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NOTE

The Diminishing Dominion of Expert Opinion: Missouri's Imposition of the Ultimate Issue Rule

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I. INTRODUCTION

In August 2017, the Missouri General Assembly amended its expert testimony statute, Section 490.065.[1] The newly-enacted Section 490.065.2(3)(b) states, "In a criminal case, an expert witness shall not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."[2] Section 490.065.2(3)(b) is identical to Federal Rule of Evidence 704(b) ("Rule 704(b)").[3] This change is significant because issues in criminal cases, such as deliberation with respect to homicide and the affirmative defense of insanity, frequently implicate defendants' mental states.[4] In addition, Rule 704(b) and its state-law counterparts have drawn significant scholarly criticism as unduly restricting helpful expert testimony. For example, one

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1. MO. REV. STAT. § 490.065 (2017).

2. MO. REV. STAT. § 490.065.2(3)(b) (2017).

3. *See* FED. R. EVID. 704(b).

4. *See* Michael A. Graham, *§704(2) Opinion on an Ultimate Issue: Mental State or Condition*, 6 HANDBOOK OF FED. EVID. § 704(2) (8th ed.) (2019) ("Presumably the expert may answer the questions 'Was the accused suffering from a mental disease or defect?,' 'Explain the characteristics of the mental disease and defect,' 'Was his act the product of that disease or defect?' and 'What is the effect of the disease or defect on the person's mental state?' However the expert may not answer the question 'Was the accused able to appreciate the nature and quality of his act?' or 'Was the accused able to appreciate the wrongfulness of his acts?'") (internal citations omitted).

scholar argues Rule 704(b) produces "counterproductive" and "troubling" results by "requir[ing] the jury, as the finder of fact, to reach a conclusion as to the defendant's mental state without the benefit of the most useful testimony the expert could offer."[5]

Consider the case of *United States v. West*, where the defendant, charged with bank robbery, asserted the affirmative defense of insanity.[6] The trial court appointed a psychiatrist who concluded West suffered from schizoaffective disorder, a severe mental disease.[7] The psychiatrist also concluded that West appreciated the wrongfulness of his actions in robbing the bank – a finding that would be fatal to West's insanity defense.[8] Defense counsel invoked Rule 704(b) to argue that although the psychiatrist could testify that West suffered from schizoaffective disorder, the psychiatrist could not testify that West appreciated the wrongfulness of his conduct.[9] Rule 704(b) allowed this result by drawing a distinction between the two statements: the former was an opinion on the ultimate issue of West's mental state, but the latter was not.[10] This distinction afforded defense counsel the "thrill of using the state-appointed expert to distort the factfinding process."[11] The United States Court of Appeals for the Seventh Circuit agreed with defense counsel, holding that Rule 704(b) would block the psychiatrist's opinion that West could appreciate the difference between right and wrong, but would not operate to exclude the psychiatrist's conclusion that West suffered from schizoaffective disorder.[12] The court, however, was "clearly concerned that the expert's testimony, bereft of its ultimate conclusion, would be misrepresentative."[13]

Although the federal reporters contain many cases with odd problems arising under Rule 704(b), Missouri reporters contain little law about Section 490.065.2(3)(b). Since its promulgation, the Missouri Court of Appeals has addressed Section 490.065.2(3)(b) in three criminal cases but found it inapplicable in each case.[14] Thus, although psychiatric testimony

5. *See* Daniel J. Capra, *A Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691, 691–95 (2001) (citing Dana R. Hassin, *How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. MIAMI L. REV. 667, 671 (2001)).

6. United States v. West, 962 F.3d 1243 (7th Cir. 1992).

7. *Id.* at 1245.

8. *Id.*

9. *Id.*

10. *Id.*

11. Capra, *supra* note 5.

12. *West*, 962 F.3d at 1248.

13. *Id.* at 1249.

14. State v. Capozzoli, 578 S.W.3d 841, 845–47 (Mo. Ct. App. 2019); State v. Walther, 581 S.W.3d 702, 705 n.2 (Mo. Ct. App. 2019); State v. Murphy, 534 S.W.3d 408, 416 (Mo. Ct. App. 2017).

plays a pivotal role in criminal proceedings,[15] no case has turned on the admission or exclusion of evidence pursuant to Section 490.065.2(3)(b). This Note serves as a prospective guide, based on both state and federal jurisprudence, to the application of Section 490.065.2(3)(b) in Missouri criminal cases that question the admissibility of psychiatric evidence pertaining to the defendant's requisite mental culpability for the crime charged.

Part II of this Note provides a brief history of Rule 704(b) and examines possible motivations for the Missouri General Assembly's enactment of Section 490.065.2(3)(b). Part III discusses the three Missouri Court of Appeals cases that mention Section 490.065.2(3)(b). Part III emphasizes that, although Section 490.065.2(3)(b) has not yet determined the outcome of a case, it is prudent to understand and interpret Section 490.065.2(3)(b) for when it is implicated in future cases. Part IV suggests Missouri courts must inquire into both state and federal jurisprudence to properly determine the admissibility of psychiatric testimony in criminal trials.

