- of the element of the
24 crime to convict.

25 So, here, that mental state is

1 knowing, and that's what the expert expressly
2 said. In your hypothetical, you have to know
3 not just that the ex -- that the defendant was
4 told that but that she heard it, she understood
5 it, she remembered it, she wasn't told something
6 different --

7 JUSTICE KAGAN: Yeah. How about if I
8 say --

9 MR. FISHER: -- all kinds of those.

10 JUSTICE KAGAN: -- how about if I said
11 something like, in my experience, the -- the --
12 the organization always informs the courier of
13 the nature of the scheme and doesn't allow the
14 courier to set off until she verbally assents?

15 MR. FISHER: Right. I think, at some
16 point, you get so close that that may well be a
17 statement about mens rea. But what I want to
18 emphasize, Justice Kagan --

19 JUSTICE KAGAN: I guess what I'm
20 suggesting -- and it's really the same point
21 that Justice Alito was making, I think -- is
22 that it just seems at that point a -- a kind of
23 game as to how you frame the testimony so that
24 it falls just over the line, you know, or,
25 instead, you can argue that it's just inside the

1 line, but in the end, the government is going to
2 get this testimony in.

3 MR. FISHER: Well, if you think that's
4 too formalistic, you could, of course, make the
5 rule broader. All I'm saying is that there is a
6 core of Rule 704(b) which is statements about
7 the defendant's mens rea, and that's
8 unquestionably what you have in this case. And
9 how far out that goes and whether it covers your
10 hypothetical would just be a different case on
11 different facts.

12 JUSTICE JACKSON: But why is your
13 statement --

14 JUSTICE BARRETT: What about --

15 MR. FISHER: But it has to mean
16 something.

17 JUSTICE BARRETT: -- what about your
18 own -- oh, sorry.

19 JUSTICE JACKSON: Why is it a
20 statement about the defendant's mens rea?
21 That's the part that I'm not understanding. So,
22 you know, the Chief says, if the expert in a
23 situation says 80 percent of the time, you know,
24 when these conditions exist, the person knows.

25 Why isn't there still an inference to

1 be drawn as to whether or not the defendant is
2 in the 80 percent or the 20 percent?

3 MR. FISHER: Because the -- the expert
4 would not -- the expert is just giving a
5 less-than-absolute opinion in that regard.

6 JUSTICE JACKSON: No, I understand,
7 but there's --

8 MR. FISHER: It's still an opinion
9 about whether.

10 JUSTICE JACKSON: Right.

11 MR. FISHER: And it's still about
12 people in the defendant's class. Let me put it
13 to you this way, Justice Jackson.

14 JUSTICE JACKSON: No, the question is
15 whether the defendant is in the class. That's
16 what I'm saying. The inference that remains
17 from a testimony that is not a hundred percent
18 --

19 MR. FISHER: Yeah.

20 JUSTICE JACKSON: -- is whether or not
21 the defendant is in the class that the expert
22 has identified.

23 MR. FISHER: Well, the defendant is
24 certainly in the class, just to use the facts of
25 this case, because the class is people crossing

1 the border with large quantity of drugs in their
2 car. So the defendant is in that class.

3 JUSTICE JACKSON: And the -- and the
4 --

5 MR. FISHER: And our position is
6 simply that the expert is giving a probabilistic
7 opinion as to whether or not she had -- she knew
8 she had drugs.

9 JUSTICE JACKSON: But couldn't you
10 characterize it as the expert is speaking to the
11 class of people who have drugs in their car and
12 know about it?

13 MR. FISHER: Well, I think this brings
14 me --

15 JUSTICE JACKSON: And they say --
16 and -- and -- and if you characterize the class
17 as that, then the question is still whether the
18 defendant is in that class, right?

19 MR. FISHER: Well, I think, you know,
20 that's one way to put it, but I think, Justice
21 Jackson, imagine the expert testified: I think
22 there's an 80 percent chance or I think probably
23 this particular defendant knew she had drugs in
24 the car.

25 That would still leave the same amount

1 of inferential analysis if you want to put it
2 that way to be done by the jury, but it's not
3 inference as to mens rea. It's just inference
4 as to whether or not the defendant is guilty or
5 not. It's still a probabilistic opinion.

6 So I think the only thing I want to
7 persuade you of is that just like an expert
8 giving a probabilistic opinion about the
9 defendant herself leaves, if you want to put it
10 this way, some room for the jury to confirm that
11 that expert is correct that this defendant is
12 one of the majority, the same thing would be
13 true if the expert said the thing about the
14 defendant herself.

15 And -- and convert -- and -- and the
16 other version of this, I think, that helps prove
17 my point is that, I think, again -- and I'll let
18 my -- my friend speak for himself -- but I think
19 I understand the government to say that if the
20 defendant says -- if the expert says people like
21 this always know they have drugs in the car,
22 that's covered by Rule 704(b).

23 Now that's contrary to Ninth Circuit
24 precedent and it doesn't explicitly mention the
25 defendant, but it is covered. And so, if you

1 put together the notion that you don't have to
2 explicitly mention the defendant to cover the
3 defendant with the notion that probabilistic
4 opinions are covered just as much as absolute --

5 JUSTICE ALITO: Well, I don't know --

6 JUSTICE BARRETT: Mr. Fisher --

7 JUSTICE ALITO: -- how that -- I -- I
8 don't know how that testimony, every single
9 person who drives a car across the border with a
10 large quantity of drugs knows that there are
11 drugs in there, how that gets in under 702. The
12 -- an expert's testimony is admissible under 702
13 if it is the product of reliable principles and
14 methods.

15 I don't know what reliable principles
16 and methods could lead anybody to conclude that
17 every single person who does that knows what's
18 in the car.

19 MR. FISHER: Well, I --

20 JUSTICE ALITO: So there are other
21 rules that take care of the extreme cases. You
22 have -- the expert has to satisfy 702 and then
23 there's always 403 if some -- if in some case
24 the trial judge thinks this is -- this goes too
25 far. I don't know why you have to try to make

1 an exception in 704.

2 MR. FISHER: So let me go through both
3 the rules you mentioned, Justice Alito. Under
4 Rule 702, I think the reason why that evidence
5 typically comes in is the expert couches it as
6 in my experience. And to go back to your
7 hypothetical, in my experience, 83 out of 83,
8 therefore, people always know.

9 And we cite cases in our brief where
10 the expert has given this exact kind of
11 testimony up to 2013 in the Ninth Circuit, so --

12 JUSTICE ALITO: Well, I mean, the --
13 the fact testimony, 83 out of 83, is one thing.
14 Whether it's permissible to draw from that
15 experience the inference that they always know,
16 I think that's dubious under 702.

17 MR. FISHER: Well, I think you're -- I
18 think you may be right. The NACDL brief talks
19 about some of the problems with law enforcement
20 expert testimony that exists sort of writ large
21 across the courts, and maybe Rule -- maybe you
22 have a Rule 702 case that you might want to look
23 at sometime when it comes to that problem. But
24 I don't think you need to do that here because
25 Rule 704(b) is the finer-grained rule that deals

1 particularly with mens rea.

2 JUSTICE GORSUCH: Mr. Fisher --

3 MR. FISHER: And -- yeah?

4 JUSTICE GORSUCH: -- 704 is -- is
5 party agnostic, and so what's going to be good
6 for the goose here is going to be good for the
7 gander. And I would think that would mean that
8 if -- if we're going to allow this testimony
9 that defendants are going to be able to hire
10 former DEA agents to come in and say: Well,
11 there's an 80 percent chance that drug mules
12 don't know.

13 Is that the world we're going to
14 invite if -- if -- if we find for the government
15 here?

16 MR. FISHER: Well, it would certainly
17 be allowed. Whether defendants can find those
18 experts is maybe a different question. But,
19 certainly --

20 JUSTICE GORSUCH: Oh, in my
21 experience, you know, it's not too hard to hire
22 an expert witness.

23 MR. FISHER: Well --

24 JUSTICE GORSUCH: So, I mean, but
25 that's what we're going to have. And I'm just

1 wondering how far removed we're going to wind up
2 from -- from what motivated it, if you want to
3 talk about it in that --

4 MR. FISHER: Yeah.

5 JUSTICE GORSUCH: -- terms or the text
6 of 704 --

7 MR. FISHER: Right.

8 JUSTICE GORSUCH: -- as adopted, which
9 was to stop -- you know, it was motivated in
10 part by the Hinckley case.

11 MR. FISHER: Right.

12 JUSTICE GORSUCH: And we're going to
13 wind up having experts saying there's an
14 80 percent chance that he didn't know it was the
15 President of the United States, he thought it
16 was a duck or -- or --

17 MR. FISHER: Or virtually -- or I'm
18 virtually sure and I'm virtually positive in the
19 other direction.

20 JUSTICE GORSUCH: Going to be right
21 back where we started.

22 MR. FISHER: Right, because what
23 Congress was concerned about was the confusing
24 spectacle of competing opinions on mens rea.

25 And even if -- I would just add one

1 more thing -- even if there were just one
2 expert, if you do want to look at congressional
3 intent, what that intent is clear about is that
4 experts should not be talking about the ultimate
5 issue of mens rea. It's perfectly fine to talk
6 about mental state. It's perfectly talk about
7 -- fine about experiential facts that lend to
8 inferences about mental state. But the jury's
9 special role in criminal cases is designed to
10 find mental state in expert --

11 JUSTICE GORSUCH: And then --

12 JUSTICE BARRETT: But what about --

13 JUSTICE GORSUCH: -- and then just to
14 -- just to finish up, you know, the -- the fact
15 that parties can often get inferences through
16 facts about mens rea and therefore come
17 virtually close to this, is that anything
18 unusual in -- in -- in trial practice? I -- I
19 was always taught there's always a way to skin
20 the evidentiary cat, and I can come up with a
21 whole bunch of facts that -- to suggest that
22 somebody does or doesn't have a mental state.

23 MR. FISHER: Yeah, that's exactly
24 right. And, of course, the prosecutor at
25 closing can connect all of the dots and make an

1 argument to the jury. So I'm not here to make a
2 big dramatic argument, but I am here to make a
3 meaningful argument about testimony that's this
4 explicit about the defendant's mens rea.

5 JUSTICE BARRETT: Well, that --
6 actually, Justice Gorsuch's question brings up
7 one that I had, is what about your client's own
8 expert testimony in this case, you know, an
9 expert who says there's no way for someone to
10 suspect or know that the car has drugs in it?

11 MR. FISHER: So I think, Justice
12 Barrett, that particular sentence of our
13 expert's testimony crossed the line of Rule
14 704(b), but, remember, the trial judge had
15 already ruled at that point that Agent Flood's
16 testimony was admissible and had construed the
17 rule in the way the Ninth Circuit does to bar
18 only explicit opinions about the defendant
19 herself. So the defendant was playing under the
20 same rules that the prosecution was playing
21 under.

