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NOTE

POLICE EXPERT WITNESSES AND THE ULTIMATE ISSUE RULE

The defendant was convicted of possession of marijuana with intent to distribute. The arresting officers testified that when they approached the defendant, he fled after discarding a bag which contained ten coin envelopes of marijuana, a plastic bag of marijuana, and a loaded pistol. The officers further testified that the defendant was apprehended almost immediately and \$359 in cash was found in his pockets. A police officer was then qualified by the court as an expert in narcotics transactions. The prosecutor posed a hypothetical question to this expert which incorporated all of the facts to which the arresting officer had testified. Over the defendant's objection, the expert was allowed to testify that, in his opinion, an individual with ten coin envelopes of marijuana, a plastic bag of marijuana, \$359 in cash, and a handgun was involved in the distribution of marijuana. The expert also was permitted to testify that it was common for a distributor to carry a revolver and that "[t]he reason the subject had the revolver was to keep from being ripped off, due to the location and amount of money and what he was selling."¹ The Louisiana Supreme Court *held* that admission of the expert's response to the hypothetical question and his statement of the purpose for which the defendant carried the handgun was reversible error. According to the Court, this testimony was an impermissible opinion on the ultimate issue of the case, the defendant's guilt or innocence, and there was a great risk of prejudice to the defendant since jurors and the general public have great confidence and trust in police officers. The court, however, further *held* that the officer's expert testimony that it is common for marijuana distributors to carry revolvers was admissible. *State v. Wheeler*, 416 So. 2d 78 (La. 1982).

As early as 1877, the United States Supreme Court held that testimony by an expert witness on a question ultimately to be decided by the jury was admissible. In *Transportation Line v. Hope*,² the plaintiff sought recovery for the loss of its barge which was damaged while being towed by the defendant. The defendant appealed the trial court's judgment for the plaintiff, contending that the trial court erred in allowing the plaintiff's expert to testify that, in his opinion, it was neither safe nor prudent for a tug boat to tow three boats abreast with a high wind in wide water.³ In response, the Supreme Court stated:

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1. *State v. Wheeler*, 416 So. 2d 78, 79-80 (La. 1982).
2. 95 U.S. 297 (1877).
3. *Id.* at 298.

It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify.⁴

Transportation Line's permissive rule was followed consistently by federal appellate courts⁵ and was codified in 1974 with the enactment of Federal Rule of Evidence 704.⁶ Under rule 704, otherwise admissible testimony which embraces the ultimate issue will not be rejected for that reason. A law officer, or any other expert witness, may give opinion testimony if he is qualified by knowledge, skill, training, or education and his specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact at issue.⁷ Expert opinion testimony, however, may be excluded when its probative value is outweighed by its prejudicial impact, or when it is either cumulative or a waste of time.⁸ The trial court has broad discretion to admit expert testimony which will aid the jury.⁹

Although the ultimate issue objection clearly was abrogated in federal court with the enactment of Federal Rule of Evidence 704, defendants have continued to object to the admission of ultimate issue testimony by complaining that such testimony "invades the province of the jury." Federal courts, however, have consistently cited rule 704 and rejected this objection.¹⁰ In *United States v. Milton*,¹¹ the Fifth Circuit Court of Appeals replied to such an objection:

The provinces of judge, jury and expert witness are not carto-

4. *Id.*

5. *Carlson v. Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 772 (2d Cir. 1960); *Western Coal & Mining Co. v. Berberich*, 94 F. 329, 333 (8th Cir. 1899); *Fireman's Ins. Co. v. J.H. Mohlman Co.*, 91 F. 85, 87 (2d Cir. 1898). *Contra* *United States v. Spaulding*, 293 U.S. 498, 506 (1935).

6. FED. R. EVID. 704 provides that: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

7. FED. R. EVID. 702.

8. FED. R. EVID. 403.

9. *United States v. Tsinnijinnie*, 601 F.2d 1035, 1040 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); *United States v. Watson*, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *United States v. Milton*, 555 F.2d 1198, 1204 (5th Cir. 1977); *United States v. Johnson*, 527 F.2d 1381, 1384 (D.C. Cir. 1976).

