No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE JESUS MARQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

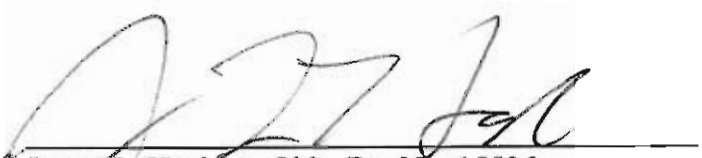
MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Jessie Jesus Marquez, moves this Court for leave to proceed *in forma pauperis* on his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit pursuant to Supreme Court Rule 39.1. Petitioner has been determined previously to be indigent by the Tenth Circuit Court of Appeals, and the undersigned counsel has been appointed by the Tenth Circuit to represent Petitioner under the Criminal Justice Act (18 U.S.C. 3006A). *See* attached Order.

WHEREFORE, because Petitioner is indigent and the undersigned counsel has been appointed to represent him by the Tenth Circuit pursuant to the Criminal Justice Act, Petitioner moves this Court for an order allowing Petitioner to proceed *in forma pauperis*.

DATED this 5th day of November, 2018.

Respectfully Submitted,



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COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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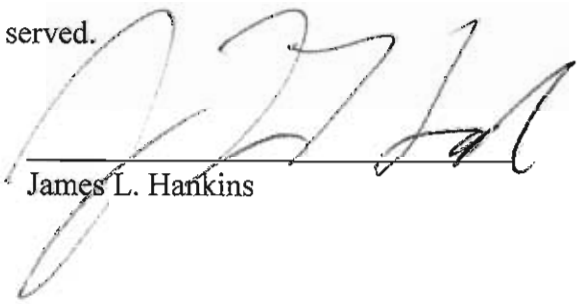
CERTIFICATE OF SERVICE

I, James L. Hankins, certify that I have this 5th of November, 2018, served a copy of Petitioner's Motion to Proceed *In Forma Pauperis,* via United States Postal Service, first-class postage pre-paid thereon, to:

Sarah M. Davenport
ASSISTANT UNITED STATES ATTORNEY
200 N. Church Street
Las Cruces, NM 88001
Telephone: 575.522.2304

All parties required to be served have been served.



James L. Hankins

FILED
United States Court of Appeals
Tenth Circuit

April 27, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESSIE JESUS MARQUEZ,

Defendant - Appellant.

No. 17-2028
(D.C. No. 2:13-CR-03367-RB-2)
(D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Circuit Judge.

This matter comes on for consideration of the motion filed by George Harrison to withdraw as counsel for Appellant Jessie Jesus Marquez and to appoint new counsel. Upon consideration thereof, the motion is granted.

Mr. Harrison is appointed counsel for Mr. Marquez pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, effective nunc pro tunc from the date the notice of appeal was filed. The appointment ends with the entry of this order appointing new counsel for Mr. Marquez.

James L. Hankins is appointed counsel for Mr. Marquez under 18 U.S.C. § 3006A. Mr. Hankins may be reached at 929 N.W. 164th Street, Edmond OK 73013; the telephone number is 405.753.4150; the fax number is 405.445.4956; e-mail is jameshankins@ocdw.com.

Mr. Hankins shall file an entry of appearance within 10 days of the date of this order.

Mr. Harrison shall transmit to Mr. Hankins copies of all documents in his possession relevant to this appeal by May 4, 2017.

The previous deadline for the opening brief is terminated and the opening brief shall be served and filed within 40 days of the date of this order. Subsequent briefing shall proceed in accordance with the schedule set forth in the Federal Rules of Appellate Procedure and the Tenth Circuit Rules.

All pleadings filed in this appeal may be accessed on the court's PACER docket. Criminal Justice Act counsel may obtain access to these materials free of charge by registering at pacer.psc.uscourts.gov.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk
Ellen Rich Reiter
by: Ellen Rich Reiter
Jurisdictional Attorney

No.

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE JESUS MARQUEZ,

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

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Question No. 1

Marquez was convicted of Possession of Meth with Intent to Distribute. The only evidence presented by the Government to support this conviction were statements attributed to Marquez in a recorded phone call. The Government produced no drugs, no drug tests, no description of drugs allegedly possessed by Marquez, no person who saw drug possession by Marquez, and no other circumstantial evidence to support this conviction. The question presented for review is:

Are statements made during a recorded phone call, standing alone, sufficient to sustain the Government's constitutional burden of proof in a drug case?

Question No. 2

Two federal agents offered extensive overview testimony about drug organizations and interpretations of drug lingo and recorded conversations pursuant to Rules of Evidence 701 & 702. The First Circuit, the D.C. Circuit, and the Fourth Circuit have authority circumscribing the ability of the Government to utilize such testimony; however, the Tenth Circuit appears to disagree with this authority. The question presented for review is:

To what extent do Rules 701 and 702 limit the scope of opinion, overview, and interpretive testimony of federal agents in drug cases?