22 We agree on a retrial that that
23 particular statement would be out.

24 JUSTICE BARRETT: That that would have
25 to stay out? And what about framework evidence,

1 that the evidence professors say framework
2 evidence is valuable and it comes in in most
3 cases, and, you know, your average juror is
4 probably not going to understand how cartels
5 work? So it would be valuable, I would think,
6 to say things like, well, you know, cartels like
7 to know where the parked -- car is going to be
8 parked on the other side of the border so they
9 know where to find the drugs. This is the value
10 of the drugs. So this is how cartels --

11 MR. FISHER: Yeah.

12 JUSTICE BARRETT: -- do it. So the
13 evidence professors say this would be a terrible
14 rule because framework evidence is valuable.

15 Do you -- what rule do you see for
16 this kind of framework evidence?

17 MR. FISHER: I think the -- the
18 professors just misunderstand our rule. And
19 we're, again, not advocating something out of
20 thin air. It's the Fifth Circuit's own doctrine
21 that we're -- that we're advocating here. And
22 that doctrine makes clear all the stuff you just
23 posited is perfectly admissible because, again,
24 it's -- there -- there's no statement about mens
25 rea in those sentences you just read me.

1 They're just facts in the world that make it
2 highly likely or unlikely a person had a mens
3 rea, but it's not statements about knowledge to
4 use the mens rea in this case.

5 And -- and this brings me back --

6 JUSTICE JACKSON: But, Mr. -- Mr.
7 Fisher --

8 MR. FISHER: -- to Justice Kagan --

9 JUSTICE JACKSON: -- Mr. Fisher,
10 sometimes statements about knowledge are
11 actually defense important. You suggested that
12 in this case the defense put that evidence in
13 sort of because they were living in the world
14 that the court had already established.

15 But one of the things the evidence
16 professors talk about is that if you exclude
17 this kind of evidence, you could have a
18 situation in which you have a battered spouse
19 who assaults their -- the person who is beating
20 them, and they're not going to be able to put on
21 expert evidence that negates mens rea in that
22 situation.

23 What do you say about that? It seems
24 to me this is not all net positive for defense.

25 MR. FISHER: So I think this is the

1 flip side of the exchange I had with Justice
2 Gorsuch. The defendant in that situation can
3 put on an expert to talk about the phenomenon of
4 battered women syndrome. That expert could
5 testify about the cycle of violence and learned
6 helplessness and the features of battered women
7 syndrome.

8 The only thing the expert could not do
9 is say: I think this defendant or people in her
10 position would not have had the requisite mens
11 rea. But then, at closing, the defendant can
12 make that very argument.

13 It's just direct expert testimony
14 about the precise element of the crime -- crime
15 that is barred, the mens rea element of the
16 crime that is barred, by Rule 704(b). So,
17 again, I don't have some broad --

18 JUSTICE JACKSON: But is there a
19 difference between saying the defendant herself
20 didn't have the mens rea or women in this
21 situation didn't have the mens rea? I guess
22 that's what I'm not understanding about your
23 argument.

24 MR. FISHER: I think that those two
25 things are both covered by the rule. Now the --

1 and even the government --

2 JUSTICE JACKSON: Both covered by?
3 But I thought that's what you just said they
4 could get up to the line of saying.

5 MR. FISHER: No, no, no. I think they
6 -- they could describe women in the situation of
7 battered women -- of battered women syndrome and
8 what those symptoms are and what those features
9 are of that -- of that condition, but the expert
10 could not testify as to whether or not a person
11 with that condition would have had the mens rea
12 to commit this crime. It's just the mens rea
13 testimony. It's not mental state testimony,
14 mental condition testimony more generally.

15 JUSTICE SOTOMAYOR: Mr. Fisher, I -- I
16 want to articulate your rule. And you're right,
17 it's different. But you keep saying it's the
18 Fifth Circuit rule. I'm not sure it's the Fifth
19 Circuit rule, because the Fifth Circuit has
20 criticized evidence with respect to what the
21 drug traffic -- the drug cartels' knowledge are.
22 So I think you're breaking from the Fifth
23 Circuit, as the government breaks from the Ninth
24 Circuit. Everybody's trying to find that happy
25 medium.

1 But the Rules of Evidence don't say,
2 even if you can get something in a different
3 way, your mistake is -- you can do it this
4 particular way all the time. I mean, I'm
5 thinking about we have a lot of hearsay that you
6 can't get it in under hearsay, but you can get
7 it in for other reasons that don't go to the
8 ultimate guilt of people.

9 Rules are rules, and there's a reason
10 for them. And I think what you're arguing is
11 this rule says you can talk about modus operandi
12 of drug traffickers generally, but you can't
13 talk about a particular defendant or class of
14 defendants and what their mental state is
15 because that's what the rule tells you you can't
16 do.

17 So it might feel like an exercise
18 without a point, but it is an important point.
19 Isn't that what you're trying to say?

20 MR. FISHER: I think that's right. I
21 think we are defending pretty much what happens
22 in the Fifth Circuit. And the reason why that's
23 the rule is because of the importance of mens
24 rea. It's the -- as the Court itself has
25 highlighted in cases in recent years, it is the

1 heart of our criminal law and -- and it's the
2 heart of a jury's function to make that
3 moralistic qualitative determination.

4 So, if it seems formalistic when I say
5 you're drawing a line, a protective barrier
6 around mens rea, it's because that's what the
7 right of jury trial is about and that's what the
8 drafters of this rule recognized. You have to
9 get a --

10 JUSTICE GORSUCH: Mr. Fisher --

11 MR. FISHER: -- jury trial.

12 JUSTICE GORSUCH: -- has the federal
13 government had any trouble convicting drug
14 traffickers in the Fifth Circuit?

15 MR. FISHER: Not to my knowledge.

16 And, of course, the government's had 20 years to
17 bring this issue up if it didn't like the Fifth
18 Circuit law. So I think it works pretty well in
19 the Fifth Circuit.

20 But let me say something that would
21 lead -- if you agreed with the government's
22 concession now that -- saying that people in
23 this position always have the requisite mens
24 rea, you're going to have to draw some very
25 difficult lines. What if the expert testified

1 and said people like this virtually always,
2 99 percent of the time? What if the expert said
3 maybe it's hypothetically possible a
4 defendant -- take the 83 out of 83, and the
5 expert said maybe, maybe it's possible somebody
6 could not have known, but I've never seen such a
7 case? You know, would that count? What if the
8 expert said, like in this case, there's only
9 three situations I can -- I'm aware of where an
10 expert -- I'm sorry -- where the defendant
11 doesn't have the mens rea and those three
12 situations are all different from this case.

13 And then take it one step further in
14 closing argument when defense counsel tried to
15 argue, well, Agent Flood admitted there's a few
16 situations defendants don't have the mens rea.
17 The government objected and said, well, you
18 can't argue that other situations might be
19 possible because, here, you named three.

20 JUSTICE ALITO: But those all sound --
21 those all sound to me like cases in which Rule
22 403 might well come into play.

23 MR. FISHER: Well, remember, what the
24 Ninth Circuit says about Rule 403 and Rule 401
25 is that this testimony goes to the heart of a

1 blind mule defense, like in this case. So it's
2 the exact opposite of being irrelevant or unduly
3 prejudicial.

4 JUSTICE ALITO: Well, it's -- well,
5 it's relevant, but it -- it has a highly
6 prejudicial value and maybe it would be excluded
7 by a lot of trial judges or --

8 MR. FISHER: Well, I think -- I think
9 the government's position is in line with the
10 Ninth Circuit, and we concede there's force to
11 it, that this evidence is damaging because it's
12 so directly relevant to the defendant's mens
13 rea. That's the problem with it.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito, anything further?

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: I -- Justice Alito
20 is inviting, I think, even more chaos in the --
21 among courts. If you're going to rely on 403 or
22 702 or any individualized decision-making by
23 judges, you're just throwing this up into the
24 air with no clarity.

25 MR. FISHER: I think that's right,

1 Justice Sotomayor. One way to think about this
2 is you have Rule 403, which is maybe the
3 broadest, most flexible of the Rules of Evidence
4 to deal with prejudicial evidence. You have the
5 next narrower rule, which is Rule 702, which is
6 just about expert evidence and reliable bases
7 for that evidence. And then you have the
8 narrowest of them all, Rule 704(b).

9 I'm only asking you today to rule --
10 to apply Rule 704(b), which is --

11 JUSTICE SOTOMAYOR: I mean, once --
12 once you're asking courts to go into asking
13 every police officer how many of these cases
14 have you had, when am I going to decide that 10
15 cases is not adequate, but 83 might be?

16 MR. FISHER: Yeah.

17 JUSTICE SOTOMAYOR: When there's
18 550,000 drug arrests, is 83 enough? I don't
19 know the statistical answer to that.

20 Your rule is much simpler, isn't it?

21 MR. FISHER: I think it --

22 JUSTICE SOTOMAYOR: It's, if you're
23 going to talk about a defendant and what a
24 defendant is thinking, that's off limits; if
25 you're talking about modus operandi of what

1 others do or don't do, that's okay?

2 MR. FISHER: Right. So my rule has
3 two components. One is, is it about mens rea?
4 Unquestionably yes here because the expert used
5 the word "know." And is it about the defendant?
6 And our rule there is very simple as well,
7 directly about the defendant or a class of
8 people including her. That's the full scope of
9 that --

10 JUSTICE SOTOMAYOR: And the -- what is
11 permissible, as you said, is if a expert says,
12 drug traffickers prefer to hire people that the
13 traffickers know and trust than to hide the
14 drugs in a stranger car, or drug traffickers
15 want to know where the car goes, so they're
16 going to use a GPS or something like that.
17 That's modus operandi.

18 MR. FISHER: Descriptive modus
19 operandi evidence that does not speak to mens
20 rea directly is perfectly fine.

21 And I -- Justice Sotomayor, let me add
22 one thing to what you were talking about because
23 I think it goes back to the Chief Justice's
24 question about cross-examination and maybe
25 Justice Alito's question about Rule 702 as well.

1 If the expert testified either on
2 direct or cross, look, this is my experience
3 across most cases, but I can't tell you anything
4 about this particular defendant because I don't
5 know anything about this defendant, whether or
6 not she had the mens rea, then you would have a
7 real objection under relevance or Rule 702.

8 Of course, you had nothing like that
9 in this case, you know, so the plain implication
10 to the jury was not just most people like this
11 have the mens rea, but I believe this defendant
12 has the mens rea.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: I feel as though I
15 should offer a bit of my time to Justice Alito
16 to respond to being a chaos inciter.

17 (Laughter.)

18 JUSTICE ALITO: I'll ask Mr. Guarnieri
19 about that.

20 (Laughter.)

21 JUSTICE KAGAN: What was my question?

22 (Laughter.)

23 JUSTICE KAGAN: Here's my question.
24 You've relied quite a number of times on the
25 government's apparent concession that the a

1 hundred percent case would come out your way.

