No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Odere Suleitopa,
Petitioner,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

Petition for Writ of Certiorari

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Question Presented

Federal Rule of Evidence 701 states that a lay witness's opinion testimony must be rationally based on the witness's perception. The Circuits have long been divided over whether Federal Rule of Evidence 701 permits law enforcement officers to offer lay opinion testimony regarding an investigation when they have only after-the-fact knowledge that is not based on first-hand perception. Should the Court grant certiorari to resolve this conflict in how courts assess the important question of the definition of Rule 701's "personal knowledge" requirement?

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Petition for Writ of Certiorari

Petitioner Odere Suleitopa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. The opinion is reproduced in Appendix A. The opinion of the district court is unpublished and reproduced in Appendix B.

Jurisdiction

The United States District Court for the District of Maryland had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C § 1291. The Fourth Circuit issued a decision on March 7, 2018. (App. A1.) Petitioner requested and was granted a 60-day extension of time in which to file this petition. This Court's jurisdiction to review the decision is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

Federal Rule of Evidence 701 states:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Statement of the Case

A grand jury charged Odere Suleitopa with eighteen counts of wire fraud in violation of 18 U.S.C. § 1343 and five counts of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). (JA 10-15.)[1] He proceeded to trial by jury and was found guilty on all counts. (JA 730-34.) He appealed these convictions in the Fourth Circuit Court of Appeals, where the convictions were affirmed. (App. A.)

A. A summary case agent testified to a lay opinion regarding the identity of the perpetrator.

The charges in this case arose from a series of credit card transactions at Walmarts located in Denton and Easton, Maryland, in November 2015. Most of the facts relating to these charges, which turned out to be fraudulent, were undisputed. (JA 35.)

The eighteen different charged transactions shared certain characteristics. The transactions involved purchasing multiple Walmart gift cards for $900.00, and electronics such as PlayStation consoles, Xbox consoles, or iPads. (JA 187, 197-202, 551-52.) Surveillance video shows that the purchaser wore a black track suit and a wide-brimmed hat that totally obscured the purchaser's face. (JA 676-700.) The magnetic strip on the credit cards did not work in these transactions, so the cashier had to hand-key in the card number. (*E.g.* JA 194, 211.)

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[1] "JA" refers to the Joint Appendix filed with the Fourth Circuit.

The transactions all involved real accounts being charged for the purchases of the gift cards and electronics. Although the account numbers were real, issued to real people, from real banks, the parties stipulated that the real account holders all physically possessed their actual credit cards, were not in Maryland in November 2015, did not authorize any of the charged transactions, and did not know who used their account information. (JA 162-64, 410-15.) None of the people who were the real account holders lost any money on these fraudulent transactions, but the banks that issued the credit accounts and Walmart did. (*See id.*) The government never recovered any of the credit cards used in the charged transactions. (JA 518.)

Only three cashiers were involved in the eighteen charged transactions. None was able to identify Mr. Suleitopa as the purchaser. Indeed, the only cashier who testified at trial was unable to identify Mr. Suleitopa for the jury when he was asked on the stand. (JA 283-84.) The police never interviewed the other two cashiers, although one of them had also been charged with theft from Walmart. (JA 246-48.) Mr. Suleitopa made clear from the beginning of trial that his defense centered on the inability of any cashier or eyewitness to the actual transactions to identify him as the person who conducted the fraudulent transactions. (JA 35-37.) Identity was the critical contested issue at trial.

A Homeland Security Investigations special agent testified as a summary witness. This agent was not present at the Walmarts when the fraudulent transactions occurred and he was not present for the investigative actions undertaken by local law enforcement that occurred shortly thereafter. (JA 531-32.)