10. *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979); *United States v. Milton*, 555 F.2d 1198, 1203-04 (5th Cir. 1977); *United States v. McCoy*, 539 F.2d 1050, 1063 (5th Cir. 1976); *United States v. Johnson*, 527 F.2d 1381, 1384 (D.C. Cir. 1976).

11. 555 F.2d 1198 (5th Cir. 1977).

graphically immutable and precise. Courts must accommodate to the expertise that the jury must receive from those who possess it, lest the jury flounder in confusion begotten by the arcane. The trial judge must have discretion to discern the needs presented by a particular case and the forms of expert testimony that may best guide the jury over unfamiliar terrain.¹²

Common law jurisdictions are divided as to the admission of expert opinion testimony on ultimate issues, although the strong majority position follows the rule of the federal courts.¹³ At this writing, nineteen states have adopted Uniform Rule of Evidence 704,¹⁴ which is identical to Federal Rule of Evidence 704, and five states have adopted statutes substantially in accord with rule 704.¹⁵ Additionally, sixteen states have abrogated the ultimate issue rule judicially,¹⁶ and one of these has proposed adoption of rule 704.¹⁷ Of the nine remaining states, four allow ultimate issue testimony only in certain circumstances,¹⁸

12. *Id.* at 1204-05.

13. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 12 (E. Cleary 2d ed. 1972) [hereinafter cited as MCCORMICK ON EVIDENCE]; 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, §§ 1920-1921 (Chadbourn rev. 1978).

14. See ARIZ. R. EVID. 704; ARK. STAT. ANN. § 28-1001, Rule 704 (1979); COLO. R. EVID. 704; DEL. R. EVID. 704; HAWAII R. EVID. 704; ME. R. EVID. 704; MICH. R. EVID. 704; MINN. R. EVID. 704; MONT. CODE ANN. § 26-10-704 (1981); NEB. REV. STAT. § 27-704 (1979); N.M. R. EVID. 704; N.D. R. EVID. 704; OHIO R. EVID. 704; OKLA. STAT. ANN. tit. 12, § 2704 (West 1980); OR. REV. STAT. § 40.420, Rule 704 (1981); VT. R. EVID. 704; WASH. R. EVID. 704; WIS. STAT. ANN. § 907.04 (West 1975); WYO. R. EVID. 704.

15. See CAL. EVID. CODE § 805 (West 1966); FLA. STAT. ANN. § 90.703 (West 1979); KAN. STAT. ANN. § 60-456(d) (1976); NEV. REV. STAT. § 50.295 (1979); UTAH R. EVID. 56(4).

16. See *Widmyer v. Southeast Skyways, Inc.*, 584 P.2d 1 (Alaska 1978); *Pisel v. Stamford Hosp.*, 180 Conn. 314, 430 A.2d 1 (1980); *Bean v. Diamond Alkali Co.*, 93 Idaho 32, 454 P.2d 69 (1969); *First Nat'l Bank v. Sousanes*, 96 Ill. App. 3d 1047, 422 N.E.2d 188 (1981); *Rieth-Riley Constr. Co. v. McCarrell*, 163 Ind. App. 613, 325 N.E.2d 844 (1975); *Andrews v. Andrews*, 242 Md. 143, 218 A.2d 194 (1966); *Commonwealth v. LaCorte*, 373 Mass. 700, 369 N.E.2d 1006 (1977); *Wessar v. John Chezik Motors*, 623 S.W.2d 599 (Mo. App. 1981); *State v. Chatman*, 156 N.J. Super. 35, 383 A.2d 440 (1978); *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); *State v. Hunt*, 305 N.C. 238, 287 S.E.2d 818 (1982); *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978); *State v. Porraro*, 121 R.I. 882, 404 A.2d 465 (1979); *Hughes v. Children's Clinic*, 269 S.C. 389, 237 S.E.2d 753 (1977); *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734 (Tenn. 1977); *Washington v. State*, 630 S.W.2d 882 (Tex. Crim. App. 1982).