2 MR. FISHER: Yeah.

3 JUSTICE KAGAN: I took the government
4 to be hedging on that question, and I'll just
5 tell you. We'll -- we'll -- we'll find out soon
6 enough. But, if the government is not, in fact,
7 taking the position --

8 MR. FISHER: Yeah.

9 JUSTICE KAGAN: -- that you took about
10 the a hundred percent case, what changes in your
11 argument?

12 MR. FISHER: I don't --

13 JUSTICE KAGAN: I mean, how much of
14 your argument relies on that supposed
15 concession?

16 MR. FISHER: I'm not trying to rely on
17 the concession as such. And I -- I think you're
18 right, there's a little bit of hedge in the
19 brief fairly, so you can ask him, but I think it
20 is -- is a correct statement of law, regardless
21 of who says it or why, that -- that saying
22 everyone in this position has the mens rea is
23 the equivalent of saying the defendant in the
24 courtroom has the mens rea.

25 It is a class of people that

1 necessarily includes the defendant.

2 So there's really only two things you
3 have to decide in this case, Justice Kagan.
4 That's the first thing, is that when you move
5 from the defendant to a class of people
6 including the defendant, whether you're still
7 within 704(b), the answer is yes.

8 And the second question is whether, if
9 that opinion is stated in probabilistic terms
10 instead of absolute terms, you're still within
11 704(b). We say yes. At that point, you're done
12 and you can leave for another day modus operandi
13 versus direct statements of mens rea because,
14 you know, you have a direct statement of mens
15 rea here.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: Just wanted to
19 explore a little bit further your response to
20 the Chief Justice.

21 The 80 percent, he comes in and
22 testifies 80 percent know but admits that he
23 doesn't know about the defendant.

24 How is that evidence in court in the
25 first place?

1 MR. FISHER: That -- that's what I was
2 trying to say, Justice Gorsuch. I think that if
3 the -- if the expert disclaimed any knowledge
4 whatsoever about this defendant and -- and any
5 inference that might be drawn from his overall
6 experience or from his probabilistic opinion,
7 then I think the defense counsel would rise to
8 object and have a very good ground to exclude
9 that opinion.

10 But that's not what happens here.
11 It's the only reason --

12 JUSTICE GORSUCH: Whether it comes out
13 on direct or cross, it wouldn't make any
14 difference.

15 MR. FISHER: That's right.

16 JUSTICE GORSUCH: He shouldn't be in
17 court.

18 MR. FISHER: The only reason the
19 government is offering this testimony is because
20 the expert is implicitly saying: I believe this
21 defendant probably falls within the group.
22 There's no disclaimer here that the expert is
23 offering. And that's the whole point of the
24 testimony. And if -- and if --

25 JUSTICE GORSUCH: So, if we're --

1 MR. FISHER: -- if I could say one
2 other thing, Justice Gorsuch?

3 JUSTICE GORSUCH: Please.

4 MR. FISHER: That is underscored by --
5 by Agent Flood's answers on cross-examination
6 that there's only three possibilities that I'm
7 aware of where the defendant does not know they
8 have drugs, and those possibilities are all
9 different from this case.

10 JUSTICE GORSUCH: Right.

11 MR. FISHER: So, when you add that all
12 up, the expert is effectively saying not just
13 most people but this person by logical
14 implication knew she had drugs.

15 JUSTICE GORSUCH: Correct. And --
16 and -- and so, in this case, the only
17 implication is she knew. In the other cases
18 we've been discussing, the 80 percent --

19 MR. FISHER: Right.

20 JUSTICE GORSUCH: -- and I don't know,
21 then you've got a Daubert problem possibly and
22 we're going to have to tackle that in the next
23 case.

24 MR. FISHER: I think that's right.
25 This is the easier case in that sense too. It's

1 not just a most case. It's a most and the only
2 situations I can think of are something else,
3 so, therefore, you get to all by the totality of
4 Agent Flood's testimony.

5 JUSTICE GORSUCH: Yeah. Whereas down
6 the other road, we're going to have a bunch of
7 Daubert questions. We're also going to have how
8 much probability is enough probability questions
9 too.

10 MR. FISHER: You -- you -- you could.
11 I think -- I think the better rule there is that
12 when it comes to Rule 704(b), any opinion of any
13 probability --

14 JUSTICE GORSUCH: No, I understand
15 your view. But if you should lose --

16 MR. FISHER: Yeah. Yes, we would.

17 JUSTICE GORSUCH: -- we're going to
18 have Daubert questions --

19 MR. FISHER: Yes.

20 JUSTICE GORSUCH: -- and we're going
21 to have probabilistic questions about how much
22 probability is enough.

23 MR. FISHER: Exactly.
24 Ninety-nine percent, I'm virtually certain, but
25 I can't guarantee, all these kinds of verbal

1 formulations would be borderline cases.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: On the text of the
5 rule, that seems to be a problem for you just in
6 my view. And then you rely heavily on the
7 government saying: Well, even though the text
8 only says that it prohibits expert testimony
9 that this defendant had knowledge, that may also
10 prohibit testimony that all defendants in the
11 class always have knowledge.

12 And you seize on that, understandably.

13 MR. FISHER: Mm-hmm.

14 JUSTICE KAVANAUGH: But then the key
15 move in your argument, I think, is that "always"
16 means the same thing as "usually," and that's
17 just not true.

18 MR. FISHER: Oh, I agree, that's not
19 true. So there's -- there's two steps, Justice
20 Kavanaugh. So the first is whether the
21 defendant, to use the text of the rule, covers a
22 class of people including the defendant.

23 And I think the answer is yes. And I
24 can just give you a couple more examples. If
25 somebody -- if somebody was trying to figure out

1 what a member of this Court thought and somebody
2 answered, well, Supreme Court Justices always
3 think X, that would be a statement about whether
4 that particular Justice had a particular state
5 of mind.

6 And then the second step is whether
7 the "always" versus "probably" matters. It
8 matters in some sense. It's a degree of
9 certitude. But, to go back to the text of the
10 rule, it is still an opinion about whether that
11 Justice has something in her mind.

12 So to say if you're trying to figure
13 out what some justice thinks and somebody says,
14 Justices usually think X, that is a statement
15 about whether the justice has a particular state
16 of mind.

17 Now it's not absolute, but it goes to
18 the nature of expert testimony.

19 JUSTICE KAVANAUGH: It's not -- how is
20 testifying that usually, how is that an opinion
21 about whether the defendant did have a mental
22 state?

23 MR. FISHER: It -- it -- it's opinion
24 about whether the defendant did or did not have
25 the mental state. So did or did not covers the

1 full scope.

2 JUSTICE KAVANAUGH: Yeah.

3 MR. FISHER: And I think an opinion
4 can be absolute or it can be probabilistic.

5 Take the opinion -- take the example
6 we give in our brief where a therapist, after
7 invest -- after interviewing a patient, says:
8 People don't usually have trouble getting out of
9 bed unless they're depressed.

10 Well, that's not a direct statement
11 about that individual, but in context, we
12 understand it to be saying, I think you're
13 depressed. You know, we've talked a lot this
14 morning, Justice Kavanaugh, about the nature of
15 expert testimony. Expert testimony is rarely
16 absolute. I think a couple of you have pointed
17 that out today. It's usually a probabilistic
18 opinion.

19 So, to go back to the Hinckley case,
20 if the expert had said, I think John Hinckley
21 was probably insane, he probably couldn't tell
22 right from wrong, that wouldn't be an absolute
23 opinion, but it would have to be covered by Rule
24 704(b).

25 And the only thing I'm trying to

1 persuade you of today is to say most people in
2 Hinckley's position wouldn't have known right
3 from wrong is exactly the same statement as
4 saying I think Hinckley couldn't tell right from
5 wrong.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: So I just want to be
10 sure that I understand how we would articulate
11 your rule if you win.

12 So this is -- you brought up your
13 depression example. So, on page 18 of your
14 brief, in that same paragraph, you talk about
15 the example where, you know, high school seniors
16 generally know the honor code.

17 MR. FISHER: Mm-hmm.

18 JUSTICE BARRETT: So this kind of is
19 similar to the hypotheticals Justice Kagan was
20 giving you early on. What if I said -- so that
21 falls outside of your rule because it refers to
22 knowledge? No. Right?

23 MR. FISHER: It falls what now?

24 JUSTICE BARRETT: It falls -- that
25 would be in -- that would be inadmissible under

1 704(b) under your rule.

2 MR. FISHER: Right.

3 JUSTICE BARRETT: Right. Okay. But
4 what if you had somebody testify -- and let's
5 just say it was an expert, not a fact witness --
6 that yes, the honor code is distributed to all
7 students, we give them time to read it, they
8 sign it at the bottom, and then we walk out.

9 What about that?

10 MR. FISHER: I think that would be
11 okay.

12 JUSTICE BARRETT: That would be okay.
13 And why? So it's just the word "knowledge," is
14 it that formalistic, or once you start stepping
15 back and it takes an inference to get there --

16 MR. FISHER: Right, it's an inference,
17 Justice Barrett.

18 JUSTICE BARRETT: -- it's okay?

19 MR. FISHER: In that scenario you're
20 describing, the -- there could still be
21 questions about whether the person who signed
22 the honor code understood the explanation,
23 whether that person remembered the honor code
24 when the alleged transgression happened, et
25 cetera.

1 But to -- but you asked me about how
2 you would articulate the rule. If you wanted to
3 be extra careful, you don't even have to
4 articulate that part of the rule. Here, you
5 have a statement directly about knowledge.

6 So whatever the line is between
7 knowledge and other statements that might be
8 less direct about the particular mens rea, that
9 would be a different case.

10 JUSTICE BARRETT: Well, I think we'd
11 be down the sowing chaos road if we didn't
12 articulate whoever's rule in that.

13 MR. FISHER: Well -- well, either way,
14 you're going to have to answer that question.
15 Pages 28 to 30 of the government's brief, it
16 says that testimony needs to be understood in
17 context and what it -- and what it signals in so
18 many words.

19 I think the government agrees that
20 statements are going to have to be understood in
21 context as to whether or not they're about mens
22 rea. So we agree with that.

23 We might -- we might calibrate that
24 line a little bit differently, and you could
25 give a first cut at it in this opinion, but,

1 again, all you have to say in this opinion --
2 and this goes back to Justice Kavanaugh's
3 question -- is that the words "the defendant"
4 cover not just statements about the defendant,
5 but they cover statements about a class of
6 people that includes the defendant, regardless
7 of whether they're absolute or probabilistic.

8 Then you're done. You can say that,
9 you know, therefore, we can give some guiding
10 principles to when something is about mens rea
11 or not about mens rea, but you wouldn't even
12 have to do that strictly speaking in this case.

13 JUSTICE BARRETT: Thanks.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: So I guess I'm still
17 a little confused about how your rule works. I
18 apologize for that.