II. LEGAL BACKGROUND

This Part discusses relevant history before Missouri's enactment of Section 490.065.2(3)(b) in 2017. Subpart A examines Rule 704 in its original form, which abolished the "ultimate issue" rule,[16] discussed *infra*, and Subpart B examines Congress's addition of Rule 704(b), which revives the ultimate issue rule in criminal cases.[17] Finally, Subpart C highlights *State v. Clements*, a 1990 case in which the Missouri Court of Appeals relied on Rule 704(b) in holding that exclusion of certain expert testimony on the defendant's mental state deprived him of a fair trial. This Part suggests that *Clements* marks the beginning of Missouri courts' long-standing alignment with federal jurisprudence with respect to expert testimony on a criminal defendant's mental state.

A. Rule 704 in its Original Form

As originally proposed by the United States Supreme Court's Advisory Committee on the Rules of Evidence ("the Advisory Committee"), and adopted without change by Congress, Rule 704 provided that "testimony in the form of an opinion or inference is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact."[18] Today, Rule 704(a), which resembles the original

15. *See* Ake v. Oklahoma, 470 U.S. 68, 79 (1985).

16. FED. R. EVID. 704 advisory committee note.

17. Capra, *supra* note 5.

18. *Capra, supra note 5.*

text of Rule 704, states that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704(a) embodies the modern consensus of courts that any witness's opinion, whether lay or expert, should be admitted at trial when helpful to the trier of fact.[19] According to the Advisory Committee, Rule 704 abolished the common law "ultimate issue" rule.[20] The "ultimate issue" rule prohibited any witness from giving an opinion regarding issues that were the exclusive province of the jury to decide, such as the guilt or innocence of a defendant.[21] The Advisory Committee Notes to Rule 704 criticize categorical limitations on the ultimate-issue testimony as "unduly restrictive," difficult to apply, and useful only to deprive the trier of fact of useful information."[22] As one scholar argues,

> The reasoning behind [Rule 704] is sound: assuming that an expert provides a solid foundation and explanation on an issue for which the factfinder needs assistance, the expert should not be precluded from providing a logical and helpful conclusion to his testimony. The factfinder is simply left hanging if the expert is not permitted to cap off the testimony by stating a conclusion on the ultimate issue to which the expert is testifying. Sometimes, a conclusion on an ultimate issue ties the expert's testimony into a coherent whole, and as such it helps the jury to understand the issues in dispute.[23]

In similar fashion, the Advisory Committee characterized the purpose of the "ultimate issue" rule, to prevent witnesses from "usurping the province of the jury," as "empty rhetoric" that leads to "odd verbal circumlocutions."[24] The rationale for precluding ultimate opinion psychiatric testimony extends to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven.[25] The Advisory Committee has fashioned its Rule 704 provision to reach all legal issues

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19. Sean Reilly, *Federal Rule of Evidence 704(b): A Remedy in Need of a Cure*, 28 REGENT U. L. REV. 111, 112 (2015).

20. FED. R. EVID. 704 advisory committee note.

21. Reilly, *supra* note 19 (citing Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 620–21 (1987)).

22. FED. R. EVID. 704 advisory committee note; 7 Wigmore §§ 1920, 1921; McCormick § 12.

23. Capra, *supra* note 5.

24. FED. R. EVID. 704 advisory committee note (citing 7 Wigmore § 1920, p. 17) ("[For example], a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard.").

25. § 704:2. Federal practice, 22A Mo. Prac., Missouri Evidence § 704:2 (4th ed.) (2019) (quoting report of the Senate Judiciary Committee, 1984 U.S.Code Cong. & Admin.News 3182, 3412 to 13 (1985)).

for which experts provide testimony, for example, premeditation in a homicide case, or lack of predisposition in entrapment.[26]

B. Congress's Subsequent Alteration of Rule 704

The public became outraged with the policy of permissibility in the Federal Rules of Evidence toward expert testimony following the acquittal of John Hinckley, Jr., for the shooting and attempted assassination of President Ronald Reagan, Press Secretary James Brady, and two others in 1981.[27] At trial, psychiatric experts for both the prosecution and the defense offered divergent opinions as to whether Hinckley could form the requisite specific intent.[28] The jury eventually found Hinckley not guilty by reason of insanity.[29]

In a relatively swift response to the *Hinckley* verdict, Congress passed the Insanity Defense Reform Act of 1984, one provision of which added a subdivision (b) to Rule 704.[30] In clear conflict with the Advisory Committee Note,[31] Rule 704(b) "plainly revives the ultimate issue rule in criminal cases" by prohibiting an expert in a criminal case from testifying to whether the defendant did or did not have the requisite mental state to commit the charged crime.[32] The merits of Rule 704(b) are the subject of contentious debate. On one hand, the legislative intent is clearly to limit psychiatrists to "presenting and explaining their diagnoses," and to prevent them from being asked to speak in terms of "legal or moral constructs" that could be construed by a jury as outcome determinative.[33] On the other hand, some scholars criticize the addition of Rule 704(b) as "rais[ing] the very anomaly" discussed in the Advisory Committee Note – that an expert could say something about the defendant's mental state but "simply cannot

26. *Id.*

27. Dana R. Hassin, *How Much Is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. MIAMI L. REV. 667, 670 (2001) (citing Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (1984)).

28. Jonathon B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545 (1985).

29. Lynda C. Fentiman, *Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Declarant*, 40 U. MIAMI L. REV. 1109, 1169 (1986).

30. Capra, *supra* note 5 (citing 18 U.S.C. §§ 4241–4247).

31. Capra, *supra* note 5. This amendment was promulgated outside the rule-making process, and so there is no advisory committee note for reference.