17. See N.Y. CODE OF EVID. § 704 (New York State Law Revision Commission 1980).

18. The Georgia Supreme Court allowed expert testimony on the ultimate issue in *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981). In *Sinns v. State*, 248 Ga. 385, 283 S.E.2d 479 (1981), however, the court refused to extend the *Smith* holding to the facts of *Sinns*, distinguishing *Smith* by the complexity of the issue upon which the expert testified. In *Iowa v. Nimmo*, 247 N.W.2d 228 (Iowa 1976), the Iowa Supreme Court held that expert opinion testimony on the ultimate issue was improper, but the court rejected the objection that the expert's testimony invaded the province of the jury. The court stated that a court could permit a scientific or practical expert to express his opinion as to whether or not a certain method used or course of con-

four decidedly favor the ultimate issue rule,¹⁹ and one, New Hampshire, has neither jurisprudence nor statute dealing with the issue.

The issue of whether to admit ultimate issue testimony is further complicated where the expert giving the testimony is a law enforcement official. Federal courts generally allow such testimony; thus law enforcement officials as expert witnesses are quite common in federal courts. Federal agents have been qualified as experts in the habits of narcotics users and dealers,²⁰ the modus operandi of alien smuggling rings,²¹ the examination of bank surveillance films,²² and the odor of whisky mash.²³ Federal agents are used extensively as experts in the areas of gambling and bookmaking, where the ordinary layman is unfamiliar with the terms and methods.²⁴

States which have adopted the Uniform Rules of Evidence or which have judicially abrogated the ultimate issue rule generally admit police opinion testimony. Montana, which has adopted the Uniform Rules, permits expert opinion testimony by an investigating officer as to the cause of an accident.²⁵ Opinion testimony by narcotics officers that a defendant who possessed large quantities of drugs intended to deliver them to others is allowed in Idaho and Pennsylvania, states which have judicially abrogated the ultimate issue rule.²⁶ Minnesota

duct followed was a proper one, but no witness could express an opinion as to whether a person's conduct measured up to a legal standard. The Mississippi Supreme Court allowed expert medical testimony on the cause of the plaintiff's injury in a civil action for assault and battery in *Sipe v. Farmer*, 398 So. 2d 1325 (Miss. 1981), but the court carefully noted that it was not relaxing its rule that expert testimony on the ultimate issue is inadmissible. The highest court of West Virginia noted, in *State v. Mitter*, 285 S.E.2d 376 (W. Va. 1981), that the contours of the ultimate issue rule are difficult to define, but expert opinion could not be admitted to show a defendant's subjective intent.

19. See *Ex parte Dial*, 387 So. 2d 879 (Ala. 1980); *Wyatt v. State*, 405 So. 2d 154 (Ala. Crim. App. 1981); *Koester v. Commonwealth*, 449 S.W.2d 213 (Ky. 1969); *Hargadon v. Louisville & Nash. R.R.*, 375 S.W.2d 834 (Ky. 1964); *Watkins v. Ebach*, 291 N.W.2d 765 (S.D. 1980); *Freeman v. Commonwealth*, 223 Va. 301, 288 S.E.2d 461 (1982).

20. *United States v. Johnson*, 527 F.2d 1381, 1383 (D.C. Cir. 1976).

21. *United States v. Sanchez-Murillo*, 608 F.2d 1314, 1318 (9th Cir. 1979).

22. *United States v. Fernandez*, 480 F.2d 726, 735 (2d Cir. 1973).

23. *United States v. Clancy*, 285 F. Supp. 98, 99 (S.D. Miss. 1968).

24. See *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977); *United States v. McCoy*, 539 F.2d 1050, 1062 (5th Cir. 1976). In *Scavo*, the testimony of a federal agent qualified as an expert in the field of gambling was admitted as helpful to the jury because "[t]he structure of a gambling enterprise is not something with which most jurors are familiar" and gambling "employs a jargon foreign to all those who are not connected with the business." 593 F.2d at 844.