During his testimony, he narrated surveillance video, and described still shots taken from the videos and pasted into summary exhibits. (See App. B.) To the extent that there was surveillance video of these transactions, it also showed that the purchaser's face was wholly obscured by a large hat. (See App. B4.) The special agent was not present during any of the events depicted in the photographs or videos. (JA 531.) During this testimony, the agent repeatedly characterized the clothing and hats as the same as in other videos and photographs, the same as clothing seized from Mr. Suleitopa's car (App. B11) and even testified, "Here you see the Defendant coming out." (App. B10) The defense repeatedly objected to this testimony as invading the province of the jury. (App. B3, B4, B10)

The district court overruled the first objection, (App. B3), then failed to either overrule or sustain any of the others. (App. B4, B10) The district court also made such statements as, "Obviously it's up to you to determine the identity," (App. B3); "Obviously he's describing what is seen, but these are jury questions," (App. B4); "That's for you all to determine," (App. B10); and "Now, obviously it's up to you to determine whether it's the same clothes," (App. B11).

During the closing arguments, the defense focused on the fact that none of the cashiers–the only people who actually saw and were present when the purchaser made the fraudulent transactions defendant—was able to identify Mr. Suleitopa as the purchaser. (JA 629.) Without this identification, the defense argued that the government had not come close to meeting its burden of proving the defendant guilty beyond a reasonable doubt. (JA 630.) The jury returned a guilty verdict on all counts.

(JA 672.)

B. Mr. Suleitopa appealed the district court's decision to permit the lay opinion testimony.

Mr. Suleitopa appealed, arguing that the district court erred in admitting the special agent's improper lay opinion testimony that was offered as to the ultimate issue in the case—the perpetrator's identity. He argued that it did not satisfy either of the foundational requirements of Federal Rule of Evidence 701: it was neither based on personal observation, nor was it helpful to the jury. The agent testified only to his interpretation of surveillance recordings and had no personal knowledge of the recorded transaction, which the Fourth Circuit has held to not satisfy the personal knowledge requirement of Rule 701. *See United States v. Johnson*, 617 F.3d 286 (4th Circ. 2010). And since the agent narrated surveillance videos that the jury could see just as well as he could, he was in no better position to interpret the video than the jury itself. His testimony was not helpful to the finder of fact, amounting, as the Rule's Advisory Committee Note warns "to little more than choosing up sides."

The Fourth Circuit affirmed the district court's holding. (App. A) The court below held that the special agent had sufficient personal knowledge because of his familiarity with the surveillance video and Mr. Suleitopa's appearance in the course of the investigation. (App. A3.) Because of this familiarity, the court below held that his testimony was helpful to the jury because he was more likely to correctly identify Mr. Suleitopa as the person in the surveillance video. (App. A3.)

Reasons for Granting the Petition

The Court should grant certiorari to resolve the circuit split over whether lay opinion testimony that is not based on first-hand perception is admissible.

Federal Rule of Evidence 701(a) requires that a lay witness's opinion testimony be "rationally based on the witness's perception." The Advisory Committee's Notes clarify that "the witness's perception" is "the familiar requirement of first-hand knowledge or observation." *See* Fed. R. Evid. 701 advisory committee's notes. This requirement of personal knowledge stems from "the law's usual preference that decisions be based on the best evidence available." *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts* § 602.02[1], at 602-03 (Joseph M. McLaughlin ed., 2d ed. 2013).

Yet the circuits have divided over the meaning of "first-hand" knowledge. This issue arises frequently in the context of testimony from law enforcement officers, who often testify to their lay opinion of an investigation—which may include testimony about interactions they participated in or those that they learned of later through collected surveillance. The circuits use divergent standards to determine whether an officer's observations at a later date qualify as first-hand knowledge that permits their testimony to be admitted under Rule 701. All circuit courts agree that some lay opinion testimony from law enforcement officers is admissible under Rule 701, such as when an officer testifies to the meaning of a conversation that he or she took part in. But circuits disagree as to whether information gained at a later date clears the

bar set out by Rule 701 for "first hand" knowledge or observation.