19 But Justice Sotomayor suggested that
20 you're saying that expert testimony about modus
21 operandi and actus reus is fine to come in, but
22 expert testimony about mental state is not.

23 So I don't know what happens with
24 battered women syndrome, which is testimony
25 about the mental state of the defendant. Are

1 you saying that's in or out and why?

2 MR. FISHER: So the -- so mental state
3 in general is okay. So an expert can say: I
4 believe this defendant has battered women
5 syndrome. I believe this defendant, to use the
6 Hinckley example, has schizophrenia. So that's
7 one form of mental state.

8 JUSTICE JACKSON: I thought that's
9 exactly what the rule says you're not supposed
10 to have an expert do.

11 MR. FISHER: No, no, no. What the --
12 no, no, no. What the rule says is the mental
13 state required of the element of -- as an
14 element of the crime.

15 JUSTICE JACKSON: Right.

16 MR. FISHER: So there are general --

17 JUSTICE JACKSON: And in the Hinckley
18 case, the element we were talking about was the
19 defense, that he was saying, I'm insane.

20 MR. FISHER: Right.

21 JUSTICE JACKSON: And so I thought the
22 rule was that you were not supposed to have
23 dueling experts talking about whether or not
24 he's insane. So I'm positing a situation --

25 MR. FISHER: Yeah.

1 JUSTICE JACKSON: -- in which the
2 question is, does this person -- you know, are
3 they guilty of assault? And they would like to
4 put on a defense that they had battered women
5 syndrome --

6 MR. FISHER: Right.

7 JUSTICE JACKSON: -- that -- going to
8 their mental state.

9 MR. FISHER: Right.

10 JUSTICE JACKSON: In or out?

11 MR. FISHER: Some yes, some no. But
12 this is a very important question, so I want to
13 make sure I get it right. So, to use the
14 Hinckley example, you could have dueling
15 testimony as to whether or not John Hinckley,
16 Junior, had schizophrenia or not. That's not
17 the element of the offense. You could have
18 dueling testimony as to whether or not John
19 Hinckley, Junior, had hallucinations or
20 delusions or had difficulty perceiving reality.
21 That's not the element of the crime.

22 The element of the crime is being able
23 to tell right from wrong. That's what you could
24 not have expert testimony about. So, to use --

25 JUSTICE JACKSON: But it says element

1 of the crime or defense.

2 MR. FISHER: Right, but -- but the
3 defense is still negating the mens rea. So the
4 critical thing is to pinpoint the mens rea.

5 So, in the assault case, the mens rea,
6 I think, would be something like a reasonable
7 belief that you were acting in self-defense. I
8 think that's what a typical battered women
9 syndrome case would look like. An expert can
10 take the stand and say, I believe this person
11 has battered women syndrome. Here are
12 characteristics of battered women syndrome:
13 There's a cycle of abuse, there's learned
14 helplessness, there's difficulty leaving. All
15 these things that are not the element of whether
16 or not --

17 JUSTICE JACKSON: All right. So you
18 disagree --

19 MR. FISHER: -- she believed her life
20 was in danger when she acted.

21 JUSTICE JACKSON: You -- you disagree
22 with Justice Sotomayor suggesting that all
23 that's off the table because it's mental state
24 evidence. We have to do some sort of fine --

25 MR. FISHER: I don't know whether I'm

1 disagreeing with Justice Sotomayor, but --

2 JUSTICE JACKSON: Okay. All right.

3 MR. FISHER: -- at least -- at least
4 what I want to say is mental state evidence, to
5 just give another lay example, the defendant --
6 I believe people in this situation are nervous.
7 That would be perfectly fine. It's a mental
8 state, but it's not going to be the element of
9 the crime or a defense.

10 All I'm saying is that Rule 704(b)
11 keeps out that last step, that -- that assigning
12 --

13 JUSTICE JACKSON: Okay. One final
14 question.

15 MR. FISHER: -- the mens rea to the
16 defendant.

17 JUSTICE JACKSON: Thank you. What
18 about intent to distribute? That is a pretty
19 standard charge.

20 MR. FISHER: Yes.

21 JUSTICE JACKSON: Drugs with intent to
22 distribute. And you have an expert who comes
23 in. And I -- in my experience, this is also
24 pretty standard. The police walk into the
25 apartment, there's all this paraphernalia and

1 chemicals and stuff that a layperson --

2 MR. FISHER: Yeah.

3 JUSTICE JACKSON: -- might not
4 understand what this is about.

5 MR. FISHER: Right.

6 JUSTICE JACKSON: And so the expert
7 that the government puts on the stand says: In
8 my expertise, people who have this kind of
9 material in these quantities in their apartments
10 have it because they're manufacturing drugs that
11 they intend to sell.

12 In or out?

13 MR. FISHER: Out, because the expert
14 is speaking to intent, which is the mens rea
15 element. But the expert could --

16 JUSTICE JACKSON: So, if they don't
17 put the word "intent" in, they're manufacturing
18 drugs for sale, in or out?

19 MR. FISHER: I think that that is a
20 harder case, and so the line would be between
21 saying, you know, scales are used to weigh drugs
22 that -- you know, they often get bagged up and
23 sent out for sale. Things about the way that
24 the drug operation might work, things about what
25 those pieces of equipment do or don't do with

1 regard to drugs would be okay. But a direct
2 statement of intent would be not okay.

3 The D.C. Circuit has explained this
4 very clearly and other courts have held that.
5 So --

6 JUSTICE JACKSON: Thank you.

7 MR. FISHER: -- you're right
8 there's -- okay.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Guarnieri?

12 ORAL ARGUMENT OF MATTHEW GUARNIERI
13 ON BEHALF OF THE RESPONDENT

14 MR. GUARNIERI: Mr. Chief Justice, and
15 may it please the Court:

16 By its plain terms, Rule 704(b) comes
17 into play only when the expert is offering an
18 opinion about the defendant's own mental state.
19 That's the key textual limitation that resolves
20 this case.

21 Agent Flood's testimony did not
22 violate Rule 704(b) for the simple reason that
23 he did not express any opinion at all about
24 whether Petitioner herself knew about the drugs
25 hidden in her car. Indeed, he did not mention

1 Petitioner a single time in his entire
2 testimony.

3 The Court should reject Petitioner's
4 invitation to replace the line drawn in the text
5 of Rule 704(b) with one of her own invention.
6 According to Petitioner, Rule 704(b) prohibits a
7 novel and amorphous category of what she has
8 called class-wide mens rea testimony.

9 That proposal cannot be squared with
10 the text, purpose, or history of the rule. And
11 I think the history is particularly instructive
12 here. I want to emphasize three points this
13 morning.

14 First, when Congress enacted Rule
15 704(b) in response to the acquittal of John
16 Hinckley, Congress adopted a reform that applies
17 equally to both sides. It is party agnostic, as
18 Justice Gorsuch observed this morning. It is
19 not a rule targeted at government experts. And
20 whatever the Court says in this case will also
21 govern future expert testimony offered by the
22 defense on issues like insanity or battered
23 women syndrome.

24 Second, Congress kept Rule 704(a) in
25 place. The general rule in federal court

1 continues to be that opinion testimony is not
2 objectionable merely because it embraces an
3 ultimate issue. Rule 704(b) operates as a
4 limited exception to that general rule.

5 And, third, the original text of Rule
6 704(b) confirms that an expert may still testify
7 with respect to the mental state or condition of
8 the defendant, as long as the expert stops short
9 of opining on the ultimate issue. Agent Flood
10 respected that limitation here.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: But Mr. Fisher makes
13 the point that in effect, when you talk about
14 the probable -- probabilities of someone
15 carrying drugs, that you are in effect talking
16 about the defendant, that you could only be
17 concerned about the conduct of the defendant.

18 So the -- how would you respond to
19 that?

20 MR. GUARNIERI: Well, I think my
21 friend on the other side is conflating two
22 distinct issues in this case. One is whether
23 the expert is offering an opinion that is about
24 the defendant herself. Agent Flood did not do
25 that here when he testified in general terms

1 that drug traffickers do not entrust large
2 quantities of drugs to people who are unaware of
3 those -- in most circumstances.

4 JUSTICE THOMAS: Well, his point is
5 that it wouldn't be relevant otherwise if you
6 weren't talking about the defendant.

7 MR. GUARNIERI: Well, I think that's
8 right, Justice Thomas. It's true that it is
9 relevant because we are asking the jury to infer
10 something about the defendant herself, about
11 Petitioner herself, from the expert's opinion.

12 But that doesn't make it an opinion --
13 it doesn't mean the expert is expressing an
14 opinion about the defendant. When Rule 704(b)
15 talks about expressing an opinion about the
16 defendant, it means expressing an opinion framed
17 --

18 JUSTICE GORSUCH: So -- so --

19 MR. GUARNIERI: -- in terms of the
20 defendant's own mental state.

21 JUSTICE GORSUCH: -- if I understand
22 it right, for relevance purposes, it has to be
23 about the defendant, right?

24 MR. GUARNIERI: Yes, I think that's
25 what makes the testimony relevant. Yes.

1 JUSTICE GORSUCH: But that's the only
2 way in which you get this evidence in in the
3 first place. It is -- has to be about the
4 defendant. We're not talking about some
5 stranger to the suit, right?

6 MR. GUARNIERI: Yes, I agree, Justice
7 Gorsuch.

8 JUSTICE GORSUCH: So it's about the
9 defendant for purposes of 702, but it's not
10 about the defendant for purposes of 704. Help
11 me with that.

12 MR. GUARNIERI: It is relevant to the
13 defendant. Let me give you a plain language
14 examine -- example.

15 JUSTICE GORSUCH: Is it with respect
16 to the defendant?

17 MR. GUARNIERI: If I told you, Justice
18 Gorsuch, that I had just read a terrific book
19 about Julius Caesar, I think you would expect
20 that the book at least mentions Julius Caesar
21 somewhere in there.

22 JUSTICE GORSUCH: No.

23 (Laughter.)

24 MR. GUARNIERI: And if you learned
25 that it's a book about ancient Romans in general

1 --

2 JUSTICE GORSUCH: No, I wouldn't
3 necessarily -- you know, it could be about his
4 times and his place and -- and -- and the Roman
5 empire of the era.

6 MR. GUARNIERI: I think that's exactly
7 right.

8 JUSTICE GORSUCH: Right?

9 MR. GUARNIERI: And that's my point,
10 Justice Gorsuch. We -- we all understand --

11 JUSTICE GORSUCH: Okay. And I'm
12 drawing an inference about him.

13 MR. GUARNIERI: That's right. That's
14 exactly right. And that's how we think the
15 rules operate here.

16 JUSTICE GORSUCH: You want us to draw
17 -- you want the jury to draw an inference about
18 the mental state of this defendant, don't you?

19 MR. GUARNIERI: Yes. We are offering
20 the testimony because it is relevant to the
21 jury's assessment of Petitioner's own mental
22 state, but that doesn't mean that it is an
23 opinion about the defendant's mental state.