32. Capra, *supra* note 5.

33. Hassin, *supra* note 27 (citing FED. R. EVID. 704 advisory committee note).

say the buzzword 'intent' or 'incapable of understanding the wrongfulness of his actions.'"[34] However, Rule 704(b) is highly unlikely to change.[35]

C. State v. Clements

In *State v. Clements*,[36] decided before the Legislature enacted Section 490.065.2(3)(b), the Missouri Court of Appeals, Southern District, invoked Rule 704(b) to hold that certain expert testimony deprived a criminal defendant of a fair trial.[37] In *Clements*, the State's expert witness testified the defendant deliberated and therefore satisfied the deliberation element of first-degree murder.[38] The trial court instructed the jury on the definition of "deliberation" and on the State's first- and second-degree murder instructions.[39] Because the jury had already found Clements guilty of the homicide, "Dr. Harte's answer bore directly on the crucial element of its degree."[40] Clements claimed Dr. Harte "invad[ed] the province of the jury" by making the "ultimate decision" as to whether Clements deliberated about the killing.[41]

In assessing whether the trial court properly admitted the challenged statement that Clements deliberated before the killing, the court concluded that Rule 704(b) would clearly render the statement inadmissible.[42] The court relied on the United States Court of Appeals for the Eleventh Circuit's statement that "The purpose of [Rule 704(b)] is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."[43] The court also cited the United States Court of Appeals for

34. Capra, *supra* note 5; *see also* Reilly, *supra* note 19, at 116 (The Advisory Committee observed that the [ultimate issue] rule was "unduly restrictive, difficult of application, and. . . deprive[d] the trier of fact of useful information." Predictably, these same problems have haunted the courts since Rule 704(b) brought the "ultimate issue" rule back from the dead.").

35. Reilly, *supra* note 19, at n.207 ("If the Rule is to change, Congress must change it. While the Supreme Court has the power to prescribe rules of evidence, those rules must be consistent with Acts of Congress. 28 U.S.C. §§ 2071–72 (2012). Therefore, because Congress has legislated on the issue of expert testimony in criminal trials in Rule 704(b), the Supreme Court may not change the Rules of Evidence to contradict this Rule. *Id.* at § 2071(a)."; *see also* Capra, *supra* note 5, at n.12 (noting Congress's ultimate authority over the rulemaking in federal courts)).

36. State v. Clements, 789 S.W.2d 101, 108 (Mo. Ct. App. 1990).

37. *Id.*

38. *Id.* (quoting MO. REV. STAT. § 565.020.1 (1986)).

39. *Id.*

40. *Id.*

41. *Id.* at 107–08.

42. *Id.*

43. *Id.* at 107–08 (quoting United States v. Alexander, 805 F.2d 1458, 1462–63 (11th Cir. 1986)).

the Eighth Circuit's statement that "Rule 704(b) forbids 'testimony … as to whether [the defendant] had the specific criminal intent' required to commit the offense charged.' … Such testimony, because it specifically comments on the presence or absence of an element of the crime charged, is too conclusory to be helpful to a jury."[44] The court would have reached the same result in *Clements* if it had applied Section 490.065.2(3)(b) instead of Rule 704(b) because the two rules are textually identical.

The *Clements* court relied on a body of Missouri decisions consistent with the spirit and purpose of Rule 704(b). The court found a consensus among Missouri courts that the opinion testimony of expert witnesses "should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved."[45] It relied on Supreme Court of Missouri precedent in enunciating that "[a]n expert witness may not be called upon for a conclusion of law."[46]

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> The general rule is that a medical expert will not be allowed to invade the province of the jury and substitute his reasoning and conclusions for the reasoning and conclusions of the jury upon the issue, or issues, before the triers of fact. … [A] medical expert in a criminal prosecution [is not] allowed to state whether the [defendant] had mental capacity sufficient to know right from wrong, or to form a specific criminal intent to an extent rendering him amenable for his crimes.[47]

The *Clements* court found that the psychiatrist was not an expert on the "paramount issue" of whether the defendant deliberated because deliberation was an ultimate issue within the capability of lay jurors.[48] In other words, expert testimony is generally inadmissible if the jury can determine the issue on its own.[49]

The court held that the challenged testimony deprived Clements of a fair trial partially because the expert made an impermissible "leap in logic" and inferred "what is in fact unspeakable, namely, the probable

44. *Id.* (quoting United States v. Gipson, 862 F.2d 714, 716 (8th Cir. 1988)).

45. *Id.* (quoting Sampson v. Missouri Pacific R. Co., 560 S.W.2d 573, 586 (Mo. 1978) (en banc)).

46. *Id.* (quoting Gardine v. Cottey, 230 S.W.2d 731, 745 (Mo. 1950) (en banc)).

47. *Gardine*, 230 S.W.2d at 745 (Mo. 1950) (en banc) (quoting Deiner v. Sutermeister, 178 S.W. 757, 764 (Mo. 1915) (emphasis added)).

48. *Clements*, 789 S.W.2d 101, 110 (Mo. Ct. App. 1990).