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A. Published Opinion of the Tenth Circuit Court of Appeals

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In the

SUPREME COURT OF THE UNITED STATES

JESSIE JESUS MARQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Jessie Jesus Marquez petitions respectfully for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit decided this case by published opinion filed August 7, 2018. *See* attached Appendix "A" (*United States v. Jessie Jesus Marquez,* No. 17-2028 (10th Cir., August 7, 2018)).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered August 7, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V, provides, in part:

> No person shall be held to answer for a capital, or otherwise infamous crime...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

Federal Rule of Evidence 701 provides:

> 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.

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

STATEMENT OF THE CASE

In this large drug conspiracy case out of New Mexico, the Government indicted 19 persons, all of whom pled out except for Marquez (and the principal conspirator, Robert Christner, who died prior to indictment and trial as a result of health reasons). Marquez was indicted on seven counts: one count of conspiracy, two counts of possession of meth with intent to distribute, and four counts of using a "communication device" (his cell phone) to further a drug trafficking crime.

Jury trial commenced in Las Cruces, New Mexico, on January 25, 2016, in the courtroom of the Hon. Robert C. Brack. The Government called eight witnesses, and the defense rested without presenting evidence or calling a witness. At the conclusion of the evidence, the jury convicted Marquez on six of the seven counts (acquitting him on one of the possession with intent to distribute counts).

Marquez was sentenced formally on February 15, 2017, to 121 months on the conspiracy count; 121 months on the count of possession with intent to distribute; and 48 months on each of the "phone counts"; all counts to run concurrently, followed by five years of supervised release.

Marquez filed notice of appeal on March 1, 2017, and on August 7, 2018, the United States Court of Appeals for the Tenth Circuit affirmed in a published opinion. *See* appendix "A."

This Petition is in conformity with the Rules of this Court and is timely.

STATEMENT OF THE FACTS

As outlined in the circuit court below, this case concerns a drug conspiracy to distribute meth in and around the Alamogordo, New Mexico, area, which was headed by a man named Robert Christner. In fact, most of the Government's evidence involved Christner, but since Marquez was related to Christner's wife, and had contact with Christner, Marquez became a target.

But, the case started with the DEA efforts to investigate Christner.

The DEA grooms informants in criminal cases, and it was Christner's bad luck that one of these DEA informants, unnamed at trial, was able to make several controlled buys of meth–at the behest of the DEA–from Christner. This is how, as explained to the jury by DEA Agent Amy Billhymer, the investigation into the Christner conspiracy group in New Mexico began. According the Agent Billhymer, Christner dealt in "pound quantities" of meth.

The rest of the investigation, from that point, centered around trying to ascertain and identify the persons involved with Christner in his drug enterprise. This proved more difficult than one might think because Christner had several residences, but stayed frequently at hotels, often had no vehicle and was driven around by a driver, and he moved around a lot in the Las Cruces or Alamogordo areas of New Mexico.

In order to overcome some of the difficulties in surveillance, the DEA sought, and received, authorization for wiretaps of Christner's telephone. The DEA intercepted communications from Christner on three separate occasions, and on seven total phones–not all of which belonged to Christner. In this regard, the DEA ran the "wire room" listening to calls from 8:00 a.m. to midnight each day. Agent Billhymer told the jury that, although she and other agents were familiar with the sound of Christner's voice–because they had heard it many times through the audio of the controlled buys with the confidential informant–DEA agents did not know the voices of the people Christner called or to whom he spoke at the time of the initial intercepts.

The Government played some of the recorded calls for the jury, with commentary from Agent Billhymer. Although the DEA had intercepted approximately 4,000, calls, Agent Billhymer reviewed only a handful for the jury.

Listening to the phone calls of Christner proved fruitful when his supplier in Arizona, an unknown male, indicated that he was sending "three full ones, two oranges, eight grapes" which was a little over three pounds of meth. The meth was to be delivered by a drug courier named Michelle Casillas.

Federal agents, upon listening to the phone conversations, were ahead of it, and orchestrated tails on Casillas and Christner. As it turned out, Casillas was intercepted via traffic stop, but Christner evaded surveillance with his fast, erratic driving. However, he was stopped later in the day, and although no drugs were found in the car, police did find over $16,000.00 in cash. Although Christner escaped that time, things went badly for Casillas. Police removed her from the vehicle, searched it, and found approximately three pounds of meth inside the car.

Concerning this case, Agent Billhymer told the jury that Casillas was a drug courier for Christner, and that she would transport drugs from the unknown supplier in Arizona back to New Mexico for distribution. Marquez was not a part to any of these phone calls or text messages related to Michelle Casillas transporting three pounds of meth from Arizona to New Mexico, was not mentioned in any of these calls, and was not sighted as having anything to do with it.

Meanwhile, the man at the top of the conspiracy, Christner, was presumably unnerved at the arrest of Michelle Casillas, and he ditched his phone. As fate would have it, however, he informed the DEA informant of his new number almost immediately, and the DEA thereafter continued to intercept his calls starting on or about April 11 or 12, 2013.

The jury listened to a call that occurred on Christner's new phone on April 12. 2013. The import of this call, according to Agent Billhymer, was that Christner discussed a "big one" or large quantity of meth.

Christner and another person were trying to set up a large purchase of meth. This meant that Christner had lost contact with his previous supplier in Arizona and was looking for a new supplier. Agent Billhymer and the jury listened to more calls between Christner and an unknown person that occurred on April 17, 2013, that appeared to set up a meeting. However, agents were not able to surveill the meeting or determine whether it actually occurred.