25. *Wollaston v. Burlington Northern, Inc.*, 612 P.2d 1277 (Mont. 1980).

26. *State v. Gomez*, 101 Idaho 802, 623 P.2d 110 (1980) (expert in narcotics investigation permitted to testify that an addict would not possess fifteen grams of heroin

also allows police expert opinion testimony; the Minnesota Supreme Court, in a very liberal application of Uniform Rule 704, permitted testimony by a vice officer as to the meaning of an alleged prostitute's offer of "anything you want."²⁷

Police expert testimony of this nature generally is rejected in strict ultimate issue jurisdictions. South Dakota and Kentucky do not allow expert opinion testimony by investigating officers as to contributing factors in automobile collisions,²⁸ and Iowa will not permit police testimony that the quantity of drugs with which a defendant was apprehended exceeds that normally possessed for personal use.²⁹ Not all states, however, follow this ultimate/non-ultimate issue dichotomy. Several states which have abrogated the ultimate issue rule exclude accident reconstruction by an investigating officer,³⁰ while Georgia, an ultimate issue jurisdiction, permits such testimony.³¹

In Louisiana, the general rule is that a witness may not give opinion testimony.³² An exception is provided, however, for expert witness testimony.³³ An expert is defined in Louisiana criminal procedure as one who has "special knowledge" gained from "special training or experience."³⁴ The Code of Civil Procedure defines an expert as one learned or skilled in a science, art, profession, or calling who has special knowledge or skill which may assist the court in the adjudication of any case.³⁵ Before an expert will be allowed to testify, his expertise must be established to the satisfaction of the trial judge, who is vested with broad discretion in determining the expert's competency.³⁶

for his personal use); *Commonwealth v. Waters*, 276 Pa. Super. 584, 419 A.2d 612 (1979) (narcotics officer permitted to testify that a person who possesses 432 bags of heroin intends to deliver heroin to others).

27. *State v. Bennett*, 258 N.W.2d 895 (Minn. 1977). The officer, who had qualified as an expert on prostitution, testified that he visited a "sauna," and after receiving a water bed massage from the defendant, was told by her that he could have anything else he wanted at prices that would surprise him. Although the defendant contended she was offering only a cup of coffee or a shower, the officer was permitted to testify that, in his opinion, the defendant was offering sexual services.

28. *Claycomb v. Howard*, 493 S.W.2d 714 (Ky. 1973); *Watkins v. Ebach*, 291 N.W.2d 765 (S.D. 1980).

29. *Iowa v. Nimmo*, 247 N.W.2d 228 (Iowa 1976).

30. *Lollis v. Superior Sales Co.*, 224 Kan. 251, 580 P.2d 423 (1978); *Sanchez v. Billings*, 481 S.W.2d 911 (Tex. 1972).

31. *Gooch v. State*, 155 Ga. App. 708, 272 S.E.2d 572 (1980).

32. LA. R.S. 15:463 (1981).

33. LA. R.S. 15:464 (1981).

34. *Id.*

35. LA. CODE CIV. P. art. 192.

36. LA. R.S. 15:466 (1950); *State v. Nelson*, 306 So. 2d 744, 750 (La. 1975); *State v. Grove*, 306 So. 2d 308, 309 (La. 1975); *State v. Francis*, 285 So. 2d 191, 192 (La. 1973);

Scarce Louisiana jurisprudence existed, prior to *Wheeler*, on the application of the ultimate issue rule to expert testimony. The first determination by a Louisiana court on the issue of whether or not an expert could give opinion testimony on a question to be answered by the trier of fact was dicta in *Marcy v. Sun Mutual Insurance Co.*³⁷ *Marcy* was an action to recover for the sudden sinking of a floating dock insured under an all risks policy. The insurer's defense was that the sinking was due to defects in the dock. Judgment was rendered for the plaintiff, and the defendant appealed on the ground that its "expert" witnesses were not allowed to testify that the loss was caused by defects in the dock. The Louisiana Supreme Court held that the testimony was properly excluded as the defendant's witnesses were not experts in dock building. The court then noted that the testimony was inadmissible even if the defendant's witnesses were experts, as such testimony, if accepted by the jury, would be "a decision of the case itself."³⁸