The circuit courts fall into three main schools of thought on what constitutes personal knowledge for the purposes of lay opinion testimony from a law enforcement officer. The first group—the Fifth, Tenth, and Eleventh Circuits—applies the broadest interpretation of Rule 701's personal knowledge requirement. The Seventh and Ninth Circuits take a middle-of-the-road approach to the meaning of personal knowledge, restricting testimony that in some circumstances might be permitted by one of the circuits in the first group. The last group, which includes the First, Second, Fourth, and Eighth Circuits, applies the narrowest reading of the personal knowledge required for law enforcement officers to give lay opinion testimony.

I. A three-way circuit split exists regarding the interpretation of Rule 701's personal knowledge requirement.

A. The Fifth, Tenth, and Eleventh Circuit give the broadest interpretation to the meaning of "personal knowledge."

The first group of Circuits uses the broadest interpretation of Rule 701's "personal knowledge" requirement. The Fifth, Tenth, and Eleventh Circuits admit lay opinion testimony even if based solely on information gathered during an after-the-fact investigation. *See United States v. El-Mezain*, 664 F.3d 467, 515 (5th Cir. 2011); *United States v. Jayyousi*, 657 F.3d 1085, 1104 (11th Cir. 2011); *United States v. Diaz*, 637 F.3d 592, 600 (5th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1223 (10th Cir. 2007); *United States v. Griffin*, 324 F.3d 330, 351 (5th Cir. 2003); *United States v. Novaton*, 271 F.3d 968, 1009 (11th Cir. 2001); *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001); and *United States v. Garcia*, 994 F.2d

1499, 1507 (10th Cir. 1993).

The Eleventh Circuit holds that lay witness law enforcement officers possess sufficient first hand-knowledge even when the witness learns of the matter solely through reviewing records during the course of the investigation. For instance, the Eleventh Circuit has held that an FBI financial analyst possessed sufficient first-hand knowledge to provide lay opinion testimony when the analyst had merely reviewed and summarized financial documents in the course of an investigation. *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006). *See also United States v. Gold*, 743 F.2d 800 (11th Cir. 1984).

The Eleventh Circuit has reasoned that Rule 701(a) is satisfied even when a lay witness does not participate in or observe a conversation. *Jayyousi*, 657 F.3d at 1102. In cases involving coded language that the officer gives lay opinion testimony about, the Circuit has held that Rule 701(b)'s helpfulness prong is met because the testimony helps the jury better understand the defendants' recorded conversation. *Id.* at 1103.

The Fifth Circuit goes even further, holding that lay opinion testimony from law enforcement officers is not only permitted when their knowledge is based on their personal perception of documents created in the course of the investigation, but also if the witness has employed specialized knowledge in forming their opinion. The Fifth Circuit held in *United States v. El-Mezain*, for instance, that several FBI agents were permitted to give lay opinion testimony as to the meaning of terms used in conversations and documents they had investigated, as well as to the relationship

between the defendants that they had investigated. 664 F.3d at 467. The court held that the testimony was admissible as lay opinion as long as the agents' testimony was limited to their personal perceptions from their investigation of the case, rather than others' perception—even if some specialized knowledge on the part of the agents was required. *Id.* at 514. By virtue of their extensive involvement in the investigation, the court concluded that the testimony was based on the agents' participation in and understanding of the case at hand. *Id.*

The Tenth Circuit has similarly allowed law enforcement officers to testify based on knowledge gleaned entirely from an investigation, including testimony to the ultimate issue of identification of the defendant. In *Zepeda-Lopez*, the Tenth Circuit held that an FBI Special Agent could testify, based solely on his review of the same tapes offered into evidence, that the voice on audiotapes and the image in a videotape belonged to the defendant. *United States v. Zepeda-Lopez,* 478 F.3d 1213, 1215 (10th Cir. 2007). The Tenth Circuit did not address the defendant's Rule 701(a) argument that the Special Agent lacked personal knowledge, and instead addressed the defendant's 701(b) argument that the identification was not helpful to the jury, as they were just as capable as the Agent to determine whether the voice and image belonged to the defendant. The Circuit rejected this argument, citing *United States v. Bush*, 405 F.3d 909 (10th Cir. 2005). It held that as in *Bush*, where a law enforcement officer identified a defendant in recorded calls after having conducted at least three in-person interviews with the defendant, the Special Agent's opportunity to review the tapes "many times" sufficed to fulfill the helpfulness prong of Rule 701.