Another call was intercepted the next day, on April 18, 2013. According to Agent Billhymer, the content of the call indicated that Christner had "met with someone" and was going to meet with them the next day. Later the same day, Christner spoke on the phone to co-conspirator Anthony Montoya. Montoya was a distributor of drugs for Christner in the Alamogordo, New Mexico, area. These discussions focused on "ounce quantities" of meth.

Other intercepts of April 18, 2013, solidified for Agent Billhymer that Christner was communicating with a person to set up a meeting with a new supplier, and that the meeting was within a 30-minute drive from Las Cruces, New Mexico. This appeared to be a bust, according to conversations between Christner and co-conspirator Michael Lucero, because Christner dealt with pound quantities, and the new supplier only dealt in ounces, and thus could not satisfy the demand for larger quantities desired by Christner. Lucero was also a distributor of meth for Christner in the Alamogordo, New Mexico, area.

The Government played additional phone calls from April, 2013, indicating that Christner was negotiating in pound quantities of meth, for which he was paying $8,000.00 per pound. Another co-conspirator named Stephan "Chill" Morales made his debut on the intercepted calls, picking up money for Christner. Morales was a distributor of meth for Christner in the Las Cruces, New Mexico, area.

Eventually, later in the early evening of April 19, 2013, Christner informed Morales that his ride was there to pick him up, and that he wanted to meet with Montoya at a convenience store in Las Cruces. Agents conducted surveillance and located Christner at the Village Inn, standing next to the building and talking on his cell phone. He then got into a gold Mitsubishi and drove to the convenience store and met with another individual.

They headed on I-10 towards Anthony, New Mexico. Christner apparently sensed the surveillance, his car exited, pulled over to the side of the road, and "just sat stationary until all the [agents conducting surveillance] passed the vehicle." There was a line of five or six cars containing DEA agents that were following Christner at that time, all of which passed his car on the side of the road. Agents were unable to turn around and re-acquire Christner without looking too obvious, so the surveillance was terminated. Agents learned later that the amounts involved in the transaction in Anthony were small amounts of meth or "ounce levels."

At last, we get to Marquez. Agents ran information on the gold Mitsubishi which came back with Rose Marquez as the registered owner. Rose Marquez is the mother of Jessie Marquez, and agents identified Jessie Marquez later as the driver of the vehicle on this particular day, although Deputy John Duffy who was at the scene conducting surveillance could not identify the man as Marquez (although he did obtain the license plate from the car).

DEA Agent Conan Becknell, on the other hand, was able to identify Marquez as the driver of the gold Mitsubishi. Marquez actually had a legitimate job at that time working at Chuck E. Cheese, and agents were able to locate the gold Mitsubishi there.

More intercepted phone calls were played for the jury, with appearances by other conspirators, such as Jay Black, described by Agent Billhymer as a distributor of meth for Christner

in Alamogordo. Black was described as one of Christner's "most trusted individuals." *Id.* Another name mentioned in the calls was Rustan "Rusty" Turner, who was also a distributor trusted by Christner.

At this point in the investigation, approximately one month after the arrest of Michelle Casillas, Christner had found a new supplier of meth that he was "comfortable with," and he let his people know that they were back in business. Christner was comfortable with the new supplier because he could obtain pound quantities. Christner also stopped using this particular phone, so agents were once again out of luck intercepting calls from that number.

Agent Billhymer told the jury that the DEA solved the problem of Christner not using one of his phones by having the informant make additional controlled buys and obtaining Christner's new numbers; also, the DEA obtained wiretaps of two other phones, that of Christner's girlfriend, and the phone of Jessie Marquez. As to Marquez's phone, the jury heard a recording from late May, 2013, where, according to Agent Billhymer, Marquez called Christner and used coded drug language ("zebra" for "ounces").

Another call was played for the jury, this one, according Agent Billhymer, was Marquez "negotiating" with someone else. A follow-up phone call made by Marquez, according to Agent Billhymer, to an unknown male revealed the two discussing a price for one ounce of meth at "9," or "950," or even "1,000."

After this call was played, and Agent Billhymer interpreted it for the jury, the prosecutor asked Agent Billhymer directly, based upon the sum of the investigation, "what do you believe was Mr. Marquez' role in Mr. Christner's drug trafficking business?" Agent Billhymer answered:

> Basically that he distributed methamphetamine for Mr. Christner. At this particular time of the investigation, there was approximately a month gap between the last time we were listening to Target Telephone 2 and then this time when we began listening to Mr. Marquez' phone, Target Telephone 7. And through other calls, we determined that, once again, Mr. Christner might not have been happy with that source of supply and he was actually communicating with a new source of supply in Arizona, not the same guy as before, but a new–a new person that was actually facilitated by his girlfriend.

However, in the next transcript page, when asked what she "expected to hear" based upon the April phone intercepts, Agent Billhymer testified that she expected to hear conversations between Marquez and the new supplier, but in fact did not hear any conversations about this topic.

The denouement for Christner came shortly thereafter, on June 6, 2013, when intercepted phone calls indicated a large drug deal in which a female would deliver the meth to Christner. The DEA intervened, Christner was set up, and ultimately Christner and two other of his crew were arrested on that date.