49. *See* Landers v. Chrysler Corp., 963 S.W.2d 275, 281 (Mo. Ct. App. 1997).

relationship between medical concepts and legal or moral constructs[.]"[50] This proscription is especially true with respect to the insanity defense. In this context, "insanity" is a legal term with a different meaning and different purpose than medical insanity.[51] The purpose of the insanity defense is to determine who among the mentally ill should be held criminally responsible for their conduct.[52] As staff members of the National Legal Research Group, Inc. stated:

> An individual may be "medically insane" and yet legally responsible for his or her acts. The distinction between legal and medical insanity is that, from a medical standpoint, one may be insane by reason of a mental disease or mania; from a legal standpoint, one's mental condition must be such that one is unable to distinguish right from wrong and is unable to know the nature and consequences of actions. The classification of a mental disease or defect developed by psychiatrists for the purpose of treatment does not control a legal definition used for assessing criminal responsibility. A clinical diagnosis of mental illness or psychosis does not equate to legal insanity, and a person who suffers from schizophrenia and is psychotic can often distinguish right from wrong. Mental illness alone is not sufficient to relieve criminal responsibility; instead, a defendant who is mentally ill but fails to establish an insanity defense, may be found guilty but mentally ill in some states.[53]

Clements provides incontrovertible evidence that Missouri courts and practitioners should align their interpretations and applications of Section 490.065.2(3)(b) with federal jurisprudence on Rule 704(b). After all, the *Clements* court imposed the federal ultimate issue rule in a criminal case long before the Legislature codified it.

III. RECENT DEVELOPMENTS

Given the contentious nature of Rule 704(b), one might question why the Missouri General Assembly codified the rule word-for-word. Subpart

50. *Clements*, 789 S.W.2d at 109, 111 (quoting United States v. Edwards, 819 F.2d 262, 265 (11th Cir. 1987) (internal citations omitted)) (When … 'ultimate issue' questions are … put to the expert witness who must then say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury."). *See also* Clark v. Arizona, 548 U.S. 735, 777 (2006).

51. Kristina E. Music Biro et al., *Distinction Between Legal Insanity and Mental Illness*, 21 AM. JUR. 2D CRIMINAL LAW § 46 (2019).

52. Kristina E. Music Biro et al., *supra* note 52.

53. *Id.*

A scrutinizes legislative motivations for, and judicial benefits of, Missouri's copying of Rule 704(b). Subpart B examines the three Missouri appellate cases that have mentioned Section 490.065.2(3)(b) but found it inapplicable. Finally, Subpart C argues that those cases portend issues pertaining to the proper scope and application of Section 490.065.2(3)(b) but provide limited utility in defining its proper scope and application.

A. Missouri's Codification of Section 490.065.2(3)(b)

The original version of Section 490.065, enacted in 1989 and effective until August 28, 2017, provides valuable context for this inquiry:

> In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.[54]

Testimony by such an expert witness 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.

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.[55]

It should come as no surprise that the Legislature copied Rule 704(b) in enacting Section 490.065.2(3)(b) because more than forty states mimic the Federal Rules of Evidence, and states often "follow the [United States] Supreme Court's gloss on those rules."[56] Such following is common even in the few states which do not mimic the Federal Rules of Evidence.[57] One scholar argues that the Federal Rules of Evidence, including Rule 704(b), function as models and "constitutional guarantors" for state courts and

54. MO. REV. STAT. § 490.065 (1989).

55. *Id.*

56. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 709 (2016).

57. Dodson, *supra* note 56.

legislatures.[58] Further, alignment with a federal rule that promulgated and approved by the Supreme Court "practically guarantees that a state rule will withstand constitutional scrutiny."[59] Thus, the Supreme Court provides "safe-harbor incentives" for state rules.[60] Rule 704(b) and its state-law counterparts are no exception to this trend.

B. Missouri Case Law Pertaining to Section 490.065.2(3)(b)

Three Missouri cases have presented opportunities for application of Section 490.065.2(3)(b) since its adoption in 2017: the Missouri Court of Appeals, Western District, decided *State v. Capozzoli* in 2019,[61] and the Missouri Court of Appeals, Eastern District, heard *State v. Murphy* and *State v. Walther* in 2017 and 2019, respectively.[62]

In *State v. Capozzoli*, a driving while intoxicated ("DWI") case, the State's drug recognition expert testified that the defendant exhibited several conspicuous indicia of intoxication at the time of her arrest.[63] Capozzoli claimed Section 490.065.2(3)(b) barred admission of the testimony.[64] Capozzoli's argument hinged on the court finding that the "intoxicated condition" element of DWI[65] constitutes a "mental condition."[66] The court acknowledged that nothing in Section 490.065.2(3)(b) defines "mental condition," but disposed of Capozzoli's objection on the ground that the testimony at issue pertained to Capozzoli's physical, not mental, condition at the time of the offense.[67] This holding is consistent with the Missouri courts' longstanding characterization of "intoxication as a *physical* condition[.]"[68]

58. Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 119–24(2008).

59. *Id.*

60. Stein, *supra* note 58, at 119–21.

61. State v. Capozzoli, 578 S.W.3d 841 (Mo. Ct. App. 2019).

62. State v. Walther, 581 S.W.3d 702 (Mo. Ct. App. 2019); State v. Murphy, 534 S.W.3d 408 (Mo. Ct. App. 2017).

63. *Capozzoli*, 578 S.W.3d at 844 ("Officer Dumsday testified about his contact with Ms. Capozzoli after her arrest, noting that her face was flushed, and her eyes were bloodshot. He also noticed an odor of alcohol 'from her person' and testified that her speech was slurred.").

64. *Id.* at 846.

65. *See* MO. REV. STAT. § 577.010.1 (2017) ("A person commits the offense of driving while intoxicated if he or she operates a vehicle while in an intoxicated condition.").