Only three Louisiana appellate cases have dealt directly with the question of expert opinion testimony on the ultimate issue. In two cases which arose during the 1930's, *Bayles v. Jefferson Standard Life Insurance Co.*³⁹ and *Rickerfor v. New York*,⁴⁰ ultimate issue testimony was not allowed. *Bayles* was an action to recover under a life insurance policy. The insurer contended the death was suicide. The Second Circuit Court of Appeal held inadmissible a physician's testimony that the insured's death was accidental. The court stated that the question of whether or not the death was self-inflicted was not one of science, but was a question of fact to be determined by the judge or jury.⁴¹ In *Rickerfor*, the Orleans Circuit held *ipse dixit* that insurance experts could not testify that a breach of warranty alone increased the moral hazard of risk under a fire insurance policy; that was a question which the court itself ultimately had to decide after considering the facts.⁴² However, in *Gage v. St. Paul Fire & Marine Insurance Co.*, ultimate issue testimony was allowed, and the Louisiana Supreme Court denied writs.⁴³

Ford v. Dixie Buick, Inc., 400 So. 2d 228, 231 (La. App. 4th Cir. 1981); Porter v. Johnson, 369 So. 2d 1141, 1142 (La. App. 1st Cir. 1979); State *ex rel.* Dep't of Highways v. Williams, 170 So. 2d 152, 154 (La. App. 2d Cir. 1964).

37. 11 La. Ann. 748 (1856).

38. 11 La. Ann. at 749.

39. 148 So. 465 (La. App. 2d Cir. 1933).

40. 186 So. 109 (La. App. Orl. 1939).

41. 148 So. at 469.

42. 186 So. at 112.

43. 282 So. 2d 147, 151-52 (La. App. 3d Cir.), writ denied, 284 So. 2d 602 (La. 1973).

The *Gage* court cited *Lauro v. Travelers Ins. Co.*, 261 So. 2d 261 (La. App. 4th Cir.), writ denied, 262 La. 188, 262 So. 2d 787 (1972), a medical malpractice case in which

In the interval between *Marcy* and *Wheeler*, the Louisiana Supreme Court mentioned the ultimate issue rule in only two cases. In a footnote in *State v. Augustine*,⁴⁴ a case in which insanity was raised as a defense, the court noted that medical experts had "inadvertently invaded the province of the court"⁴⁵ by testifying that the criminal defendant was legally sane. The court reiterated its support for the ultimate issue rule in *State v. Nelson*,⁴⁶ its last expression on this issue prior to *Wheeler*. The court stated that "while a jury is entitled to the aid of experts in determining the existence or nonexistence of facts not within common knowledge, an expert must not take the place of the jury by expressing his opinion as to an ultimate fact."⁴⁷ This statement was purely dicta, however, as the court held that the witness was not qualified as an expert.⁴⁸

Testimony by police experts had been readily accepted prior to *Wheeler*. Police chemists and criminologists employed by law enforcement agencies routinely testify as experts in criminal cases in such areas as analysis of controlled dangerous substances,⁴⁹ fingerprinting,⁵⁰ identification of seminal fluid and blood,⁵¹ comparison of hair samples,⁵² and firearms identification.⁵³ In civil cases, police officers frequently testify as accident reconstruction experts.⁵⁴ While police expert testimony is routinely admitted, the competency of the witness is not based on the fact that he is a police officer. The witness' expertise and competency to testify still must be independently established to the court's satisfaction.⁵⁵

the jury was instructed that it must be guided by the opinions of experts as to whether the defendant used the degree of care ordinarily exercised by other physicians in the community. The Fourth Circuit stated that this jury charge reflected the current status of the law.

44. 252 La. 983, 998 n.3, 215 So. 2d 634, 639 n.3 (1968).

45. 252 La. at 998 n.3, 215 So. 2d at 639 n.3.

46. 306 So. 2d 745 (La. 1975).