Marquez was not arrested, nor had any part in this transaction.

Once caught and seeing no way out, Christner cooperated with the DEA in at least some respects, and was debriefed superficially that same day; but as it turned out, the arrest really was the end of the line for Christner because the next day he complained of chest pains, was admitted to the hospital, diagnosed with a heart attack, and about a week later he died of complications of his heart condition.

Christner was never indicted in this case.

The last intercepted phone call played for the jury was a 40-minute marathon, during which Marquez identified himself, allegedly, as a cousin to Christner's wife, Maria, as "the Mexican, Jessie," and otherwise talked to some of the other folks indicted in this case, such as Bret Hampton,

who told Marquez about the bust. The key aspect of this call that stands out is the fact that the others involved are telling information *to* Marquez; Marquez is not giving anyone information, and in fact seems oblivious to what was going on, having not had any communication with Christner in about a week.

At this point, in light of the death of Christner, the DEA began making preparations to arrest the various conspirators. To that end, search warrants were obtained for the residences of Marquez. The agents found some scales, but no residue of meth or any other illegal drugs.

As to whether it was actually Jessie Marquez talking on the phone calls that were played to the jury, the Government provided little to prove that fact. Agent Billhymer referred to a voice on some of the intercepted phone calls as that of Marquez; however, she admitted that she had never spoken to Marquez, or heard his voice in person.

How then was she able to say that any voice on the intercepted calls was him? Her explanation was that agents listened to phone calls regarding meetings, and if Marquez showed up at the meeting, they assumed it was him on the phone call–even though they lost the tail on Christner and did not know who he met a large portion of the day, and even though Christner was related to Marquez and it was not uncommon for them to meet or talk on the phone; nor did the DEA perform any type of voice analysis of the phone calls.

Further, the DEA did not perform any controlled buys with Marquez. Did not observe him selling drugs. *Id.* Did not find him in possession of any drugs. Marquez was not a courier of drugs, nor was he ever found to be transporting drugs. The focus of the investigation was Christner, not Marquez; and Marquez was not present when Christner was busted. Nor was it unusual that Marquez talked to Christner on the phone–they were related by marriage.

In fact, Agent Billhymer admitted that the Government had no intercepts which showed that Marquez with any interactions with any of the other 18 individuals indicted in this case, all of whom pled guilty, and none of the indicted co-defendants provided any direct knowledge implicating Marquez. Finally, when Marquez was arrested, he had cell phones, but none of them were involved in the investigation of this case.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE THE LEGAL QUESTION WHETHER STATEMENTS MADE DURING A TELEPHONE CALL, STANDING ALONE, CAN BE SUFFICIENT TO SUSTAIN THE BURDEN OF THE GOVERNMENT OF PROVING POSSESSION OF DRUGS BEYOND A REASONABLE DOUBT.

As outlined above, and as explained by the Tenth Circuit panel below, the Government was able to secure a conviction of Marquez for the crime of possession of methamphetamine with intent to distribute, when the only evidence presented at trial in support of this count was a single intercepted phone call between Marquez and Christner on March 16, 2013. *See* appendix at 10. As the Tenth Circuit panel explained, the Government "introduced no other evidence to show Marquez possessed drugs on that date." *Id.*

Further, during this call neither Marquez nor Christner used the words "drugs" or "methamphetamine" and the Government sought to overcome this by testimony from federal agents who gladly told the jury about what Marquez and Christner were talking (coded language). *Id.* 11. The Government's evidence–the only evidence–was a single statement allegedly made by Marquez to the effect of, "I still have it," with "it" being the drugs. *Id.*

Thus, the situation at trial was that the Government presented no actual drugs that were

allegedly possessed by Marquez, no lab tests of any substances purporting to be drugs possessed by Marquez, no person who claimed to have seen Marquez possess drugs on March 16, 2013, no physical evidence of drug possession by Marquez, and no direct admission by Marquez that he possessed drugs.[1]

The legal question thus presented is whether a statement in a phone call, standing alone, can ever be legally sufficient as a matter of law to sustain the Government's burden of proving possession of drugs. Marquez had strong reason to believe that such a statement could not support the Government's burden based upon Tenth Circuit precedent in *United States v. Hall*, 473 F.3d 1295 (10th Cir. 2007) and *United States v. Baggett*, 890 F.2d 1095 (10th Cir. 1989); as well as authority from the Second Circuit in *United States v. Bryce*, 208 F.3d 346 (2nd Cir. 1999).

In *Hall*, *Baggett*, and *Bryce*, the circuit courts of appeals held that statements made during a phone call indicating drug possession, standing alone, had insufficient evidentiary strength to sustain the Government's burden.