24 If you accept the logic of that
25 argument, a great deal of testimony that is

1 inferentially relevant --

2 JUSTICE GORSUCH: I would think that a
3 great many district courts would, on that
4 theory, say that this testimony should be
5 stricken on 702 grounds. It's just not
6 relevant.

7 MR. GUARNIERI: 704(b) --

8 JUSTICE GORSUCH: Is that what you're
9 inviting?

10 MR. GUARNIERI: No, we are not
11 inviting that, Justice Gorsuch.

12 JUSTICE GORSUCH: No, of course not,
13 right?

14 MR. GUARNIERI: Indeed, the district
15 court in this case, Petitioner made a Rule 401
16 objection to the relevancy of this testimony.
17 The district court overruled it. Petitioner has
18 not renewed that contention in this Court.

19 I think what we are -- there is
20 testimony that is relevant to the jury's
21 assessment of the defendant's mental state that
22 is nonetheless not testimony that is opining
23 directly on the defendant's mental state.

24 JUSTICE JACKSON: Nor could the
25 defendant -- excuse me, nor could the expert

1 actually opine because he's not an examining
2 expert, isn't that right? I mean, there really
3 isn't a world in which this expert could speak
4 directly in a sense to what is going on in this
5 defendant's mind. The only thing he is
6 competent to testify about is sort of, in his
7 expertise, how these things work as a general
8 matter, right?

9 MR. GUARNIERI: I think that's
10 correct, Justice Jackson, and, indeed, in this
11 particular case, Agent Flood confirmed that he
12 was not involved in the investigation of this
13 case when he was asked that on
14 cross-examination.

15 JUSTICE KAGAN: Mr. Guarnieri, do you
16 want to first answer the hundred percent case?

17 MR. GUARNIERI: Sure. So I think
18 Petitioner is misreading our brief on that
19 point. I mean, we think that the distinction
20 between testifying in absolute terms or
21 conditional terms about the way that drug
22 traffickers operate is really more of a
23 reliability issue. I don't think at this point
24 in time we could sponsor any testimony --

25 JUSTICE KAGAN: So, in fact, your

1 argument would be the same if the expert got up
2 and said, in my experience, a hundred percent of
3 the time drug traffickers use couriers who know
4 that there are drugs in the car?

5 MR. GUARNIERI: Yeah, I think we would
6 have the same Rule 704(b) position with respect
7 to that testimony. And -- and the key to the
8 application of Rule 704(b) --

9 JUSTICE GORSUCH: So all defendants
10 know that they -- of -- of drugs, and -- and
11 you're still not -- it's still not testimony
12 about the defendant's mental state?

13 MR. GUARNIERI: Well, Justice Gorsuch,
14 I want to be careful and precise here. If the
15 expert testifies that all defendants know or
16 that all drug traffickers and this defendant or
17 this defendant and other drug traffickers --

18 JUSTICE GORSUCH: No, no, no, all
19 mules, to use the -- the common parlance, all
20 mules know that -- that -- that the drugs are
21 drugs in their car --

22 MR. GUARNIERI: Yeah, I do think --

23 JUSTICE GORSUCH: -- that's still --
24 that's still permissible under your view? It's
25 not about the defendant?

1 MR. GUARNIERI: It -- it is not
2 objectionable on Rule 704(b) grounds. It
3 doesn't mean --

4 JUSTICE GORSUCH: Still not about the
5 defendant.

6 MR. GUARNIERI: -- that testimony
7 would necessarily get in.

8 JUSTICE GORSUCH: The defendant just
9 happens to be there. It just to happens to be
10 at trial in which that person is in jeopardy
11 and -- and -- and -- but we've got this
12 testimony over here, and it doesn't matter?

13 MR. GUARNIERI: Well --

14 JUSTICE BARRETT: Yeah, I don't
15 understand that --

16 MR. GUARNIERI: -- justice -- Justice
17 Gorsuch, you could --

18 JUSTICE BARRETT: -- right? Because
19 isn't this like necessarily saying a
20 hundred percent of defendants know, aren't you
21 necessarily saying this defendant knows? Isn't
22 that what Justice Gorsuch's --

23 MR. GUARNIERI: I think the
24 distinction between those two --

25 JUSTICE GORSUCH: Apparently not.

1 JUSTICE JACKSON: Isn't the answer,
2 Mr. Guarnieri, that it's only --

3 JUSTICE KAGAN: Well, what is the
4 answer, Mr. Guarnieri?

5 (Laughter.)

6 MR. GUARNIERI: Thank you, Justice
7 Kagan.

8 Look, I think the distinction between
9 those two, the key point that we're trying to
10 get across is that Rule 704(b) forbids a
11 particular form of opinion testimony. The
12 expert cannot opine on the defendant's own
13 mental state.

14 And so we acknowledge in our brief
15 that there are going to be circumstances in
16 which experts testify about a class of people
17 and put the defendant in that class. That form
18 of expert testimony could be objectionable.

19 But if the issue is just that the
20 defendant is describing a general category of
21 person --

22 JUSTICE KAGAN: How -- how about this?

23 MR. GUARNIERI: -- and they want to
24 make a -- a categorical statement about that
25 group of people, I don't think that's a 704(b)

1 problem. It could be --

2 JUSTICE KAGAN: How -- how about this?
3 In -- in -- in my experience, I've seen a lot of
4 cases, and I'll tell you that a hypothetical
5 person with this many kilograms of drugs in its
6 car caught in this kind of way in a car with
7 this make and model, who says the following
8 things to the police when she's caught, in my
9 experience, a person like that is always going
10 to have known about the drugs in her car.

11 MR. GUARNIERI: Yeah, I think that
12 would be objectionable. Of course, that's not
13 the testimony we had in this case, but the D.C.
14 Circuit has a case which we cite in our brief
15 addressing that kind of use of mirroring
16 hypotheticals. I think that's just a
17 transparent way to circumvent Rule 704(b).
18 That's not this case.

19 JUSTICE KAGAN: Okay. So then I'm not
20 really understanding because, if you say, look,
21 you don't have to say Ms. Diaz knows, as long as
22 everybody understands that the description
23 you're giving of the person who knows is --
24 mirrors who Ms. Diaz is, so you're not willing
25 to be as formalistic as to say she has to be

1 named.

2 You're willing to say the same rule
3 should apply if there's a description that
4 basically matches her. Well, then I don't get
5 why you're not willing to say if the description
6 is a class in which everybody agrees she's a
7 part and it's a hundred percent of the class?

8 MR. GUARNIERI: Well, Justice Kagan,
9 the way we would articulate the rule is the same
10 way that the Ninth Circuit has articulated and
11 the Second and D.C. Circuits and other courts of
12 appeals have articulated, and that is that what
13 the expert may not do is testify in such a way
14 that necessarily compels the inference that the
15 defendant had --

16 JUSTICE KAGAN: But that's just --

17 MR. GUARNIERI: -- the requisite mens
18 rea.

19 JUSTICE KAGAN: It's just a matter of
20 degree as to whether the class is really super
21 narrowly about one person or then gets a little
22 bit broader or then gets a little bit broader,
23 but in all these cases, the person is a member
24 of the class, however exactly you define the
25 class. So I guess I don't see why at some point

1 you're willing to draw the line.

2 MR. GUARNIERI: Well, I'm not sure
3 that's true, Justice Kagan. There are going to
4 be cases in which there's a dispute, a factual
5 dispute, about whether or not the defendant is
6 in the class.

7 Does the defendant have this mental
8 condition or defect or this other one or perhaps
9 no mental disease or defect at all? So you can
10 -- the issue -- the parties can join issue on
11 whether the defendant is even in the class that
12 the expert is describing.

13 To step back here, I also want to,
14 again, stress that Rule 704(b) is a limited
15 exception to the general rule here, which is
16 704(a), and that is that, in general, opinion
17 testimony is not objectionable just because it
18 -- it embraces an ultimate issue.

19 You can have -- when Congress enacted
20 Rule 704(a), it made a judgment that we're going
21 to general -- in general abolish the ultimate
22 issue rule in federal court and, really, these
23 disputes should be channeled through disputes
24 about the reliability of the expert's testimony,
25 whether the expert's testimony is based on

1 sufficient facts and data under Rule 702.

2 You can have robust Daubert
3 gatekeeping under this Court's case law, which
4 is now reflected in the text of Rule 702, and
5 Rule 704(b) is just a limited prohibition on a
6 specific form of expert opinion testimony in
7 criminal trials.

8 Agent Flood's testimony looks nothing
9 like the testimony that Congress forbid when it
10 enacted 704(b).

11 The other point that I would make this
12 morning, you know, and this, I think, goes to
13 some of the concerns about how you engage in the
14 line-drawing that both -- both parties'
15 positions might present, I -- I take -- my -- my
16 friend on the other side has moved this morning
17 in response to a number of the more difficult
18 questions the Court posed was to say that, well,
19 testimony that is -- would provide a basis for
20 the jury to infer the defendant's mental state
21 is not actually about the defendant's mental
22 state unless it is framed explicitly in terms of
23 knowledge.

24 So, for example, the -- the -- the tax
25 lawyer example that we offer in our

1 hypothetical, I take my friend on the other side
2 to agree that testimony that tax lawyers are
3 generally instructed in the requirement to pay
4 some particular tax is not opinion testimony
5 about -- that would be forbidden by 704(b)
6 because it doesn't speak to knowledge.

7 And I think that's actually the
8 correct understanding of "about." It's not
9 about -- it's not about mental state if it's not
10 framed directly or expressly in terms of mental
11 state. But the problem is my friend on the
12 other side doesn't logically carry that through
13 to the rest of the text of Rule 704(b).

14 The opinion has to be not just about
15 mental state but also about the defendant's own
16 mental state. And to be about the defendant's
17 own mental state, the expert has to be in
18 general explicitly taking the stand and
19 expressing an opinion for the jury about what
20 was in the defendant's mind.

21 JUSTICE SOTOMAYOR: Functionally
22 equivalent. Now what we're arguing about,
23 because you just conceded earlier that if you do
24 -- we can argue about how wide you define the
25 class, but you could just say anyone who has 55

1 pounds of drugs in their car, hidden or not,
2 knows the drugs are there, period.

3 To me, that's a functional equivalent
4 of saying this defendant had 55 pounds of drugs,
5 so she has to know. And you admitted to -- to
6 Justice Kagan that there is a -- a point at
7 which you reach that functional equivalency.

8 MR. GUARNIERI: Yeah, I wouldn't
9 really wouldn't describe that, though, as a --
10 a -- a dispute about how you define the class.
11 I mean, I think, in general, you --

12 JUSTICE SOTOMAYOR: No, your -- the
13 dispute is about are you -- are you saying it's
14 this defendant?

15 MR. GUARNIERI: I think, in general,
16 the rule here is that the expert may not express
17 an opinion that leaves for the jury no room
18 to -- to make the ultimate inference for itself.
19 And in -- and if you express an explicit opinion
20 about the defendant's state of mind, that could
21 be sufficient for a violation.