66. *Capozzoli*, 578 S.W.3d at 845–46.

67. *Id.* at 846.

68. *Id.* (emphasis in original).

In both *State v. Walther*[69] and *State v. Murphy*[70] the Eastern District found that the parties failed to preserve for review any issue under Section 490.065.2(3)(b). *Murphy* is unique in that, although having already disposed of the issue on the basis of appellant's failure to preserve the issue for review,[71] the court still applied Section 490.065.2(3)(b) to the disputed evidence and articulated a bright-line rule that "an expert witness's opinion regarding a defendant's state of mind is inadmissible because '[t]he state of mind of a defendant is clearly within the jury's competence.'"[72]

Murphy appealed his convictions for involuntary manslaughter and second-degree assault for his role in a fatal car crash.[73] Murphy argued the trial court abused its discretion in granting the State's motion in limine barring his expert witness, a pharmacist-toxicologist, from testifying that (1) Murphy was not criminally negligent,[74] (2) Murphy was unaware of his mental and physical impairments at the time of the accident, and (3) Murphy had been involuntarily intoxicated.[75] Murphy argued that, based on the opinion of his expert witness, "the jury could have easily concluded that [Murphy] was not criminally negligent."[76] Murphy insisted he crashed the car because he had consumed medication that was prescribed to him just one day before the accident.[77] The trial court found that the barred testimony would have improperly provided an expert opinion on Murphy's mental state and guilt.[78] In response, Murphy's counsel then stated in a narrative offer of proof that Murphy's expert witness, after having reviewed the investigative reports and Murphy's medical records, was qualified to opine on whether Murphy was criminally negligent and whether Murphy was unaware of his mental and physical impairments at the time of the offense.[79]

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69. State v. Walther, 581 S.W.3d 702, n. 2 (Mo. Ct. App. 2019).

70. State v. Murphy, 534 S.W.3d 408, 415 (Mo. Ct. App. 2017).

71. *Id.* at 415 ("Defendant's counsel did not make an offer of proof regarding [the] excluded opinion that Defendant was involuntarily intoxicated at the time of the accident, and therefore our review of its exclusion is not preserved for appeal."). *See also* State v. Flynn, 937 S.W.2d 739, 741 (Mo. Ct. App. 1996) (quoting State v. Fleer, 851 S.W.2d 582, 595 (Mo. Ct. App. 1993) ("When an objection is made to proffered evidence and that objection is sustained, the proponent must make an offer of proof in order to preserve the matter for appellate review.").

72. *Murphy*, 534 S.W.3d at 415–16.

73. *Id.* at 410.

74. Criminal negligence establishes mental culpability for both first-degree involuntary manslaughter and second-degree assault. *See* MO. REV. STAT. §§ 565.024.1(2), 565.060.1(4) (2000).

75. *Murphy*, 534 S.W.3d at 414.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 415 ("To preserve a claim relating to a motion in limine, the proponent must attempt to present the excluded evidence at trial and, if it remains excluded, make

In its opinion, the court's first basis for upholding the exclusion of the testimony was that defense counsel made an insufficient narrative offer of proof regarding the excluded testimony and thus failed to preserve review of its exclusion for appeal.[80] Moreover, the court found Murphy's offer of proof insufficient for the remaining conclusions that Murphy was: (1) unaware of his mental and physical impairments; and (2) not criminally negligent, since defense counsel did not explain how the witness, a psychiatrist, was qualified to offer the *legal* opinion that Murphy was not negligent.[81] The court found these arguments to constitute "conclusions regarding [Murphy]'s state of mind and his guilt, respectively"[82] and noted that "[t]he state of mind of a defendant is clearly within the jury's competence."[83] The court reasoned that expert witnesses "are not allowed to testify regarding the guilt or innocence of the defendant as it usurps the decision-making function of the jury."[84] Although the *Murphy* court could have disposed of any issue arising under Section 490.065.2(3)(b) solely on the basis of failure to preserve such issue for review, its application of the statute comports with the "consistent[]" judicial prohibition of expert testimony regarding a defendant's state of mind or guilt.[85]

Most recently, in *Walther*, the Eastern District "decline[d] to comment on how, or whether [Section] 490.062.2(3)(b) would affect the admissibility of the testimony of the State's psychiatric expert that the defendant did not suffer from a mental disease or defect under the Revised Statutes of Missouri."[86] This testimony precluded Walther's request for the trial court to instruct the jury on diminished capacity.[87] Walther did not raise an issue regarding the admitted testimony under Section

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a sufficient offer of proof. An offer of proof must be sufficiently specific to inform the trial court what the evidence will be, the purpose and object of the evidence, and the facts necessary to establishing admissibility of the evidence.") (internal citations and quotations omitted).

80. *Id.* ("The preferred method for making an offer of proof is to question the witness outside the presence of the jury. Although some Missouri courts have allowed counsel to make the offer in narrative form, it is more difficult for counsel to present a detailed and specific summary of a witness's testimony without presenting conclusions of counsel. Mere conclusions of counsel will not suffice. Therefore, when counsel uses the narrative offer of proof he or she 'runs a greater risk that the court will find the offer insufficient.'") (internal citations omitted).

81. *Id.* (citing Campbell v. Campbell, 929 S.W.2d 757, 762) ("A narrative offer of proof that is merely conclusory is inadequate.").

82. *Id.* at 415–16.