However, the Tenth Circuit panel stated that Marquez had "overstated" the holdings of these cases, principally on the factual distinction that the defendants in *Hall* and *Baggett* were talking about buying drugs rather than distributing drugs that they already possessed; and that in *Bryce*,

---

[1] The Tenth Circuit panel found below that the alleged statement by Marquez that he "still" had it constituted direct evidence of drug possession. *See* appendix at 13 (*citing United States v. Cardinas Garcia*, 596 F.3d 788, 796-97 (10th Cir. 2010) ("Direct evidence is evidence [that], if believed, resolves a matter in issue[.]") Marquez takes issue with this characterization because in order to make this leap of logic, the panel had to rely on more than the words allegedly spoken by Marquez–it had to take the additional step of accepting the interpretation of his words per the testimony of federal agents who claim that Marquez meant drugs when he made the statements. This is much different from a direct admission of possession as characterized by the panel. Thus, the words, even if spoken by Marquez, are not direct evidence of drug possession because there is an additional step of "interpretation" by federal law enforcement agents that must be believed in order to make that assumption.

which involved statements regarding the sale of drugs, the statements were "equivocal." Appendix 11-12.

These distinctions appear to Marquez to miss the point.

First, as the Tenth Circuit panel admitted, the recorded phone call introduced by the Government of Marquez talking made no direct reference to drugs or drug possession. Appendix 11. In order to make this leap as a matter of fact in the first instance, the Government had to introduce testimony by federal drug agents interpreting what Marquez meant during the phone call. *Id.* ("But government witnesses testified that they were discussing methamphetamine in coded language.")

This seems to Marquez to be important, because we are not actually talking about statements made by Marquez during a phone call—we are talking about the opinion of federal agents of what Marquez meant when he made statements during a recorded phone call. The inference that he was discussing drugs is once-removed from the actual words spoken during the call.

Beyond this, the distinction pointed out by the panel that the defendants in *Hall* and *Baggett* were discussing purchases rather than sales seems to miss the point, as does the alleged factual distinctions in *Bryce*.

The point is that the Government has to prove beyond a reasonable doubt that the accused possessed a physical substance. Mere words to that effect, standing alone, whether claiming to sell or purchase, seem to fall short of that constitutional burden.

Finally, although *Hall* and *Baggett* involved recorded calls regarding purchases, *Bryce* involved a sale. Marquez perceives that the Second Circuit in *Bryce* got it right, and that the factual distinctions outlined by the Tenth Circuit panel are distinctions without difference.

In the view of Marquez, the constitutional burden of proof established by this Court in *In re Winship*, 397 U.S. 358 (1970), has to mean something. At a minimum, it must stand for the proposition that words alone, spoken during a recorded phone call, cannot sustain the burden of the Government to prove beyond a reasonable doubt that the accused possessed contraband.

This Court must grant certiorari and consider a constitutional rule that would prevent convictions on such obviously insufficient evidence.

II.

THIS COURT SHOULD OFFER GUIDANCE TO THE LOWER COURTS ON THE PROPER ROLE OF OVERVIEW TESTIMONY BY FEDERAL AGENTS IN THE CONTEXT OF FEDERAL RULES OF EVIDENCE 701 AND 702.

As Marquez argued in the Tenth Circuit below, he had three complaints regarding federal agents testifying: 1) Agents Billhymer and Becknell gave opinion testimony, one as a lay witness the other as an expert, that was an improper encroachment into the province of the jury as to the role of Marquez in the conspiracy; 2) both Agents Billhymer and Becknell "interpreted" drug lingo on the recordings, essentially telling the jury that the language used supported the Government's case without any foundation and encroaching upon the province of the jury to decide the facts; and 3) Agent Billhymer conveyed hearsay from her interview with Christner prior to his death.

In essence, the jury had to do little thinking for themselves in this case because Agents Billhymer and Becknell told them what all of the language used on the recordings meant, who was speaking on the tapes, and the various roles of the players in the conspiracy.

For example, after one of the calls from April, 2013, was played, Agent Billhymer "interpreted" it for the jury. She was asked by the prosecutor directly, based upon the sum of the

investigation, "what do you believe was Mr. Marquez' role in Mr. Christner's drug trafficking business?" Tr. 236. Agent Billhymer answered:

> Basically that he distributed methamphetamine for Mr. Christner. At this particular time of the investigation, there was approximately a month gap between the last time we were listening to Target Telephone 2 and then this time when we began listening to Mr. Marquez' phone, Target Telephone 7. And through other calls, we determined that, once again, Mr. Christner might not have been happy with that source of supply and he was actually communicating with a new source of supply in Arizona, not the same guy as before, but a new–a new person that was actually facilitated by his girlfriend.

Tr. 237. In fact, after nearly every recording played, the prosecutor asked Agent Billhymer to tell the jury what it really meant. *See, e.g.*, Tr. 60-62; 64; 67; 68; 71-72; 76; 158; 160; 169. Agent Billhymer was not qualified as an expert in this regard under Rule 702; thus, she testified as a layman under Rule 701.

In addition, Agent Billhymer debriefed Christner before he died about the case, and was allowed to tell the jury, over objection on Confrontation grounds, that Christner had "confirmed" her understanding of how is drug conspiracy operated and its organizational structure. Tr. 243.

Finally, both Agent Billhymer and Agent Becknell "interpreted" drug lingo in the recordings and told the jury what certain words and phrases meant. *See, e.g.*, Tr. 252 ("all the M's were not at that spot" meant money); 256 ("car" meant meth); 257 ("slings" meant deals in meth); 325 ("fire" meant high quality); 326 ("no legs to it" meant inferior meth); 328 ("girls" is a code word); 329 ("full ones" means pounds; "oranges" means ounces; "grapes" means grams); 332 ("Ps" means pounds); 333 ("at ten" and "from eight" are prices per pound); 334 ("groceries" means meth); 334 ("green" means money); and 335 ("zebras" means ounces).