Id. at 918.

B. The Seventh and Ninth Circuits interpret the personal knowledge requirement for law enforcement officers using a middle-of-the-road approach.

The Seventh and Ninth Circuits comprise the second group. These circuits will permit law enforcement officers to offer opinion testimony about information they learned after-the-fact during an investigation when combined with related first-hand knowledge. *See United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007); *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008.)

For instance, in *Freeman*, the Ninth Circuit held that there was no error when the district court admitted a detective's lay interpretations of recorded phone calls. 498 F.3d at 904-05. The prosecution's lead witness was a detective who opined on the meaning of what he testified was drug jargon used between the defendant and two of his alleged co-conspirators. The detective based his testimony on his direct perception of several hours of intercepted conversations—in some instances coupled with direct observation of the suspects—and other facts he learned during the course of the investigation. *Id.* at 904. The Ninth Circuit held that the detective's perception of the conversations amounted to direct knowledge, but noted that it was crucial that throughout his testimony, the witness attempted to provide context to explain his reasoning and the basis for his opinions. *Id.*

One distinguishing characteristic of the Ninth Circuit is its stricter limitations on lay testimony from law enforcement officers who have knowledge of a defendant from a picture in a surveillance photograph. In *United States v. LaPierre*, a police

officer who investigated a bank robbery gave lay opinion testimony that the defendant was the individual pictured in the bank surveillance photographs. 998 F.2d 1460, 1465 (9th Cir. 1993). The court held that the testimony was inadmissible because it ran the "risk of invading the province of the jury and unfairly prejudicing [the defendant]." *Id.* at 1465. The jury was able to view the surveillance photographs and independently determine the identity of the defendant.

While the Ninth Circuit has permitted this kind of testimony when the witness had "substantial and sustained contact with the person in the photograph" and is helpful to the jury because the defendant's appearance in the photograph is different from his or her appearance before the jury and the witness is familiar with the defendant as he or she appears in the photograph. *Id.* The Ninth Circuit held that in order to satisfy the requirements of Rule 701(b), helpfulness to the jury, there must be reason to believe that the witness is more likely to correctly identify the person than the jury. *Id.*

In contrast, the Seventh Circuit held in *United States v. Rollins*, a drug conspiracy case, that the testimony of a Drug and Enforcement Administration agent of his impressions of intercepted telephone conversations was admissible. *Rollins*, 544 F.3d 820, 831-32. The agent, who listened to the intercepted wiretap call daily from the start of the investigation, was permitted to testify based on his knowledge of code words that were unique to the conversations in the alleged conspiracy. *Id.* The court held that it was helpful to the jury to have explanations from the investigator "who became intimately familiar with the unusual manner of communicating" used

by the conspirators. *Id.* at 831. The Seventh Circuit, however, did not permit the agent to testify based on his experience as a law enforcement officer more generally. *Id.*

C. The First, Second, Third, Fourth, and Eighth Circuits apply the narrowest reading of Rule 701's personal knowledge requirement for lay opinions by law enforcement officers.

The third approach limits law enforcement officers' lay opinion testimony by more narrowly interpreting the requirements of personal knowledge and helpfulness to the jury. The First, Second, Third, Fourth, and Eighth Circuits use this approach.

In the Second Circuit, *United States v. Garcia* sets out the Circuit's position that law enforcement's lay opinion testimony must be based on a witness's personal perception of the matter he or she is testifying to, and not from records of information the witness learned from the investigation as a whole. *United States v. Garcia*, 413 F.3d 201 (2nd Cir. 2005). The court held that basing an opinion on the entirety of an investigation—in contrast with traditional personal perception—necessarily included information from other officials who were investigating, and so could not meet the 701(a) requirement of personal knowledge. *Id.* at 212. It also held that the testimony was not helpful to the jury under Rule 701(b) because it did little more than summarize the evidence in a way that told the jury how to decide the case. *Id.* at 210.