83. *Id.* (quoting State v. Cochran, 365 S.W.3d 628, 634 (Mo. Ct. App. 2012)).

84. *Id.* at 415–16 (quoting State v. Cochran, 365 S.W.3d 628, 634 (Mo. Ct. App. 2012)).

85. *Id.* at 416 (citing State v. Cochran, 365 S.W.3d 628, 634 (Mo. Ct. App. 2012)); State v. Clements, 789 S.W.2d 101, 110–11 (Mo. Ct. App. 1990).

86. State v. Walther, 581 S.W.3d 702, 705 n.2 (Mo. Ct. App. 2019).

87. *Id.* at 706.

490.065.2(3)(b).[88] The court declined to raise such an issue *sua sponte* because "[i]ssues not raised on appeal are considered waived."[89]

C. What Murphy*,* Capozzoli*, and* Walther *Portend*

Eventually, a Missouri court will be required to confront a challenge to the admission or exclusion of evidence in a criminal trial under Section 490.065.2(3)(b). Unfortunately, the *Murphy–Capozzoli–Walther* trilogy fails to provide useful, practical guidelines on Section 490.065.2(3)(b). For example, the *Capozzoli* court found it is "unclear … what criminal offenses the Legislature had in mind when it included 'mental condition' in the proscription on expert testimony where [mental condition] is an element of the crime charged,"[90] perhaps signaling uncertainty and discomfort with Section 490.065.2(3)(b). Rather, the *Murphy–Capozzoli–Walther* series highlights a need to look to state *and* federal jurisprudence, past and present, to enunciate fundamental, overarching guidelines on the scope and application of Section 490.065.2(3)(b).

IV. DISCUSSION

This Part discusses Section 490.065.2(3)(b) through a prospective lens. Subpart A examines *State ex rel. Gardner v. Wright*,[91] which firmly suggests that Missouri courts should interpret Section 490.065.2(3)(b) the same way that the United States Supreme Court and other federal courts interpret Rule 704(b) and its state-law counterparts. Subpart B examines the key federal precedent, *Clark v. Arizona*, a 2006 case in which the United States Supreme Court applied an Arizona statute substantially similar to Rule 704(b).[92] Subpart C provides scholarly support for the proposition that Missouri courts and practitioners should apply Section 490.065.2(3)(b) as narrowly as possible – that is, only to expert psychiatric and psychological testimony.

A. State ex rel. Gardner v. Wright

In *State ex rel. Gardner v. Wright*, the Missouri Court of Appeals considered the application of the new standards for the admissibility of expert testimony in a criminal case set forth in Section 490.065.2, which adopts Rule 704 verbatim.[93] The court stated that proper application of

88. *Id.* at 705 n.2.
89. *Id.* (quoting State v. Lucas, 452 S.W.3d 641, 644 (Mo. Ct. App. 2014)).
90. State v. Capozzoli, 578 S.W.3d 841 (Mo. Ct. App. 2019).
91. State ex rel. Gardner v. Wright, 562 S.W.3d 311, 312 (Mo. Ct. App. 2018).
92. Clark v. Arizona, 548 U.S. 735 (2006).
93. State ex rel. Gardner v. Wright, 562 S.W.3d 311, 312 (Mo. Ct. App. 2018).

Section 490.065.2 is "guided by existing and still applicable Missouri law and the federal jurisprudence on this matter," including seminal federal cases and their progeny.[94] Thus, the proper interpretation of Section 490.065.2(3)(b) is no mystery: Missouri courts should interpret Section 490.065.2(3)(b) the same way that the Supreme Court interprets Rule 704(b) and its state-law counterparts like the *Mott* Rule.

Although the Federal Rules of Evidence are not binding on Missouri courts, they are "suggestive."[95] Furthermore, it is generally accepted that language borrowed from an on-point Federal Rule of Evidence is "equally applicable" to the facts of a state criminal case.[96] The objective of Missouri courts and practitioners should be to align their interpretations of Section 490.065.2(3)(b) with the longstanding general principle that "[a]n expert witness may not be called upon for a conclusion of law."[97]

B. Federal Precedent on State-Law Counterparts of Rule 704(b)

In *Clark v. Arizona*,[98] the United States Supreme Court upheld the constitutionality of Arizona's *Mott* rule, which one scholar considers to be "essentially the same" as Rule 704(b).[99] In *Mott*, the Supreme Court of Arizona held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on an insanity defense.[100] Such evidence could not be considered on the element of *mens rea*.[101] Clark was charged with first-degree murder.[102] The key issue at trial was whether Clark "intentionally or knowingly" killed a police officer in the line of duty.[103] Clark waived his right to a jury trial, so his case was heard by the court.[104]

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94. *Id.* (citing Huffman v. State, 703 S.W.2d 566, 568 (Mo. Ct. App. 1986)) ("Section 490.065.2 adopts the Federal Rules of Evidence word-for-word, and therefore federal precedent construing those rules is strong persuasive authority for how we should view admissibility under our statute.").

95. Emerson v. Garvin Group, LLC, 399 S.W.3d 42, 45 (Mo. Ct. App. 2013) (quoting Boyer v. City of Potosi, 77 S.W.3d 62, 69 (Mo. Ct. App. 2002)).

96. State v. Curry, 357 S.W.3d 259, 265 n.4 (Mo. Ct. App. 2012).

97. *See, e.g.*, Gardine v. Cottey, 230 S.W.2d 731, 745 (Mo. 1950) (en banc).