22 All we're saying is we want to leave
23 open the possibility that that might not be
24 necessary for a violation because you're going
25 to have these extreme cases in which an expert

1 contrives to offer some opinion that carefully
2 avoids stating an express opinion about the
3 defendant in that particular case but
4 nonetheless logically, necessarily compels the
5 inference that the defendant had the requisite
6 mental state.

7 So we're talking here about the
8 marginal case. And, again, to return to some of
9 the colloquy earlier --

10 JUSTICE JACKSON: Can I just ask
11 before you -- before you go on, I'm wondering
12 whether some of the problem here might be our
13 not really focusing in on the fact that there
14 are different kinds of experts and different
15 kinds of testimony.

16 And so, to the extent that this rule
17 says that it relates to an opinion about whether
18 the defendant did or did not have a mental state
19 or condition and it was generated in the context
20 of a dispute about testimony related to the
21 psychiatric or, you know, physical condition of
22 a particular defendant, Hinckley, I'm just
23 wondering whether the problem might be that this
24 is really directed at not this kind of
25 testimony, the kind of testimony that comes from

1 an expert who hasn't examined this defendant,
2 doesn't know anything about this defendant and
3 is talking about framework or, you know, general
4 modus operandi, whereas this rule seems to be
5 targeting the kind of expert who has examined or
6 knows something about this defendant's mental
7 state.

8 What do you think about that?

9 MR. GUARNIERI: Well, Justice Jackson,
10 I think that's correct as a historical
11 description of what Congress had in mind here
12 when it enacted Rule 704(b), but I think the
13 logic of that intuition supports our position in
14 this case, not Petitioner's, and that is
15 because, when Congress enacted Rule 704(b)
16 against the backdrop of robust public debate
17 about what appropriate testimony, what
18 appropriate expert testimony should be offered
19 in criminal trials involving the insanity
20 defense, it was clear to everyone at the time
21 that Congress was not eliminating all expert
22 testimony in insanity trials.

23 JUSTICE GORSUCH: No, of course not.

24 MR. GUARNIERI: The -- the text of the
25 rule --

1 JUSTICE GORSUCH: I mean, isn't --
2 isn't the line -- I thought the text had to do
3 with whether it's an element of -- of the
4 offense or -- or the defense.

5 So, for example, in Hinckley, an
6 expert could still get up and say and opine on
7 Mr. Hinckley's mental state, to the extent he
8 has schizophrenia, he can say that. And a
9 battered woman, she has what we would define as
10 battered women syndrome.

11 What they can't do is say: And,
12 therefore, Mr. Hinckley or the -- or the other
13 -- any other defendant, did or did not have the
14 mental state required to either convict or to
15 make out an insanity defense.

16 That's the line, isn't it?

17 MR. GUARNIERI: Yes, Justice Gorsuch.
18 And I think that is just an articulation of our
19 position in this case. And -- and -- and to
20 return to our earlier exchange -- and I think
21 this again goes to Justice Jackson's question as
22 well --

23 JUSTICE GORSUCH: And so -- and so, if
24 that's the case --

25 MR. GUARNIERI: -- everyone

1 understands that when the --

2 JUSTICE GORSUCH: If that's the -- if
3 that -- if that's the case, counsel, what's the
4 difference between saying Mr. Hinckley didn't
5 understand right from wrong, A; B, a
6 hypothetical person who meets all -- looks just
7 exactly like Mr. Hinckley couldn't have
8 understood right from wrong; and, C, all persons
9 with the -- with the characteristics of Mr.
10 Hinckley do not understand right from wrong?
11 What are the difference -- what is the
12 difference between those three statements?

13 MR. GUARNIERI: If -- if I've
14 understood the examples that you have offered,
15 Justice Gorsuch, those are all just variations
16 on the expert taking the stand and saying that
17 the defendant, in fact, met the legal standard.
18 And, again, if I could step back --

19 JUSTICE GORSUCH: And so they should
20 all be -- they're all impermissible, aren't
21 they?

22 MR. GUARNIERI: I think those all
23 could be impermissible if -- if I've understood
24 the three examples. But, Justice Gorsuch,
25 again, earlier I think one of the -- one of --

1 one of our exchanges was about, well, isn't it
2 only -- the fact that it is coming into court at
3 all shows that it's being offered to prove the
4 defendant's mental state. And I think the
5 Hinckley example shows that can't be the correct
6 understanding of Rule 704(b).

7 Everyone understands when you're
8 calling your examining expert in a trial
9 involving the insanity defense to offer that
10 expert's diagnosis of the particular defendant's
11 mental state, the reason it is relevant is
12 because you want the jury to draw some inference
13 about whether the defendant does or does not
14 meet the insanity defense --

15 JUSTICE KAGAN: So, if we think about
16 the insanity --

17 MR. GUARNIERI: -- the -- the legal
18 standard for insanity, and that doesn't mean
19 it's prohibited on 704(b) grounds.

20 JUSTICE KAGAN: If we think about the
21 insanity argument, I mean, an expert can come up
22 to the stand and say a person with these sorts
23 of behaviors or sorts of symptoms, I would say
24 that that person has schizophrenia. That's
25 fine, right?

1 MR. GUARNIERI: Yes.

2 JUSTICE KAGAN: Okay. And then could
3 the person then say: I think that all people
4 with schizophrenia have the necessary capacity
5 to form an intent as to this crime?

6 MR. GUARNIERI: I don't think that
7 that would be objectionable on 704(b) grounds.

8 JUSTICE KAGAN: Okay.

9 MR. GUARNIERI: I doubt it would be
10 reliable, but it wouldn't be objectionable on
11 704(b) grounds. And -- and -- and, Justice
12 Kagan, I mean, if the --

13 JUSTICE KAGAN: Because that to me --
14 okay -- is -- is what the Hinckley controversy
15 was about and why Congress passed this rule,
16 that it didn't want the expert to go from the
17 step of saying looks to me like this person has
18 schizophrenia to the conclusion that, okay, once
19 we say that, we can say that this person has the
20 necessary intent because all people with
21 schizophrenia can form -- you know, have the
22 necessary intent or not.

23 MR. GUARNIERI: Yeah, I think the
24 problem with the particular testimony that
25 Congress was targeting in Rule 704(b) is that

1 the expert is drawing an explicit link between
2 the defendant and the legal requirement that the
3 jury has to find. That's what Congress said, no
4 more of that.

5 JUSTICE KAGAN: Well, that -- that --

6 MR. GUARNIERI: It created a public --

7 JUSTICE KAGAN: -- that is what the
8 expert in my hypothetical is doing, because he's
9 saying this defendant has a certain kind of
10 disease and I'm going to tell you what people
11 with this disease -- you know, whether they're
12 capable of distinguishing right from wrong or
13 whether they're capable of having some other
14 necessary intent for the crime.

15 So he's saying as a fact of the matter
16 in his professional opinion that a
17 hundred percent of the people with this disease
18 are going to have this intent.

19 MR. GUARNIERI: Yeah, well, Justice
20 Kagan, I think you have just -- that's a
21 variation on the syllogism that we identify in
22 our brief at page -- pages 28 to 29. If the
23 expert says everyone in this category -- if you
24 are in category X, it follows that you have
25 mental condition Y, and also I as an expert have

1 diagnosed the defendant as being in category X,
2 you have just broken down one impermissible
3 opinion into two steps, and we do think 704(b)
4 would keep that out.

5 JUSTICE KAGAN: Well, but --

6 JUSTICE ALITO: Mr. Guarnieri --

7 MR. GUARNIERI: But -- but, again, I
8 mean, it's not the categorical nature of the
9 testimony that is the problem here. If you have
10 a case in which you have called an expert to
11 describe, for example, color blindness and --
12 and that's relevant to an ultimate issue in the
13 case, and the expert wants to come into court
14 and say everyone who has color blindness, this
15 is what follows from that, the expert doesn't
16 need to qualify that testimony in order to
17 circumvent Rule 704(b) --

18 JUSTICE ALITO: I mean, Mr. Guarnieri,
19 you're making this --

20 MR. GUARNIERI: -- or comply with Rule
21 704(b).

22 JUSTICE ALITO: -- a lot more
23 complicated than I think it has to be. 704(b)
24 says about whether the defendant or did not have
25 a mental state or condition, dah-dah-dah. It

1 doesn't say "is relevant to."

2 Congress -- the -- the Rules Committee
3 presumably knew what the standard was for
4 relevance, and if they wanted to make -- to say
5 that the expert cannot state an opinion, cannot
6 state anything that is relevant to the issue,
7 they would have said so -- they would have said
8 so explicitly.

9 And a lot of these hypotheticals, it
10 seems to me, are taken care of by other rules.
11 I don't know how any expert could say a hundred
12 percent of the time this is true. I -- I don't
13 think that's reliable. It's subject to
14 objection under 702. And some of these matters
15 could be handled under 403.

16 I don't know why you're -- and -- and
17 then some -- some of them could just be fuel for
18 devastating cross-examination. If -- you know,
19 if an expert says a hundred percent of the time
20 this is true, I -- I -- I think that that would
21 be -- that might well harm the -- the case of
22 the party who introduces -- introduces that
23 testimony.

24 But let me ask you this. There are
25 people who think that there's a lot of chaos in

1 the states that comprise the Ninth Circuit, but,
2 I don't know, until this morning, it hadn't
3 occurred to me that maybe the cause for this
4 chaos is the Ninth Circuit's rule about 704.

5 Do you think that's true?

6 MR. GUARNIERI: No. We have not seen
7 any practical problems in applying -- in
8 applying the longstanding understanding of Rule
9 704(b) that we are advocating in this case.

10 And, Justice Alito, to -- to your
11 earlier points, I entirely agree with you that
12 many other rules will take care of some of the
13 hypotheticals that we are battering about today.
14 I took the Court to just be interested in how do
15 you define the outer limits of how Rule 704(b)
16 should apply.

17 Of course, this case doesn't
18 necessarily present any occasion to address
19 those outer limits because Agent Flood's
20 testimony here looked nothing like some of the
21 hypotheticals that we've been discussing this
22 morning.

23 The other point I would make, Justice
24 Alito -- and -- and we advert to this in our
25 brief -- Rule 702 itself was recently amended in

1 ways that were meant to discourage experts from
2 overstating the certainty with which they could
3 express their opinions on the stand. Rule 702
4 and Daubert gatekeeping is really the way that
5 you handle concerns that an expert is stating
6 something in categorical or absolute terms that
7 is just not supportable by the facts underlying
8 the expert's opinion.