The First Circuit similarly casts a jaundiced eye upon law enforcement officers' knowledge gleaned from an investigation. The court explained that the investigation-based opinions often rely upon a disallowed combination of perceptions—both the officer's and the officer's colleagues'. Citing *Garcia*, the First Circuit held in *United*

States v. Vazquez-Rivera that an agent's testimony was inadmissible because the agent's personal observation of the suspect during a brief webcam chat where she did not see the man's face, hear him speak, or see any identifying marks on his body was insufficient to support her purported identification of the defendant in court. *Vazquez-Rivera*, 665 F.3d 351, 358 (1st Cir. 2011). The court held that the agent's testimony revealed that her identification of the suspect relied upon the combined opinion of both her and other unidentified officers. Basing the identification on the totality of similarly-unidentified information gathered over the course of the investigation did not meet the requirement of personal knowledge, since it was not "rationally based on the witness's perception" per Rule 701(a). *Id.*

The Third Circuit holds a similarly narrow view of the appropriate definition of personal knowledge. It has held that, for a lay opinion to be rationally based on a witness's perception, the witness must have "have firsthand knowledge of the factual predicates that form the basis for the opinion." *Virgin Islands v. Knight*, 989 F.2d 619, 629 (3rd Cir. 1993). *See also Hirst v. Inverness Hotel Corp.*, 544 F.3d 221 (3rd Cir. 2008). The Third Circuit has also noted that lay opinions on the ultimate issue—the kind that often arise when law enforcement officers identify the defendant as the suspect in an interaction—"seldom . . . meet the test of being helpful to the trier of fact since the jury's opinion is as good as the witness' and the witness turns into little more than an oath helper." *Id.* at 226 (quoting *Mitroff v. Xomox Corp.*, 797 F.2d 271, 276 (6th Cir. 1986)).

The Eighth Circuit similarly restricted the definition of "personal knowledge"

in Rule 701(a), laying out a simple three-prong test for when law enforcement officers can provide lay opinion testimony regarding recorded conversations. In *United States v. Peoples*, the Eight Circuit held that an agent who listened to recorded telephone conversations and prison visitations lacked first-hand knowledge, and therefore could not give lay opinion testimony about them. 250 F.3d 630 (8th Cir. 2001). The Court held that her testimony, which both interpreted allegedly coded language and statements made in plain English and sometimes imputed reasons behind those statements, was improperly admitted because the agent neither personally observed the activities the conversations were about nor heard or observed the conversation itself. *Id.* The Eighth Circuit considers this type of knowledge "after-the-fact" rather than personal, and noted that the agent provided a "narrative gloss" on the facts, comprised entirely of her opinion about the conversations' meanings. *Id.* at 640.

Accordingly, the decision offers three circumstances when law enforcement officers can provide lay opinion testimony regarding recorded conversations. Officers who wish to offer lay opinion testimony of a recorded conversation must have either participated in the conversation, have personal knowledge—under the Eighth Circuit's narrower definition of personal knowledge—of facts relayed in conversation, or have observed the conversations as they occurred. *Id.*

The Fourth Circuit relied on the Eighth Circuit's earlier decision in *Peoples* in its own case limiting lay opinion law enforcement testimony because of lack of personal knowledge. In *United States v. Johnson*, the Fourth Circuit held that a DEA agent's lay opinion testimony about the meaning of recorded phone calls in a drug

conspiracy case—given based on the agent's having listened to, but not participated in, some of the recorded phone calls collected in the course of the investigation—was disallowed. *Johnson*, 617 F.3d 298 (4th Cir. 2010). The court declared this "second-hand information" and said that conclusions formed from this information were mere "post-hoc" assessments. *Id.* at 293. The court noted especially that the prosecution elicited testimony regarding the agent's credentials and training despite not attempting to certify him as an expert. *Id.* It also reiterated *Peoples'* language about one of its main concerns with a lack of first-hand knowledge—such testimony provides merely "a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant." *Id.* (quoting *Peoples*, 250 F.3d at 640) (internal quotation marks omitted).