Marquez argued below that it was error for Agent Billhymer to offer these "interpretations"

as a layman under Rule 701 because that rule was designed to ensure that any opinions offered by a lay witness are based on personal, first-hand knowledge or observation, and a process of reasoning familiar in everyday life. *See United States v. Williams*, 827 F.3d 1134, 1155 (D.C. Cir. 2016) (drug convictions reversed because of improper admission of lay opinion testimony from FBI Agent involved in the underlying investigation concerning his interpretations of audio and video recordings) (*citing* Fed. R. Evid. 701 adv. comm. note); *United States v. Hampton*, 718 F.3d 978 (D.C. Cir. 2013) (drug conspiracy reversed when FBI case agent "interpreted" drug lingo on intercepted phone calls; agent was not proffered as an expert under Rule 702, but rather as a lay witness under Rule 701); *United States v. Freeman*, 730 F.3d 590 (6th Cir. 2013) (same); *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010) (same); *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007) (same); *United States v. Garcia*, 413 F.3d 201 (2nd Cir. 2005) (same).

The Government apparently tried an end-around to this problem (if it even realized it was a problem) by presenting Agent Becknell, who was Agent Billhymer's boss at the time, as an "expert" in the general organizational knowledge of drug trafficking organizations and methods, and the trial court approved Agent Becknell as an expert. Tr. 304, 307.[2]

What followed was a roughly 35-transcript-page monologue about how drug trafficking organizations work, how the "super-labs" in Mexico make most of the meth that enters the United States, how he once tried to make meth at a DEA training facility in Dallas and found out that it is harder than it looks, that drug traffickers use code words on the phone, that meth is typically meted

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[2] The ruling of the district court was a little bit odd. The court limited the testimony of Agent Becknell to prevent "profiling" meaning, "I wasn't going to have him say, given what I know, Mr. Marquez is or is not a courier or mid-level supplier or whatever. I wasn't going to allow him to do that." Tr. 307. However, this is exactly what the non-expert Agent Billhymer did earlier in the trial. Tr. 237.

out in gram units which is about the size of a Splenda packet (which he produced for the jury–actual packets of the artificial sweetener Splenda), he listened to some of the recordings and "interpreted" the code words as Agent Billhymer had done previously, and took the jury through the street prices for meth. Tr. 299-340.

However, simply granting Agent Becknell expert status does not get the Government out of the woods. The problem here, in the view of Marquez, is that even accepting Agent Becknell as an expert, his testimony conflated his expert and fact testimony (his reliance upon his knowledge of the investigation to support his code interpretations), the complete lack of a methodology employed to reach his conclusions as an expert (some drug jargon is unique to an organization and he offered no rationale on how to interpret it in those situations other than his experience and training), and the lack of foundation for all of his interpretations.

These problems were highlighted in a very similar case out of the Fourth Circuit in *United States v. Garcia*, 752 F.3d 382, 391-92 (4th Cir. 2014), where the panel found these errors constituted reversible error, particularly when the expert alternated between giving expert testimony and then immediately justifying it with factual knowledge from the case as Agent Becknell did here every time he interpreted a phone call recording played in open court. *Garcia*, 752 F.3d at 393.

In essence, the Fourth Circuit found that the expert in *Garcia* used her personal knowledge of the investigation to form (not simply to "confirm") her "expert" interpretations, which is exactly what Agent Becknell did here. *Id.* *Garcia* is very similar to the facts of Marquez's case, and this Court should reach the same result of reversal as the Fourth Circuit did in *Garcia*.

Finally, Marquez presented to the panel what he detected as a disturbing trend in these drug conspiracy cases regarding "overview testimony" from the case agent (actually, in Marquez's case

it came from both Agent Billhymer and Agent Becknell).

The First Circuit has criticized sharply the Government for doing this in multi-defendant drug conspiracy cases. *See United States v. Meises*, 645 F.3d 5 (1st Cir. 2011); *United States v. Flores-de-Jesus*, 569 F.3d 8, 16-27 (1st Cir. 2009); *United States v. Casas*, 356 F.3d 104, 117-20 (1st Cir. 2004). By "overview testimony" Marquez means the procedure by which the case agent testifies as to the step-by-step progression of the investigation, describes the phone calls and meetings in detail that culminate in the arrests, and then at the end, after confirming that the agent has listened to the phone calls, the prosecutor asks the agent what role each individual had to play in the conspiracy. *See Flores-de-Jesus*, 569 F.3d at 24 (the conclusion of the agent as to the role of each conspirator is "the most troubling part" of the testimony).

Again, the legal culprit here is the manner in which the Government runs rough-shod over Rule 701 by allowing a lay fact witness to testify to "facts" of which she has no personal knowledge, often based on hearsay or multiple levels of hearsay, and often conclusory without any personal foundation (how does Agent Billhymer know that Jay Black and Rustan Turner were the "most trusted" by Christner? Or that Marquez was a street-level distributer? It is not from her personal knowledge).