9 JUSTICE GORSUCH: Counsel, have you
10 had any trouble convicting drug mules in the
11 Fifth Circuit?

12 MR. GUARNIERI: No, Justice Gorsuch.
13 And -- and I take your point that this isn't
14 going to be critical testimony in every case or
15 -- or, indeed, in any particular case. And we
16 have instances in which --

17 JUSTICE GORSUCH: I mean, in this
18 case, for example, the defendant couldn't roll
19 down her window and the border agent well knows
20 that that usually means there are drugs stuffed
21 inside the panels of -- of the vehicle, right?
22 I mean, one can draw an inference from that
23 pretty quickly when she says, I can't -- I can't
24 roll down my window.

25 I mean, there -- there's -- in my

1 experience, I mean -- and in the Tenth Circuit,
2 for example, we -- we took as a reliable
3 indication sometimes one -- one contributing
4 factor for a traffic stop was there -- there are
5 air fresheners in the car, okay, and it was
6 traveling below the speed limit, okay, and in a
7 panel van, and the -- and the windows couldn't
8 roll down. I mean, all the modus operandi
9 evidence in the world. And you can draw
10 inferences from that.

11 The one thing the rule says is you
12 can't reach inside someone's head. And it
13 doesn't seem to be a problem in the Fifth
14 Circuit.

15 MR. GUARNIERI: Justice Gorsuch, I
16 don't -- I don't dispute that. I think you're
17 right. We are -- we are convicting defendants
18 of illegally importing drugs in the United
19 States in the Fifth Circuit without this
20 testimony.

21 And -- and so too I think we could
22 obtain convictions in the Ninth Circuit without
23 this testimony. And we have a harmless error
24 argument here, which, you know, I mean, the
25 upshot of that argument is, I think, the other

1 evidence in this case was overwhelming that
2 Petitioner knew about the drugs in her car.

3 Nonetheless, this is helpful and
4 reliable testimony, and we think the jury should
5 be allowed to hear it. And -- and I think, if
6 you're thinking about the case through the lens
7 of, you know, what -- what is sort of the
8 practical -- the practicalities here, if you
9 adopt Petitioner's rule on the other hand, it's
10 going to open up a host of arbitrary and
11 difficult line-drawing exercises that I don't
12 think you really had persuasive answers to this
13 morning.

14 And so I think what the Court should
15 do is stick to the text of Rule 704(b) itself,
16 and Rule 704(b) only comes into play when the
17 defendant expresses an opinion about the
18 defendant's own -- excuse me -- when the expert
19 expresses an opinion about the defendant's own
20 mental state.

21 And Agent Flood didn't do that here.
22 He said, in most circumstances, drug traffickers
23 do not entrust large quantities of drugs to
24 people who are unaware of those drugs. He
25 explained why that was true. And he elaborated

1 on cross-examination that, of course, he is
2 aware of some scenarios in which the traffickers
3 may try to use so-called blind mules, and he
4 described the facts of those scenarios, and they
5 don't meet the facts of this case.

6 Everything that occurred here occurred
7 in full compliance with Rule 704(b), and we
8 would ask the Court to affirm.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: On the question of
14 whether you've had difficulty convicting mules
15 in the Fifth Circuit, it reminds me of Rule
16 10,000 of the rules of -- the Federal Rules of
17 Evidence, which used to be applied by district
18 judges to exclude evidence that prosecutors
19 wanted to admit, which -- which was the you
20 don't need it rule.

21 So, you know, if you don't need it and
22 there's a conceivable possibility -- there's a
23 possibility that it might create an issue on
24 appeal, the judge would keep it out. Do you
25 think that we ought to create that rule, make

1 that an enforceable, judge-made addition to the
2 Federal Rules of Evidence?

3 MR. GUARNIERI: No. The federal
4 government opposes that rule, Justice Alito.

5 (Laughter.)

6 MR. GUARNIERI: No, there is --
7 there's a metaphor in the Advisory Committee
8 notes to Rule 401, I think it's from Professor
9 McCormick, and he said as to relevancy that a
10 brick is not a wall. And what he meant was you
11 have to build your case up brick by brick.
12 Every brick is not itself going to be
13 dispositive of the whole case, but they're
14 helpful. And we are entitled to present
15 reliable evidence, reliable and helpful
16 evidence, of Petitioner's guilt and of guilt
17 generally in cases like this.

18 I think this is just -- it -- it's --
19 there's -- the question shouldn't be do we need
20 it. It's does it -- is it prohibited by the
21 Federal Rules or the Constitution, and this
22 testimony is not.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: So you have not

1 backed off of your answer to Justice Gorsuch or
2 to Justice Kagan that if a hundred percent
3 inference is pointing to the defendant, that's a
4 functional equivalency and you would agree that
5 that should be excluded, but you say it should
6 be excluded under a different rule perhaps.

7 But you didn't even go that far. You
8 said under 704 that might cross the line --

9 MR. GUARNIERI: Well --

10 JUSTICE SOTOMAYOR: -- to say that
11 every defendant with schizophrenia had --
12 doesn't know right from wrong or knows right
13 from wrong because some expert could say
14 schizophrenia doesn't cloud your mind, it just
15 makes you believe you have a reason to do it.

16 So which is it?

17 MR. GUARNIERI: Well, Justice
18 Sotomayor, two points. One, I mean, to the
19 extent that I muddled things this morning, I
20 regret it, but the key thing from our point of
21 view about the application of Rule 704(b) is
22 whether the testimony is framed in terms of the
23 defendant.

24 And I think my friend on the other
25 side gets some mileage out of positing

1 hypotheticals where he's talking about, oh, a
2 class that obviously includes the defendant or
3 necessarily includes the defendant and things
4 like that. I think it really does matter
5 whether the expert takes the stand and opines
6 about the defendant in particular. That's
7 really the key dividing line, and that's the
8 dividing line --

9 JUSTICE SOTOMAYOR: Well, I think we
10 all --

11 MR. GUARNIERI: -- that follows
12 directly from --

13 JUSTICE SOTOMAYOR: -- agree on that.
14 He says the defendant knew. That's a violation
15 of the rule.

16 MR. GUARNIERI: That's right.

17 JUSTICE SOTOMAYOR: The question is,
18 when he says the defendant, all people who have
19 X, Y, and Z know, you're willing to say, if all
20 people know who have X, Y, and Z, then it has to
21 be this defendant, correct?

22 MR. GUARNIERI: Well, I think the --
23 the key question from our perspective in
24 confronting a hypothetical like that would be
25 has the -- the defendant -- excuse me -- has the

1 testifying expert himself taken the stand and
2 put the defendant in that class.

3 If all that is at issue is that the
4 jury could --

5 JUSTICE SOTOMAYOR: Well, he's only
6 there because --

7 MR. GUARNIERI: -- infer from other
8 evidence, I mean, in order to put Petitioner in
9 the class of drug couriers here --

10 JUSTICE SOTOMAYOR: So how about if he
11 says 99.9 percent --

12 MR. GUARNIERI: Yeah. I can't --

13 JUSTICE SOTOMAYOR: -- know?
14 Ninety-five percent know? Ninety percent know?
15 Where do we draw the line?

16 MR. GUARNIERI: Yeah, I don't think
17 that's the line that Rule 704(b) draws. It's
18 not a rule about categorical versus conditional
19 testimony. It's a -- it's a line about expert
20 opinion testimony about the defendant.

21 JUSTICE SOTOMAYOR: About the --

22 MR. GUARNIERI: The distinction --

23 JUSTICE SOTOMAYOR: -- about a
24 defendant's mental state?

25 MR. GUARNIERI: Yes. Yes. And I

1 think, if you have concerns in a particular case
2 that a defendant's opinion -- excuse me, that an
3 expert opinion is, you know, overstating the
4 certainty with which that expert could describe
5 some fact of the world, that's a problem under
6 Rule 702 and Daubert. It's not a problem under
7 Rule 704(b).

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Fisher might have
10 some line-drawing problems, but I think you do
11 too, Mr. Guarnieri.

12 I mean, if I -- if -- if -- if I
13 understand what you're now saying, you're now
14 saying on the one hand, if an expert got up and
15 said a hundred percent of drug mules know what
16 they're doing, that could not be excluded under
17 your rule, but -- but if the expert got up and
18 said, I think that this defendant, it looks like
19 from the packaging she was working for this
20 particular drug cartel, and now I'm going to
21 tell you that a hundred percent of mules who
22 work for this particular drug cartel know --
23 know that they're carrying drugs, then you say
24 it is excluded. Is that correct?

25 MR. GUARNIERI: Yeah, I think that is

1 the expert expressing an opinion for the jury
2 about the defendant having the requisite mental
3 state. That's out under 704(b).

4 JUSTICE KAGAN: Okay. And so then, if
5 we go back to the one that is not excluded, it's
6 the expert getting up and just saying, all drug
7 mules have knowledge of what they're doing. I
8 guess I'm just not seeing the difference between
9 that statement and the other one because
10 everybody knows that this woman was caught in a
11 car with drugs, so she's a drug mule. And the
12 expert is saying all drug mules have knowledge.
13 So, once you're going to tell me that the other
14 is excluded, that should be excluded too.

15 MR. GUARNIERI: Well, Justice Kagan,
16 let me try and answer that question on two
17 levels, one just a mechanical level.

18 JUSTICE KAGAN: Well, I just want to
19 go on my level.

20 (Laughter.)

21 MR. GUARNIERI: Well, I think -- I --
22 I think this --

23 JUSTICE KAGAN: Like the level of the
24 question.

25 MR. GUARNIERI: Justice Kagan, the --

1 the reason -- the distinction between those two
2 is the distinction drawn in the text of Rule
3 704(b) itself, which is is the expert expressing
4 an opinion about the defendant. And in one, the
5 expert is expressing an opinion, taking the
6 stand and testifying to the jury I as an expert
7 have concluded as a matter of my expert opinion
8 that the defendant had the mental state, the
9 requisite mental state. Rule 704(b) forbids
10 that.

11 Now the -- the -- the second-level
12 response that I also wanted to offer to your
13 question, Justice Kagan, is I -- we have --

14 JUSTICE KAGAN: Well, I don't really
15 under -- okay.

16 MR. GUARNIERI: -- there's -- there's
17 a -- there's a rationality, there's a reason
18 that Congress drew that -- the line that it drew
19 in Rule 704(b) and it has to do with the
20 Hinckley trial and the concerns that there's a
21 kind of expert opinion testimony that is
22 particularly problematic that Congress wanted to
23 keep out and that's it.

24 JUSTICE KAGAN: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: I am thoroughly
3 confused. So a hypothetical saying someone in
4 John Hinckley's situation who looks just like
5 John Hinckley but isn't John Hinckley couldn't
6 have had the requisite mental state, that's out?

7 MR. GUARNIERI: Well, again, it's not
8 --

9 JUSTICE GORSUCH: Is that out or in?
10 Just out or in?

11 MR. GUARNIERI: I mean, the so-called
12 mirroring hypotheticals --

13 JUSTICE GORSUCH: Yes.

14 MR. GUARNIERI: -- I think are out --

15 JUSTICE GORSUCH: All right. Okay.

16 MR. GUARNIERI: -- under a proper --

17 JUSTICE GORSUCH: All right. Okay.

18 MR. GUARNIERI: -- understanding of
19 Rule 704(b). We accept that.

20 JUSTICE GORSUCH: Now I say -- now I
21 have the expert who says in the John Hinckley
22 case or the mule case, just flip it around, all
23 people with schizophrenia cannot form or can
24 form the requisite intent or all mules can -- do
25 or do not know. In or out?