47. *Id.* at 750.

48. *Id.*

49. *State v. Lawson*, 393 So. 2d 1260, 1265-66 (La. 1981); *State v. Carter*, 363 So. 2d 893, 898 (La. 1978); *State v. Titus*, 358 So. 2d 912, 914-15 (La. 1977); *State v. Joseph*, 341 So. 2d 861, 865 (La. 1977).

50. *State v. Woodard*, 387 So. 2d 1066, 1070 (La. 1980); *State v. Cass*, 356 So. 2d 936, 940 (La. 1977); *State v. Lewis*, 351 So. 2d 1193, 1193 (La. 1977).

51. *State v. Clark*, 340 So. 2d 208, 219 (La. 1976); *State v. Hunter*, 340 So. 2d 226, 233 (La. 1976); *State v. Hill*, 332 So. 2d 475, 476-77 (La. 1976).

52. *State v. Hill*, 332 So. 2d 475, 476-77 (La. 1976).

53. *State v. Walker*, 394 So. 2d 1181, 1185 (La. 1981); *State v. White*, 321 So. 2d 491, 496 (La. 1975).

54. *See Weber v. Aetna Life & Cas. Co.*, 259 So. 2d 628, 630-31 (La. App. 1st Cir. 1972); *Ray v. Clesi*, 169 So. 2d 553, 554-55 (La. App. 4th Cir. 1964); *Veal v. Audubon Ins. Co.*, 114 So. 2d 648, 653 (La. App. 1st Cir. 1959).

55. *See State v. Walker*, 394 So. 2d 1181, 1185 (La. 1981); *State v. Titus*, 358 So.

In many cases, testimony by police experts has been admitted without objection on questions which are classified as ultimate issues by other jurisdictions. In several trials for possession of a controlled dangerous substance with intent to distribute, police officers were allowed to testify that the form and quantity of the drugs possessed by the defendants indicated that the drugs were to be used for wholesale distribution.⁵⁶ Police officers have been permitted to describe the modus operandi of panders and bookmakers where the method of operation described was virtually identical to that of the defendants.⁵⁷

In civil trials as well, police officers have been allowed to give expert testimony on questions which would have been classified as "ultimate issues" by other jurisdictions. In *Ray v. Clesi*,⁵⁸ a suit arising from an automobile-pedestrian accident, testimony of a police officer, based on his observation of skid marks at the scene, that the defendant's brakes were defective and inadequate and that the defendant saw the pedestrian-plaintiff from fifty feet away was admitted.⁵⁹ In *Weber v. Aetna Life & Cas. Co.*,⁶⁰ a police expert in accident analysis was allowed to state that, in his opinion, both automobiles involved in the collision were moving at a significant speed at the time of impact.⁶¹

In *Wheeler*, the court⁶² noted that Louisiana Revised Statutes 15:464, which permits expert opinion testimony, is an exception to the general rule of Louisiana Revised Statutes 15:463 that a witness may not give opinion testimony. The court stated, however, that three "variables" found in a leading evidence treatise are contained within the "broad,

2d 912, 914 (La. 1977); *State v. Rogers*, 324 So. 2d 358, 362-63 (La. 1975); *Brumfield v. Fisher*, 235 So. 2d 145, 147 (La. App. 4th Cir. 1970) (officer with no special training in accident investigation not permitted to testify as expert); *Bonilla v. Arrow Food Distribs., Inc.*, 202 So. 2d 438, 445 (La. App. 4th Cir. 1967) (state trooper who had spent most of his twenty-five years on the force investigating traffic accidents held not qualified as expert in accident reconstruction).

56. *State v. Carter*, 363 So. 2d 893, 897 (La. 1978); *State v. Perique*, 340 So. 2d 1369, 1375 (La. 1976); *State v. Marks*, 337 So. 2d 1177, 1184 (La. 1976). Testimony of this nature was rejected by the Iowa Supreme Court in *Iowa v. Nimmo*, 247 N.W.2d 228 (Iowa 1976).