As he acknowledged below, Marquez realizes that trial counsel failed to object to most of this, but urged the Tenth Circuit to find plain error. Under the authorities cited above, there was error that was plain, the substantial rights of Marquez were compromised in the form of testimony that was improper and highly prejudicial, and the integrity of the judicial system should be checked in this regard.

On appeal, the Tenth Circuit's mode of analysis appears to differ substantially from that of

other circuits on this issue, and Marquez perceives a divide among the circuit courts of appeals on how to handle federal agent testimony in these drug cases, if not an outright split of authority.

First, the Tenth Circuit distanced itself from what it termed the "objective-basis rule" formulated by the D.C. Circuit in *Williams*. *See* Appendix 22 ("We're not bound by the D.C. Circuit's objective-basis rule.") The Tenth Circuit concluded that, even if it were bound by the D.C. Circuit rule, Agent Billhymer had an objective basis for her conclusions based upon her "own perception of Marquez' role, which she gleaned from personally listening to '[h]undreds of hours of [intercepted] calls." *Id.*

But in the view of Marquez, the Tenth Circuit misses the point: Agent Billhymer had no personal knowledge of the role of Marquez or any personal knowledge of how Christner's drug operations worked; she only had phone calls which she had to interpret in order to acquire such knowledge.

Similarly, the testimony of Agent Billhymer "interpreting" drug jargon was not based on her personal knowledge. Marquez presented authority from the Fourth Circuit and the First Circuit, *supra*, regarding how this subverted Rule 701, but the Tenth Circuit failed to address it, simply stating that "Marquez hasn't pointed us to any Supreme Court or Tenth Circuit authority finding error in testimony like this." *See* Appendix 24-25.

However, the holding of the Tenth Circuit, and its interpretation of Rule 701, seem to be contrary to that of the Fourth Circuit and the First Circuit. The same is true for its interpretation of Rule 702.

Concerning the testimony of Agent Becknell, which conflated lay and expert testimony, the Fourth Circuit in *Garcia* reversed a drug case on this basis. However, the Tenth Circuit noted

Garcia, but held that *Garcia* did not constitute well-established law in the Tenth Circuit, and thus refused to consider it for plain error purposes; and even noted that it had expressly approved of the admission of similar testimony, which indicates the existence of a circuit split on this issue which should merit review by this Court. *See* Appendix 26.

Finally, the extensive overview testimony of Agents Billhymer and Becknell was improper. Marquez presented the trio of cases from the First Circuit finding such testimony reversible error. *See* Appendix 27 (*citing Meises*, *Flores-de-Jesus*, and *Casas*). Again, the Tenth Circuit panel dismissed these cases from the First Circuit as not establishing well-settled law in the Tenth Circuit, and therefore not plain error. *Id.* 28.

Thus, as with the interpretations of Rule 701 and Rule 702, there appears to be serious disagreement, if not an outright circuit split, between the First Circuit and the Tenth Circuit on the issue of overview testimony by federal agents in drug cases. This Court should consider the issue and offer guidance to the lower courts on the proper scope of such testimony.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DATED this 5th day of November, 2018.

Respectfully submitted,

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COUNSEL FOR PETITIONER

In the

SUPREME COURT OF THE UNITED STATES

JESSIE JESUS MARQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, James L. Hankins, certify that I have this 5th day of November, 2018, served a copy of Petitioner's *Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*, by depositing the copy in the United States Mail, first-class postage pre-paid thereon, addressed to:

Sarah M. Davenport
ASSISTANT UNITED STATES ATTORNEY
200 N. Church Street
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Telephone: 575.522.2304

All parties required to be served have been served.

James L. Hankins

In the

SUPREME COURT OF THE UNITED STATES

JESSIE JESUS MARQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX "A"

Published Opinion
United States v. Jessie Jesus Marquez, No. 17-2028 (10th Cir., August 7, 2018)

FILED
United States Court of Appeals
Tenth Circuit

August 7, 2018

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESSIE JESUS MARQUEZ,

Defendant - Appellant.

No. 17-2028

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:13-CR-03367-RB-2)

James L. Hankins, Edmond, Oklahoma, for Defendant-Appellant.

Sarah M. Davenport, Assistant United States Attorney (James D. Tierney, Acting United States Attorney, with her on the brief), Las Cruces, New Mexico, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **MORITZ** and **EID**, Circuit Judges.

MORITZ, Circuit Judge.

Jessie Marquez appeals his convictions for six drug-related crimes, including conspiracy to distribute 500 grams of methamphetamine. Marquez raises three issues: he challenges the sufficiency of the evidence supporting each of his convictions, he asserts that the district court erred by questioning a witness, and he contends that the

district court shouldn't have admitted certain testimony from two of the government's witnesses. We reject each of Marquez' arguments. First, we conclude that the evidence was sufficient for a rational jury to find Marquez guilty of using a phone to facilitate a drug felony, participating in a conspiracy to distribute over 500 grams of methamphetamine, and possessing methamphetamine with the intent to distribute it. Next, we hold that the district court didn't err when it asked a witness one question to clarify a factual matter. Last, we find that the district court didn't abuse its discretion or plainly err when it admitted testimony from government witnesses. Accordingly, we affirm.