1 MR. GUARNIERI: I don't think that
2 testimony like that would be objectionable on
3 704(b) grounds.

4 JUSTICE GORSUCH: So that's all in?

5 MR. GUARNIERI: I mean --

6 JUSTICE GORSUCH: I'm sorry. I'd
7 understood you in prior questions to say that
8 was out.

9 MR. GUARNIERI: Well, the --

10 JUSTICE GORSUCH: Did I misunderstand
11 you, or have you spoken both ways today?

12 MR. GUARNIERI: I do not think I have
13 spoken both ways. The line I have tried to draw
14 here, and it's the line that our brief
15 articulates, is is the expert opining about the
16 defendant herself.

17 JUSTICE GORSUCH: And why would
18 Congress draft a rule saying experts can't opine
19 about the defendant's mental state after the
20 Hinckley trial and forbid a district judge from
21 admitting evidence about a mirroring
22 hypothetical that looks just like John Hinckley
23 but allow in, still allow in an expert to say
24 nobody in the class in which John Hinckley falls
25 has the requisite mental state? What -- what

1 rational Congress would -- would do such a
2 thing?

3 MR. GUARNIERI: I think Rule 704(b),
4 if you look at the history of the provision,
5 reflects a judgment by Congress that having
6 dueling experts in insanity cases directly opine
7 for the jury on whether the defendant satisfies
8 the legal definition of insanity was unseemly,
9 that it created a public spectacle --

10 JUSTICE GORSUCH: Exactly.

11 MR. GUARNIERI: -- that undermined the
12 integrity of the proceedings --

13 JUSTICE GORSUCH: But you're allowing
14 in --

15 MR. GUARNIERI: -- and that it led to
16 overstatement by the expert.

17 JUSTICE GORSUCH: -- all of that
18 testimony -- you're still allowing in all of
19 that testimony.

20 MR. GUARNIERI: Well, I think again --
21 and this --

22 JUSTICE GORSUCH: All he has to say
23 is, instead of Hinckley or instead of the
24 mirroring hypothetical, all persons in this
25 category.

1 MR. GUARNIERI: This goes back to an
2 exchange that I had with Justice Jackson
3 earlier. I think it was the understanding of
4 everyone involved at the time and the text of
5 the original rule reflects that you are still
6 going to have experts who can come in in a
7 criminal trial and testify with respect to the
8 mental state or condition of the defendant.

9 JUSTICE GORSUCH: Certainly.

10 MR. GUARNIERI: That's not prohibited
11 by Rule 704(b).

12 JUSTICE GORSUCH: With respect to
13 whether he has -- whether he has schizophrenia,
14 sure, whether he has mental illness, yes, but
15 not -- I mean, the text of the rule says not
16 with respect to the element of the crime or the
17 defense.

18 MR. GUARNIERI: That's right.

19 JUSTICE GORSUCH: Okay. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: On the text, if we
23 stick to the text, that should be our key,
24 right?

25 MR. GUARNIERI: I think we win this

1 case under the text, Justice Kavanaugh.

2 JUSTICE KAVANAUGH: Right. And are
3 the hypotheticals you've been getting real-world
4 hypotheticals?

5 MR. GUARNIERI: No, I don't think so,
6 although I will acknowledge that in the Ninth
7 Circuit there was a time when we did elicit
8 testimony that no drug trafficking organizations
9 used blind mules because that's what we
10 accurately -- we honestly believed at the time.
11 And that testimony, we don't sponsor testimony
12 like that anymore because it's -- it's not true.

13 JUSTICE KAVANAUGH: And it's not true
14 and if someone tried to introduce testimony like
15 that, I think Justice Alito said this, other
16 rules take care of that in terms of reliability,
17 et cetera?

18 MR. GUARNIERI: Yes.

19 JUSTICE KAVANAUGH: Yeah. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: So I guess that
24 drawing a line between testimony about a class
25 or a group on the one hand and testimony about

1 an individual happens at trial all the time.
2 Judges are familiar with drawing that line. And
3 I'm interested in the law professors', evidence
4 professors' brief because they point to one
5 context in which that happens with fair
6 frequency, which is with respect to eyewitness
7 testimony.

8 And they say courts often allow expert
9 testimony regarding factors that on average
10 interfere with accurate eyewitness
11 identifications. However, courts do not allow
12 experts to draw an individual inference and
13 testify that a particular witness is likely
14 inaccurate.

15 They go on to say, because social
16 science research isn't reliably -- even though
17 it is itself replicated and reliable, it can't
18 support a reliable statement about an individual
19 case, especially when that social scientist
20 hasn't really examined that individual case.
21 And so judges, they at least say, are pretty
22 familiar with the kind of line.

23 So is this the line you're drawing?

24 MR. GUARNIERI: Yeah, well, Justice
25 Jackson, I -- I think that brief -- the point

1 the professors are making in that brief is that
2 concerns that the expert has testified in some
3 way that overstates the expert's ability to draw
4 an inference about the particular case are not
5 unfamiliar in federal court. Courts handle
6 those kinds of concerns every day under Rule
7 702. And you could have a similar dynamic for
8 testimony like this.

9 JUSTICE JACKSON: Right. And that --
10 I guess what I'm suggesting is that there is a
11 difference between a -- an expert talking about
12 a group, an "on average," and here are the
13 statistics that relate to how people operate or
14 think or whatever as a group and that that's
15 actually a different kind of testimony and
16 ultimate, you know, goal and -- and -- and
17 helpful thing for jurors when they are trying to
18 draw the inference as to whether or not this
19 individual, right, is a member of that group,
20 meaning acted in the same way or thought in the
21 same way. That's still left to the jury so long
22 as the expert doesn't himself say -- go on to
23 say, and this individual is in that group,
24 right?

25 MR. GUARNIERI: I think that's exactly

1 right. We think that's how Rule 704(b) should
2 work. And, here, Agent Flood certainly left a
3 great deal for the jury, a great number of the
4 links in the chain of inferences for the jury
5 itself to draw.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Rebuttal, Mr. Fisher?

10 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

11 ON BEHALF OF THE PETITIONER

12 MR. FISHER: Thank you.

13 I'd like to start by just making
14 absolutely clear for the Court that the
15 government is not defending the Ninth Circuit's
16 case law on Rule 704(b). So, on the mirroring
17 situation the Court has talked about, there's a
18 Ninth Circuit case from 2005 called Younger,
19 where the Ninth Circuit says that evidence is
20 admissible because it does not particularly
21 speak to the defendant, with "the defendant" in
22 italics in that opinion. So the government
23 there is moving away from the Ninth Circuit's
24 view.

25 I don't fully understand exactly what

1 the government is saying about what we've called
2 hundred percent testimony or "always" testimony,
3 but, Justice Kavanaugh, I do want to absolutely
4 stress those are real-world examples. They're
5 at page 23 of our brief. That's the exact
6 testimony that agents like Agent Flood gave in
7 cases like this until 2013, when the government
8 discovered there actually were some blind mules
9 out there.

10 So it's merely a -- it's merely a
11 situation of this particular scenario where the
12 government's backed off it for empirical
13 reasons. But you could have other cases where
14 an expert would testify in the real world that
15 people with schizophrenia can never tell right
16 from wrong, that ex -- that -- that executives
17 in corporations when they lie to government
18 investigators always know they're telling a lie.
19 That would be perfectly real-world examples.

20 And I think, regardless of what the
21 government's precise position is, it's very
22 difficult to argue that kind of testimony would
23 be okay under Rule 704(b).

24 Let me give you one last scenario
25 about the government's line-drawing problems.

1 There's a case called Watson from the Third
2 Circuit that's in our brief. The government
3 itself seems to agree with the outcome in
4 Watson. In that case, the prosecutor asked the
5 expert: Do you have an opinion as to whether or
6 not the defendant here had the requisite intent?
7 The expert says: Yes, I have an opinion.
8 People like this generally have the requisite
9 intent.

10 The government seems to agree that is
11 out under Rule 704(b). Now maybe that's
12 because, at pages 28 to 30, it draws a
13 contextual rule of some kind. But there are
14 these very difficult line-drawing problems under
15 the government's rule.

16 Our rule is simple. If you talk about
17 "the" defendant herself, it's -- it's covered by
18 Rule 704(b), or a class of people including the
19 defendant, you're talking -- you're covered by
20 Rule 704(b). Here, the class of people, Agent
21 Flood is quite specific, people carrying large
22 quantities of drugs across the border. That's
23 the class. The defendant here is unquestionably
24 a member of that class. And so his testimony is
25 about the defendant.

1 I want to say one last thing. Justice
2 Kagan and Justice Jackson asked about some of
3 the history and intent of Rule 704(b). Let's
4 just use the Hinckley case. And the Senate
5 report is only a page long. I would urge you to
6 read that if you think that's important here.
7 And what the Senate said was, we're concerned
8 about experts testifying about the subject of
9 mens rea.

10 And so, after the Hinckley trial, if
11 an expert were to testify we think people like
12 this who are exhibiting these conditions
13 generally couldn't tell right from wrong or
14 probably couldn't tell right from wrong or in
15 most circumstances couldn't tell right from
16 wrong, it seems crazy to think Congress would
17 have thought that was okay under the Hinckley
18 trial.

19 The problem in the Hinckley trial was
20 that the expert was testifying not just about
21 facts from which a jury could infer mens rea,
22 but the jury was expressing an opinion on the
23 ultimate issue of mens rea from which the jury
24 could go into the jury room and do nothing but
25 say, oh, we agree with the expert.

1 And whether the expert expressed that
2 opinion in terms of probably this -- this
3 defendant had the mens rea or didn't have the
4 mens rea or certainly, the problem is that the
5 jury can go back to the jury room and say:
6 Look, sounds like Agent Flood, you know, thinks
7 people like this generally have the mens rea.
8 He must be right. We'll go along with that.

9 The point of the right to jury trial
10 and the point of the ultimate issue doctrine is
11 that when it comes to the special subject of
12 mens rea -- and, Justice Jackson, I want to be
13 really specific here -- mens rea as the element
14 of the crime to convict or as the defense, that
15 particular subject has a wall around it. The
16 jury is -- is required to make an independent
17 moralistic, qualitative determination.

18 And that's what Agent Flood did wrong
19 here. He said most people like this know they
20 have drugs in their car. Knowledge is the exact
21 element of the crime.

22 So whatever -- whatever else Rule
23 704(b) may cover in terms of statements that
24 cover mens rea, this one explicitly did, and
25 that's why it went over the line.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:35 a.m., the case
5 was submitted.)

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