57. *State v. Stoltz*, 358 So. 2d 1249, 1250 (La. 1978) (gambling); *State v. McCray*, 327 So. 2d 408, 411-12 (La. 1975) (pandering); *State v. Di Vincenti*, 232 La. 13, 22-23, 93 So. 2d 676, 679-80 (1957) (gambling).

58. 169 So. 2d 553 (La. App. 4th Cir. 1964).

59. *Id.* at 554-55.

60. 259 So. 2d 628 (La. App. 1st Cir. 1972).

61. *Id.* at 630-31.

62. Justice Dennis wrote the opinion. He was joined by Justice Calogero and three associate justices pro tempore, Judges Israel Augustine and Philip Ciaccio of the Fourth Circuit Court of Appeal and Judge Charles Gaudin of the Fifth Circuit Court of Appeal.

guiding principles" of sections 463 and 464. First, the difference in the terms "fact" and "opinion" is one of degree of concreteness of description or directness of inference. A more concrete description is preferable to a less concrete one, and a direct statement is preferable to an inferential one. Second, the closer the testimony is to a "crucial" ultimate issue, the more concrete it should be. Third, to qualify as "expert," testimony must be so distinctly related to some science, business, profession, or occupation that it is beyond the understanding of the average layman, and the witness must be sufficiently knowledgeable so that it appears his opinion probably will aid the trier of fact.⁶³ The court stated that all three variables weigh heavily against admission of testimony, even from experts, on such matters as how a case should be decided or whether a defendant is guilty, and that all courts would exclude such testimony.⁶⁴ In support of this position, the court cited several Louisiana cases involving opinion testimony by lay witnesses and three cases from other jurisdictions.⁶⁵

The court then stated that these variables have been applied in several cases where an issue was whether or not to accept police expert testimony on narcotics transactions. The California case of *State v. Arguello*,⁶⁶ where a police officer's testimony that heroin was possessed for sale was held erroneously admitted, was cited as an application of the ultimate issue rule. The court also cited several cases where an opposite result was reached.⁶⁷ The court then concluded that the trial court in the instant case erred in admitting the police officer's testimony that, in his opinion, the defendant was engaged in marijuana distribution. Applying the variables it set forth, the court held that the witness was no more expert than the jurors on this issue, the officer's testimony was "an abstract inference to the ultimate issue in the case," and the testimony was unnecessary and unhelpful to the jury.⁶⁸ As a final argument against admission of the officer's testimony, the court noted that the risk of prejudice to the defendant is greater when the witness is a police officer in whom jurors and the public have great trust and confidence.⁶⁹

The court relied heavily on Professor McCormick's evidence treatise to justify retention of the ultimate issue rule in the instant case. However, this reliance seemingly is misplaced. The court's statement that "[i]t is believed that all courts would exclude extreme

63. 416 So. 2d at 80. See MCCORMICK ON EVIDENCE, *supra* note 13, § 12 at 26.

64. 416 So. 2d at 80.

65. *Id.* at 80-81.

66. 244 Cal. App. 2d 413, 53 Cal. Rptr. 245 (1966).

67. 416 So. 2d at 81.

68. *Id.* at 81-82.

69. *Id.* at 82.

expressions, even by a witness who has been qualified as an expert, on such matters as how the case should be decided"⁷⁰ is a paraphrase of Professor McCormick's statement that "there is a kind of statement by the witness which amounts to no more than *an expression of his general belief* as to how the case should be decided It is believed all courts would exclude such extreme expressions."⁷¹ However, McCormick is not advocating exclusion of all expert opinion testimony upon an ultimate fact. On the contrary, he states that "the rule excluding opinion on ultimate facts in issue is unduly restrictive, pregnant with close questions of application and the possibility of misapplication, and often unfairly obstructive to the presentation of a party's case."⁷²