II. This circuit split in the definition of "personal knowledge" as it pertains to Rule 701 directly impacted the decision in this case.

While the Fourth Circuit disapproves of "second-hand" information—defined as information obtained when a law enforcement officer neither participated in nor observed a conversation and does not have personal knowledge of facts relayed in the conversation—the court nevertheless ruled against Mr. Suleitopa in his appeal. (App. A) It held that Agent Van Wie was more likely to correctly identify the defendant than the jury was even though his assessment was "post-hoc" and from "second-hand" information gathered during an investigation. *Cf. Johnson*, 617 F.3d at 293. In deciding this case, the Fourth Circuit subverted its own precedent of disallowing testimony that is based on reviewing evidence rather than witnessing the event.

The Fourth Circuit's failure to follow its own precedent demonstrates the uncertainty that is created by the Circuits' very different interpretations of Rule 701—disparate applications of the Rule appear not just between, but also within Circuits. This leads not just to different outcomes in similar cases, but also confusion and uncertainty as courts and parties attempt to resolve issues that frequently arise surrounding law enforcement officers' lay opinion testimony.

III. This case is a good vehicle to resolve the circuit split.

This case provides the Court with a straightforward opportunity to resolve a thorny circuit split. The issues were squarely presented to and by both the district court and the circuit court. No ancillary matters would dispose of this issue. Moreover, the district court's interpretation of Rule 701 was dispositive in this case. Far from harmless, the error in permitting the case agent to testify to the ultimate issue with personal knowledge provided the critical evidence before the jury.

IV. The court below erred by allowing lay opinion testimony without requiring the witness to possess firsthand knowledge of the underlying facts.

A. The Fourth Circuit incorrectly permitted a lay witness to identify the person depicted in surveillance imagery.

The Fourth Circuit, in ruling against Mr. Suleitopa, held that a lay witness may give an opinion concerning the identity of a person depicted in surveillance imagery if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the imagery than is the jury. It both incorrectly applied the Fourth Circuit's own narrower definition of personal knowledge, and cited

precedent that holds that for the witness's identification to be helpful to the jury, the witness must have been familiar with the defendant's appearance at around the time of his or her arrest and the defendant's appearance must have changed between the time of surveillance and the time of trial. This description does not apply to Agent Van Wie.

First, the Fourth Circuit's holding misapplies the Fourth Circuit's personal knowledge requirement. The witness's knowledge of Mr. Suleitopa's appearance was entirely a result of the witness's investigation of Mr. Suleitopa, which the Fourth Circuit has previously held is insufficient to constitute the personal knowledge required to testify a lay witness opinion. *See Johnson*, 617 F.3d at 293.

Second, the Fourth Circuit's only support for the argument that Agent Van Wie's testimony was helpful to the jury requires that the defendant's appearance have changed between the time of the surveillance and the time of trial—and Mr. Suleitopa's did not. (App. A3) The precedent the Fourth Circuit employs emphasizes that a witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible "if there is some basis for concluding that the witness is *more likely to correctly identify the defendant from the photograph than is the jury*. This criteria is fulfilled where the witness *is familiar with the defendant's appearance around the time the surveillance photograph was taken* and the defendant's appearance has changed prior to trial." *United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984) (emphasis added).

These conditions were not met in Mr. Suleitopa's case, as Agent Van Wie

became familiar with his appearance only after the surveillance photography was taken and months after his arrest. Furthermore, the exception is granted to those who are personally close the defendant and have known him or her for years. For instance, in *United States v. Robinson*, the only case the Fourth Circuit cites in its holding on this point, the person permitted to testify to the identity of the defendant in surveillance imagery was his brother. *United States v. Robinson*, 804 F.2d 280 (4th Cir. 1986). (App A3.)

