

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

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MOTION IN LIMINE to Exclude the
Government's Expert Drug Witness

██████████
Hon. Lawrence E. Kahn

The Defendant ██████████, by and through his counsel, Gene V. Primomo, Assistant Federal Defender for the Northern District of New York, submits the following MOTION IN LIMINE to exclude the Government's Expert Drug Witness, New York State Police Senior Investigator Samuel Mercado. The defendant received written notice of the government's intention to present expert witness testimony in the areas of heroin values and the roles of mules, how they get paid and various methods used to bring heroin into the United States as well as others¹. Mr. Mercado's testimony is based on his training, experience and *review of the reports, records and evidence* in the case. (emphasis added)

I.

The Rules for Expert Testimony

A district court's discretion to admit expert testimony is controlled by Rules 702, 703, and 403 of the Federal Rules of Evidence. Rule 702 provided that an expert witness may testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

¹See attached letter from Assistant United States Attorney, Richard S. Hartunian.

evidence or to determine a fact in issue." Rule 703 stated that an expert witness may base opinions on otherwise inadmissible facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Expert testimony, like other forms of evidence, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403. *United States v. Locascio*, 6 F.3d 924, 936 (2d Cir.1993).

II.

Agent Mercado's Testimony as Drug Expert Witness

The Second circuit has repeatedly upheld the use of expert testimony by government agents to describe the characteristics and operating methods of narcotics dealers." *United States v. Boissoneault*, 926 F.2d 230, 232 (2d Cir.1991). Also permitted that such agents could "offer their interpretations of any physical evidence that is properly before the jury." *Id.* at 233.

Furthermore, although "*[w]e have repeatedly expressed our discomfort with expert testimony in narcotic cases that not only describes the significance of certain conduct or physical evidence in general, but also draws conclusions as to the significance of that conduct or evidence in [a] particular case,*" we have nonetheless "permitted experts to make conclusory statements, based on their experience, that the defendant was involved in drug-related activity." *Id.* (emphasis added). With these considerations in mind, the defendant objects to this Court admitting New York State Police Senior Investigator as expert testimony in accordance with the aforementioned standards.

This is a simple case. The issue is: Did the defendant know he was carrying almost six pounds of heroin in this suitcase that he presented to the border agents during secondary inspection? A conspiracy has not been charged nor alleged. It is inconceivable that a jury would need the assistance of an expert to decide this case. A jury may not know the wholesale and

retail value of heroin, what countries produce it or all the workings of drug organization, but none of those facts tend to prove or disprove the simple issue in this case. What is troubling and a very real possibility is the fact that the agent may give ultimate conclusions and base conclusions on evidence that would violate the 6th Amendment. This has been the reason for the concern in permitting such evidence in drug cases expressed by the circuit. Specificity, by testifying from report and records in this case the government will be admitting evidence that would otherwise be inadmissible. Rule 803(8)(B) provides that law enforcement reports are defined inadmissible hearsay in criminal cases.

This circuit has repeatedly expressed its discomfort with expert testimony in narcotic cases which have had more complex issues in controversy than this simple single defendant border smuggling case. It may be the government is intent to present to the jury facts that go far beyond issues in this case by impressing on the jury the value, scope and global nature of illegal drugs. This could have the result of over-emphasizing to the jury the defendant crime and conduct as alleged in the indictment.

It is unnecessary to risk the rights of the defendant and permit Agent Mercado's testimony in this case.

Date: January 30, 2006

ALEXANDER BUNIN
FEDERAL PUBLIC DEFENDER

Respectfully submitted,

/s/ Gene V. Primomo

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Certificate of Services

I certify that I have served a copy of the foregoing pleading to Assistant United States Attorney, Richard Hartunian, at 445 Broadway, Room 218, Albany, New York by electronic filing.

June 29, 2006

/s/ Gene V. Primomo

Gene V. Primomo
Assistant Federal Defender