98. Clark v. Arizona, 548 U.S. 735, 737–741 (2006).

99. Stein, *supra* note 58, at 121.

100. State v. Mott, 931 P.2d 1046, 1051, 1054 (Ariz. 1997).

101. *Id.* (holding that defendant's proffered evidence of battered woman syndrome was inadmissible as evidence of diminished capacity to form the requisite mental states for child abuse and first-degree murder).

102. *Clark*, 548 U.S. at 737–41.

103. *Id.* at 743.

104. *Id.*

At trial, Clark did not contest the shooting and death, but argued his undisputed paranoid schizophrenia disabled him from forming the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute.[105] In relevant part, Clark sought to introduce evidence of mental illness to rebut the prosecution's evidence of the requisite *mens rea*.[106] A psychiatrist for the defense testified that Clark was suffering from paranoid schizophrenia with delusions about "aliens" when he killed the officer, and he concluded that Clark was incapable of understanding right from wrong and that he was thus insane at the time of the killing.[107]

Citing *Mott*,[108] the trial court ruled that Clark could not rely on the evidence bearing on insanity to dispute the *mens rea*, because the court in *Mott* "refused to allow psychiatric testimony to negate specific intent."[109] The trial court also held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the *mens rea* element of a crime."[110] In essence, the trial court read *Mott* to prohibit "mental-disease evidence" and "capacity evidence" from consideration on a defendant's *mens rea*. "Mental-disease evidence" is expert testimony that pertains to whether a defendant suffered from a mental disease or defect, such as schizophrenia, at the time of the crime.[111] "Capacity evidence" is expert testimony that bears on whether the disease or defect left the defendant incapable of performing or experiencing a mental process defined as necessary for sanity, such as appreciating the nature and quality of his act and knowing that it was wrong.[112]

The judge noted that although Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting, the mental illness "did not distort his perception of reality so severely that he did not know his actions were wrong."[113] Eventually, the United States Supreme Court granted certiorari to determine whether due process prohibited Arizona from excluding evidence of mental illness and incapacity due to mental

105. *Id.*

106. *Id.* at 744.

107. *Id.* at 745. In rebuttal, a psychiatrist for the state opined that Clark's mental disorder did not preclude him from "appreciating the wrongfulness of his conduct, as shown by his actions before and after the shooting." *Id.*

108. State v. Mott, 931 P.2d 1046, 1051 (Ariz. 1997) (en banc), *cert. denied*, 520 U.S. 1234 (1997).

109. *Clark*, 548 U.S. at 745.

110. *Id.* at 744.

111. *Id.* at 760.

112. *Id.*; *see also* ARIZ. REV. STAT. § 13-1105(A)(3) ("A person commits first-degree murder if … intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.").

113. *Clark*, 548 U.S. at 746.

illness to rebut evidence of the requisite criminal intent.[114] The Supreme Court now had an opportunity to define the proper scope and interpretation of a state statute imposing the ultimate issue rule in criminal cases, just like Rule 704(b).

The majority, like the trial court, interpreted the *Mott* rule as prohibiting mental-disease evidence and capacity evidence on the defendant's mental state.[115] While all Justices agreed that the *Mott* rule "confines consideration of capacity evidence to the insanity defense,"[116] the dissenting Justices believed that mental-disease evidence should be allowed on the defendant's *mens rea* because such evidence "[bore] on efforts to determine, as a factual matter, whether [Clark] knew he was killing a police officer."[117] The majority overrode this concern by noting that Clark's objection to the trial court's prohibition of mental-disease evidence on the issue of *mens rea* pertained to testimony about schizophrenics in general, not about Clark in particular.[118] The majority found no due process violation in restricting mental-disease and capacity evidence to the insanity defense, reasoning that such restriction reasonably mitigates the controversial character of some categories of mental disease, the "potential of mental-disease evidence to mislead," and the danger of according excessive certainty to capacity evidence.[119]

The majority expressly held that *Mott* imposed no restriction on "observation evidence" on *mens rea*, as it did on mental-disease evidence and capacity evidence.[120] In other words, testimony by lay or expert witnesses about what Clark did or said, which may support the professional diagnoses of disease and may be relevant to show what was on Clark's mind when he fired his gun, was admissible.[121] Therefore, while *Mott* exposes defendants to the risk of erroneous conviction, "it does so in a way that the Supreme Court approves in advance."[122] For reasons stated by the dissenting justices,[123] *Mott* clashes with due process and exposes criminal defendants to a "serious informational risk" because psychiatric testimony, although far from indisputably accurate, can help

114. *Id.*

115. *Id.* at 760.

116. In contrast, because Rule 704(b) encompasses defenses, Rule 704(b) prohibits capacity evidence on the insanity defense. *See* United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999) (In the face of mental-disease evidence, Rule 704(b) prohibits an expert "from testifying that [the mental-disease evidence] does or does not prevent the defendant from appreciating the wrongfulness of his actions.").

117. *Clark*, 548 U.S. at 783 (Kennedy, J., dissenting).

118. *Id.* at 761 (majority opinion).

119. *Id.* at 773–74.

120. *Id.* at 760.