B. This Court should uphold the personal knowledge requirement as described in *United States v. Peoples*, as it best adheres to the purpose of Rule 701.

The Court should follow the standard set out by *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001). This standard dictates that law enforcement officers who wish to offer lay opinion testimony of a recorded conversation must have either participated in the conversation, have personal knowledge—under the Eighth Circuit's narrower definition of personal knowledge—of facts relayed in conversation, or have observed the conversations as they occurred. *Id.* at 641.

The Court should uphold this standard and apply it to other recorded surveillance as well. There are numerous reasons that the Court should hold that this is the appropriate requirement for personal knowledge for law enforcement officers. It is most consistent with both the history and the text of Rule 701, helps ensure that lay witness testimony is helpful to the jury, and supports the boundary between expert and lay witness testimony. In contrast, more permissive personal knowledge requirements jeopardize all three prongs of Rule 701. Broader interpretations of the

personal knowledge requirement imperil the requirement of first-hand knowledge codified by 701(a)'s demand that testimony be rationally based on the witness's perception; the requirement of 701(b) that the testimony be helpful to understanding the witness's testimony or determining a fact in issue and not just unhelpfully "choosing up sides"; and the requirement of 701(c) that lay opinion testimony not be based on scientific, technical, or other specialized knowledge that is instead the purview of Rule 702 and should be subject to the standards that guide expert witness testimony. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

1. Requiring participation in or direct observation of surveilled activity or personal knowledge of facts relayed in a conversation is most consistent with the stated purpose of Rule 701 and the history of lay witness opinion.

Rule 701(a) says that lay opinion testimony must be rationally based on the witness's perception. The Advisory Committee Notes specify that this is "the familiar requirement of first-hand knowledge." *See* Fed. R. Evid. 701 advisory committee's notes. Cases like *Jayousi* and *Zepeda-Lopez* in the Tenth and Eleventh Circuits suggest that after-the-fact reviews of investigation materials meet the definition of first-hand knowledge, but it's not clear that the plain text of the Rule and the accompanying Notes, support such an interpretation, as they demand "first-hand knowledge or observation."

A strong personal knowledge requirement best adheres to the common law history of lay witness testimony, where opinion testimony was disallowed. *See Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U.S. 612, 618 (1884). Laypersons were

to relate only facts—explained by one judge as that which they "had seen, heard, felt, smelled, tasted, or done." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1195 (3rd Cir. 1995). Without a firsthand perception of the event, or personal knowledge of facts relayed in the event, a witness is not better positioned than a member of the jury to observe what transpired.

Violating Rule 701(a)'s requirement of personal knowledge thus implicates Rule 701(b)—the witness's testimony isn't helpful to the jury because it does not give them any information that they could not already glean from evidence presented directly to them at trial. There is no reason that Agent Van Wie's lay testimony opinion is more valuable than that of the finders' of fact, who were able to perceive the same thing that he did simply by viewing the video. In Mr. Suleitopa's case, Agent Van Wie's lay testimony narration of the surveillance video was not based on his own perception of the event, and thus could not possibly provide new information that was useful to the jury, who could see the video as well as he could.

2. A strong personal knowledge requirement, such as the one laid out in *United States v. Peoples*, helps prevent testimony that is not helpful to the jury.

Rule 701(b) states that lay opinion testimony must be helpful to clearly understanding the witness's testimony or to determining a fact in issue. When a law enforcement officer is giving lay testimony about an event for which they have insufficient personal knowledge, they cannot be helpful to the jury by giving new information about a fact at issue. Such testimony amounts to what the Advisory Committee Notes for Rule 701(b) derogates as "little more than choosing up sides,"

an occasion on which "exclusion for helpfulness is called for by the rule."

