No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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MAURICIO LICEA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether district courts must give a dual-purpose jury instruction after a law enforcement officer testifies as both an expert and a percipient witness.

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Petitioner Mauricio Licea respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals affirmed petitioner's conviction, finding "the district court did not abuse its discretion by failing to give a dual-role jury instruction. We 'do not fault the district court for failing to intervene sua sponte' in such situations where the distinction between lay and expert testimony is a 'fine one.'" *United States v. Licea, et al.* Nos. 16-50283, 16-50285 (9th Cir. 2018) (citation omitted).[1]

JURISDICTION

On September 7, 2018, the court of appeals issued its decision. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

As relevant, the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case was a family affair. It involved Mauricio Licea, and his three brothers – Vidal, Luis, and Valentin. Following a lengthy investigation into their alleged drug dealing, including the use of multiple wiretaps, the government filed an

[1] A copy of the memorandum is attached as Appendix A.

indictment charging them, and several others, with conspiracy to distribute methamphetamine, and several related crimes. ER:1-9, 655.[2]

A. The trial.

During trial, the prosecution primarily relied on the testimony of Agent Hugee, to provide both lay and expert testimony.

Agent Hugee was the government's first witness. ER:1265. He explained how wiretap investigations work, ER:1267-73, and authenticated the intercepted calls. ER:1280-81. But very quickly, Agent Hugee's testimony turned to his opinion and interpretation of the calls. As just one of myriad examples:

> Q: I'd like to direct your attention to a statement on the transcript referred to by Luis that begins, "Okay, bro. I don't know what the deal is over there, but you should speak with Lily, or I don't know who, man. I think the car -- well, they said it had crossed. They are telling Chetos that -- that the car, that it's at secondary, or I don't know what the fuck. Is he lying or what, man?" What is referred to in that call based, on your knowledge of the investigation?
>
> [Defense counsel]: Your Honor, improper interpretation. This is not the expert the government noticed.
>
> [Court]: Overruled. You may answer the question.
>
> [Agent Hugee]: In this call between Luis and Vidal, Luis is telling Vidal to check with Lily because he is being told that the car had crossed. When he says "crossed," in this investigation I believe he is talking about crossing the border, the U.S./Mexican border.

[2] ER is the excerpt of record on file with the Ninth Circuit.

ER:1282.

The government also used Agent Hugee to tell the jury that the callers' otherwise normal language was actually drug related:

- "When they speak of 'girls' in this investigation, they're using that as a term of narcotics." ER:1299.
- "Valentin asked if they found the parts. In this investigation, speaking of 'parts,' what they were normally using that terminology was for narcotics." ER:1304.
- "He is referring to how much narcotics he lost when he said, 'mine fell.'" ER:1309.

For call after call – and over consistent defense objections – Agent Hugee provided his opinion. ER:1289, 1292, 1294, 1296, 1301-02, 1306, 1308, 1310-11, 1313. Sometimes he based that opinion on his role in the investigation, offering lay opinion testimony under Federal Rule of Evidence 701. In other instances, he provided expert testimony under Rule 702 based on his training and experience.

The district court, however, failed to instruct the jury on Agent Hugee's dual roles. That is, it did not explain the difference or demarcation between his expert and lay testimony. The jury convicted Mr. Licea. ER:2268-73. The district court imposed a mandatory-minimum, ten-year sentence. ER:2275.

B. The appeal.

On appeal, among other claims, Mr. Licea argued, "[t]he district court [] erred in permitting Agent Hugee's ubiquitous interpretations of the intercepted calls. This opinion testimony failed the foundational requirements for expert testimony under Rule 702, and lay-opinion testimony under Rule 701. Compounding the harm, the district court failed to give a dual-role instruction[.]" AOB:29-30.

The court of appeals disagreed. As noted, it held, "the district court did not abuse its discretion by failing to give a dual-role jury instruction. We 'do not fault the district court for failing to intervene sua sponte' in such situations where the distinction between lay and expert testimony is a 'fine one.'" App.A at 3 (citation omitted).

REASON FOR GRANTING THE PETITION

Review is warranted to determine whether a dual-role jury instruction is required when a law enforcement officer testifies as both an expert and lay witness.

In every federal district court, prosecutors use law enforcement witnesses to provide expert testimony about the meaning of phone calls recorded during narcotics investigations. The same witnesses, however, may also be called to provide lay testimony about their role in the particular investigation. In such instances, the officer or agent wears two hats – expert and percipient witness.

From a due process standpoint, such dual-capacity testimony creates numerous fairness concerns: (1) the officer's status as an expert may lend him unmerited credibility when testifying as a percipient witness, (2) cross-examination might be inhibited, (3) jurors could be confused, and (4) the agent might be more likely to stray from reliable methodology and rely on hearsay. *See United States v. Dukagjini*, 326 F.3d 45, 54-55 (2d Cir. 2003); *United States v. York*, 572 F.3d 415, 425 (7th Cir. 2009); *United States v. Flores-De-Jesus*, 569 F.3d 8, 21 (1st Cir. 2009); *United States v. Conner*, 537 F.3d 480, 488 (5th Cir. 2008).

As matter of commonsense, these risks are reduced if jurors are aware of the dual roles, and there is an explanation of how each piece of testimony should be evaluated. Thus, district courts should be required to instruct on the distinction and the demarcation between lay and expert testimony. *See United States v. Vera*, 770

F.3d 1232, 1242-43 (9th Cir. 2014). Indeed, several courts of appeals have suggested such a rule. *See*, e.g., *id.* [3]

The Sixth Circuit, for instance, has explained, "when a witness gives both fact and expert testimony, the district court must give a cautionary jury instruction regarding the [witness's] dual witness roles[.]" *United States v. Ham*, 628 F.3d 801, 806 (6th Cir. 2011) (citation and internal quotations omitted). And the

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[3] An example of such an instruction is as follows:

> You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] to both facts and opinions and the reasons for [his] [her] opinions.
>
> Fact testimony is based on what the witness saw, heard or did. Opinion testimony is based on the education or experience of the witness.
>
> As to the testimony about facts, it is your job to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. [Take into account the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.]
>
> As to the testimony about the witness's opinions, this opinion testimony is allowed because of the education or experience of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Model Instruction 4.15.

Seventh Circuit has noted, "the danger of unfair prejudice that results from an officer performing the dual role of eyewitness and expert can be minimized by cautionary instructions and by carefully constructed examination." *United States v. Lipscomb*, 14 F.3d 1236, 1242 (7th Cir. 1994).

While these statements are helpful, they do not go far enough. As this case demonstrates, district courts continue to omit the instruction, and courts of appeals continue to affirm. This Court, therefore, must intervene and create a bright-line rule. Specifically, it should require that, when a single officer offers both lay and expert testimony, the district court *must* instruct the jury regarding the significance of the dual roles.

Such a simple rule will serve the interests of justice by furthering the ultimate goal of basic fairness. It will help guarantee due process by improving the accuracy of jury instructions. And it will make it a little easier for lay jurors to do the job that is essential to our judicial system.

Accordingly, the Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: October 23, 2018

s/ Devin Burstein

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