121. *Id.*

122. Stein, *supra* note 58, at 121.

123. *Clark*, 548 U.S. at 781–800 (Kennedy, J., dissenting).

the defendant raise a reasonable doubt as to whether he had a guilty mind.[124]

Despite these concerns, and although a mental health expert is often able to provide useful information about a defendant's capacity to form mental culpability for an offense, under *Mott*, such an expert can only "testify on the issue of insanity, identify a defendant's mental disease, or give observational testimony about the defendant's behavioral traits."[125] *Clark* clearly demonstrates that Missouri courts should read Section 490.065.2(3)(b) as prohibiting mental-disease evidence and capacity evidence from psychiatric and psychological experts on the ultimate issue of a defendant's requisite mental state. Because Section 490.065.2(3)(b) is textually identical to Rule 704(b), Missouri courts should permit mental-disease evidence, but prohibit capacity evidence, on the insanity defense.

C. Additional Support for a Narrow Interpretation of Section 490.065.2(3)(b)

Interestingly, Rule 704(b), unlike the *Mott* rule, is not *textually* limited to psychiatric or psychological expert testimony, although historical evidence indicates that Congress intended the Rule to apply only to psychiatric testimony on the ultimate issue in the case.[126] Rather, by its plain language, Rule 704(b) broadly extends to all expert testimony and "inexplicably" fails to "reflect Congress's narrow concern on the effect of expert psychiatric testimony."[127] For example, neither the House nor the

124. Stein, *supra* note 58, at 120–21.

125. Stein, *supra* note 58, at 120–21. *See Clark*, 548 U.S. at 756–60 (majority opinion).

126. Reilly, *supra* note 19, at 117 n.62 ("Both the Senate and House reports on this issue indicated that the amendment was intended only to reach psychiatric testimony. The Senate Report clearly stated that Rule 704 was amended to create limitations on 'the scope of expert testimony by psychiatrists and other mental health experts,' and went on to say that, '[u]nder this proposal, *expert psychiatric testimony* would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been.' S. Rep. No. 98-225, at 230 (1983) (emphasis added). Similarly, the House Report read, 'with regard to the ultimate issue, the psychiatrist, psychologist or other similar expert is no more qualified than a lay person.' H.R. REP. No. 98-577, at 16 (1983). The Senate report specified that the rationale for excluding psychiatric expert testimony on ultimate issues was not limited only to the insanity defense but also included other mental states. S. REP. No. 98-225, at 230. However, nowhere in either report does Congress indicate there was concern with non-psychiatric expert testimony.").

127. Reilly, *supra* note 19, at 117 n.60 (citing United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997)) (holding that "[t]he language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses.").

Senate report indicates that Congress was concerned with "non-psychiatric" expert testimony.[128] Because the rules of statutory construction given by Supreme Court precedent require that plain and unambiguous statutes be applied according to their terms,[129] most federal courts "dutifully apply this broadly-written rule" to *all* expert opinion on a defendant's requisite mental state.[130] This interpretation, while faithful to Rule 704(b)'s plain meaning, is "unduly restrictive, as it limits expert testimony not only beyond what Congress originally intended,"[131] but also beyond what is necessary to achieve Congress's intended result:

> Both the Senate and House reports on this issue indicated that the amendment was intended only to reach psychiatric testimony. The Senate Report clearly stated that Rule 704 was amended to create limitations on "the scope of expert testimony by psychiatrists and other mental health experts," and went on to say that, "[u]nder this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." … Similarly, the House Report read, "with regard to the ultimate issue, the psychiatrist, psychologist or other similar expert is no more qualified than a lay person."[132]

The more broadly judges construe Rule 704(b), the more they will deprive juries of relevant and helpful testimony.[133] To avoid this problem, Missouri courts should apply Section 490.065.2(3)(b) narrowly, or in other words, only to *psychiatric* expert testimony bearing on a defendant's requisite mental state. This narrow construction of Section 490.065.2(3)(b) would not violate state precedent.

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128. Reilly, *supra* note 19 at 117 n.62.

129. *Id.* at 117 n.64 (citing Carcieri v. Salazar, 555 U.S. 379, 387 (2009)) ("If the meaning is unambiguous, no further steps need to be taken to apply another meaning to the statute.").

130. *Id.* ("The Supreme Court holds that the Federal Rules of Evidence should be interpreted in the same manner as any other statute, Daubert v. Merrell Dow Pharm., 509 U.S. 579, 587 (1993), and thus the first interpretive step is to consider the plain meaning of the statute, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988). If the meaning is unambiguous, no further steps need to be taken to apply another meaning to the statute. Carcieri v. Salazar, 555 U.S. 379, 387 (2009).").

131. Reilly, *supra* note 19, at 118.

132. *Id.*

133. Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 620 n.5 (1987).

V. CONCLUSION

Although only three Missouri appellate cases even mention Section 490.065.2(3)(b), and Section 490.065.2(3)(b) was not outcome-determinative in any of those cases, an examination of Missouri and federal precedent provides clear guidance for its interpretation by Missouri courts and practitioners. Missouri courts no longer need to wonder what the Legislature had in mind when it enacted Section 490.065.2(3)(b).[134] The bottom line is clear: Rule 704(b) prohibits an expert from testifying that mental-disease evidence does or does not prevent the defendant from appreciating the wrongfulness of his actions.[135] Section 490.065.2(3)(b) prohibits expert mental-disease and capacity evidence, but not *observation* evidence, on the issue of *mens rea*.

134. State v. Capozzoli, 578 S.W.3d 841, 845 (Mo. Ct. App. 2019).

135. Clark v. Arizona, 548 U.S. 735, 758 n.30 (2006) (quoting United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999)).