The court also relied extensively on jurisprudence from other jurisdictions in support of the ultimate issue rule. Again, this reliance apparently is misplaced. The federal and Arizona cases cited by the court in support of this proposition, taken verbatim from a footnote in McCormick,⁷³ were decided prior to the adoption of the Federal Rules of Evidence and the Arizona Rules of Evidence.⁷⁴ In *Arguello*, the California District Court of Appeal *expressly rejected* the defendant's argument that testimony of a narcotics officer qualified as an expert was inadmissible since it coincided with the ultimate issue. The California court called this objection "untenable" and stated that whether or not an opinion coincides with an ultimate issue is a neutral factor as far as its admissibility is concerned.⁷⁵ The court further noted that "[t]he objection that opinion evidence 'goes to the ultimate issue' has been given a decent burial by our Legislature in the Evidence Code."⁷⁶

The irony of *State v. Wheeler* is that by applying the balancing test found in the Federal and Uniform Rules of Evidence, as the California court did in *Arguello*, the same result could have been reached without resorting to the ultimate issue rule. Under that test, the expert's testimony must be within the scope of his expertise, it must aid the trier of fact,⁷⁷ and its prejudicial impact cannot outweigh its probative value.⁷⁸ In *Wheeler*, as in *Arguello*, the witness' opinion was based in part on inferences which the jury could have drawn for

70. *Id.* at 80.

71. MCCORMICK ON EVIDENCE, *supra* note 13, § 12 at 26 (emphasis added).

72. *Id.* at 26-27.

73. *Id.* at 26 n.37.

74. The Federal Rules were adopted in 1974 and the Arizona Rules of Evidence were adopted in 1977.

75. 244 Cal. App. 2d at 417-18, 53 Cal. Rptr. at 248.

76. 244 Cal. App. 2d at 419 n.5; 53 Cal. Rptr. at 249 n.5.

77. FED. R. EVID. 702.

78. FED. R. EVID. 403.

itself, and thus the testimony exceeded the scope of the officer's expertise. If the prosecutor had confined his questions to those matters within the special knowledge of the officer, the officer could have informed the jury that ten coin envelopes and a bag of marijuana exceeded the amount normally possessed by an individual, and that distributors normally carry guns and large amounts of cash. The jury then could have determined for itself whether or not a defendant caught almost red-handed with those items was engaged in distribution. With this information, the jury would not have needed the "assistance" of the officer's opinion. Finally, the court could have considered the prejudicial impact of testimony by a police officer, although it is questionable how much trust and confidence the modern juror has in the testimony of today's police officer.⁷⁹

While it is unfortunate that the court chose to use ultimate issue language in its opinion, *Wheeler* should not be read as tacitly overruling prior jurisprudence, nor should it be read as prohibiting expert testimony by qualified police officers. Instead, *Wheeler* should be restricted to its facts and should serve as an admonition to overzealous prosecutors. For instance, the court held that testimony by the officer that it was common for marijuana distributors to carry handguns was permissible. Thus, the court sanctioned expert opinion testimony by police officers where the officer has special knowledge which aids the jury.⁸⁰ The prosecutor here simply went overboard.

Law enforcement officials can give valuable assistance to the trier of fact as expert witnesses. Police officers are often the only credible witnesses in certain fields, such as the habits of narcotics distributors or panders, who are readily available to testify. Their testimony should be admitted when it meets the balancing test of the Federal and Uniform Rules of Evidence, regardless of whether the testimony involves an opinion on the ultimate facts. Expert opinion on the ultimate issue is often not only helpful, but necessary, in testimony such as the proper standard of care in medical malpractice cases or appraisers' testimony on the value of property in expropriation cases. If *Wheeler* is not read restrictively and is seen as a prohibition of police expert testimony or a prohibition of all testimony relative to the ultimate issue, it is a step backward for Louisiana.

Gail Sweeney Stephenson

79. Several popular books and movies portray one honest police officer among an entire big city force. See, e.g., P. MAAS, *SERPICO* (1974). The media carries stories of police corruption and police brutality almost daily. See *Corruption Is Still A Fact of Life*, 93 U.S. NEWS & WORLD REP., Nov. 1, 1982, at 46; Press, *What Happened to Joe Friday?*, 95 NEWSWEEK, Mar. 24, 1980 at 95.

80. 416 So. 2d at 82.