This was the case with Agent Van Wie's testimony during Mr. Suleitopa's trial. Agent Van Wie had not personally perceived the interaction between the person in the video and the store employee, and so had no additional relevant personal knowledge that the jury did not acquire simply by viewing the video themselves.

Not only is such testimony not helpful to the finder of fact, it is unduly helpful to the prosecution. Law enforcement officers permitted to use "second-hand" information to meet the personal knowledge requirement can summarize the prosecution's case to the jury succinctly and persuasively. Yet the prosecution is supposed to build their case by entering the materials the officer used to form their opinion into evidence for the jury to evaluate for themselves, not rely upon a credentialed but lay witness to summarize their familiarity with a wide range of evidence and opine upon the ultimate issue.

In this case, Agent Van Wie's testimony is not based on personal knowledge of the transaction depicted by the surveillance, and so he has nothing helpful to add for the jury. But he was extremely useful to the prosecution when he claimed to identify the defendant as the person in the surveillance video—employing the authority of a Special Agent, but the court credentials of a layperson, and personal knowledge that did not extend beyond what the jury could perceive for themselves: a man whose face was entirely obscured by a large hat. More generally, law enforcement officers whose knowledge is based on evidence from an investigation cannot give lay testimony that is helpful to the finder of fact, but rather invade the province of the jury by

evaluating—and often giving professional opinions on—evidence that the jury is meant to consider independently.

3. A strong personal knowledge requirement helps maintain the crucial boundary between lay and expert witness testimony.

Rule 701(c) states that lay witness opinion testimony should not be based on scientific, technical, or other specialized knowledge. The Advisory Committee Note explains that this limitation was added to the Rule in 2000 to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient proffering of an expert in lay witness clothing." *See* Fed. R. Evid. 701 advisory committee's notes.

Yet when a law enforcement officer provides lay testimony but did not actually participate in or observe the situation to which they are testifying, an officer's professional experience may be presented as the basis for his or her opinion. This framing dresses up a lay opinion testimony as expert testimony, suggesting that the witness has substantial knowledge of the case as a whole, relevant expertise, or both. The problem with blurring the line between expert and lay witness opinion testimony is that all testimony requiring "expertise" is subject to the *Daubert* standard and the implementing standards in Rule 702 that were adopted in response to *Daubert*. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). This additional requirement was not enacted to restrict the prototypical examples of the type of evidence designed to be admitted under Rule 701, including relating the appearance of persons or things, but did seek to codify the distinction that lay testimony "results from a process of

reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." *See State v. Brown*, 836 S.W.2d 530 (Tenn. 1992) and Fed. R. Evid. 701 advisory committee's notes.

This explanation throws the problem with admitting Agent Van Wie's testimony as a lay witness opinion into sharp relief: it defies belief that the prosecution would have called a witness who had a non-law enforcement job, say an administrative assistant, who happened to have watched the video in the course of his or her work at the police department, and have that individual testify to its contents for the jury. In reality, the prosecution established Agent Van Wie's credentials and specialized training, though he was providing lay opinion testimony. (App. B1.) Restricting the ability of law enforcement officers offering lay opinions such that they may testify to only to events for which they possess first-hand personal knowledge helps ensure that the basis for their testimony is actually their personal knowledge and not their expertise, and that a jury of laypeople understands that the witness's testimony of their perception of the event is what they are to evaluate in order to find the facts of the case.

Conclusion

The circuits have intractably divided over the meaning of the personal knowledge requirement of Rule 701 of the Federal Rules of Evidence. This Court should grant certiorari to resolve the split and provide much needed guidance on this important and recurring question of federal law.

Respectfully submitted,

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APPENDIX:

United States v. Odere Razak Suleitopa, No. 17-4165 (Unpublished Opinion).....A1

Trial Transcript Excerpt from *United States v. Suleitopa*, Crim. No. 1:16-cr-168-JFM, U.S. District Court for the District of Maryland, Direct Examination of John Van Wie, dated October 26, 2016.....B1