Background

In January 2013, law enforcement began investigating Robert Christner's methamphetamine dealings in and around Alamogordo, New Mexico. Investigators conducted several controlled drug purchases from Christner and began attempting to identify his suppliers and distributors. They also surveilled and interrupted two drug deals—one in March 2013 and one in June 2013—in which Christner attempted to buy several pounds of methamphetamine from suppliers in Arizona.

During the course of this investigation, investigators obtained wiretaps on Christner's phones, allowing them to intercept many of his calls and text messages. Then, when Christner set up meetings over the phone, investigators sometimes surveilled those meetings. In one such instance, they identified Marquez as someone who had spoken to Christner on the phone about obtaining methamphetamine and had arranged to meet up with him. And after identifying Marquez, they obtained a

wiretap for his phone as well. Highly summarized, the intercepted calls between Christner and Marquez suggested that (1) Marquez distributed methamphetamine that he obtained from Christner and (2) when Christner's methamphetamine supplier fell through, Marquez tried to find him a new supplier.

The investigation as a whole resulted in an indictment charging Marquez and 17 other individuals with conspiracy to distribute "500 grams and more" of methamphetamine.[1] R. vol. 1, 2. The indictment further charged Marquez with two counts of possessing methamphetamine with the intent to distribute and four counts of using a phone to facilitate a drug felony.

Marquez proceeded to trial, and the jury convicted him of conspiracy, all four phone counts, and one possession-with-intent count. The district court sentenced him to 121 months in prison. Marquez appeals.

Analysis

I. Sufficiency of the Evidence

Marquez first challenges the sufficiency of the evidence supporting each of his six convictions. We review sufficiency questions de novo and look at "the evidence in the light most favorable to the government to determine whether any rational jury could have found guilt beyond a reasonable doubt." *United States v. Dahda*, 853 F.3d 1101, 1106 (10th Cir. 2017), *aff'd on other grounds*, 138 S. Ct. 1491 (2018).

[1] Christner himself wasn't charged because he died of complications from heart surgery a few months before the government filed the indictment.

A. Using a Phone to Facilitate a Drug Felony

Marquez first maintains that the evidence wasn't sufficient to support his convictions for using a phone to facilitate a drug felony because the government didn't "produce *any* witness who claimed to be familiar with Marquez'[] voice in real life and who could then identify it . . . as the voice on the calls." Aplt. Br. 27. As a result, Marquez asserts, a rational jury could not have concluded that the voice on the intercepted calls was his. But as the record demonstrates, the government presented substantial circumstantial evidence of Marquez' identity.

DEA Case Agent Amy Billhymer and DEA Agent Conan Becknell testified about how they identified Marquez. Specifically, on April 19, 2013, investigators intercepted a call from Christner to a phone number designated as "Target Telephone 7." R. vol. 3, 129. In the call, Christner arranged to meet with an individual and accompany that individual to buy four ounces of methamphetamine for $3,200. Christner told this individual that he'd "be on foot," Supp. R. 89, and that the individual should pick him up so they could then go buy the drugs. Christner then made a second intercepted call, in which he arranged to meet Stephen Morales at a Pic Quick convenience store. Christner indicated to Morales that he wanted to pick up money from Morales for the drug purchase he planned to make with the individual on the first call. At the end of the call with Morales, Christner said, "[T]here's my ride." *Id.* at 91. He asked Morales to go to the Pic Quick "right now." *Id.*

At this time, Becknell was surveilling Christner, who was standing on a street corner. Becknell watched as a gold Mitsubishi pulled up and Christner got into the

passenger side of the vehicle. Becknell then followed the Mitsubishi as it drove to a Pic Quick and parked. Becknell followed Christner and the Mitsubishi's driver into the Pic Quick, at one point passing "within a couple of feet" of the two men. R. vol. 3, 212. Becknell then watched Christner leave the Pic Quick, get into a green car for a few minutes, and then get back into the Mitsubishi.

Later that day, Billhymer learned that Rose Marquez owned the Mitsubishi and that Jessie Marquez was her son. Billhymer showed Jessie Marquez' driver's license picture to Becknell, and Becknell identified him as the driver of the Mitsubishi. Becknell also identified Marquez in court as the driver.

The government presented additional evidence corroborating that it was Marquez' voice the agents intercepted on Target Telephone 7. First, in another call to Target Telephone 7, the speaker who answered the phone said he was "at [his] house in town. Over here on Hoagland." Supp. R. 78. Investigators discovered that Marquez had two residences, one of which had an address on Hoagland. Second, in another call to Target Telephone 7, the speaker who answered the phone mentioned that he worked at or near a Chuck E. Cheese at the mall, and investigators confirmed that Marquez worked there. Third, and perhaps most critically, in a call made by Target Telephone 7, the caller identified himself as "Jessie"—Marquez' first name. *Id.* at 134.

Marquez points out that Billhymer testified she'd never actually heard Marquez speak in person. Nor did the government present a witness familiar with Marquez' voice to testify that Marquez was speaking on the Target Telephone 7 calls.

But as we have outlined, the government presented strong circumstantial evidence that Marquez was the speaker on Target Telephone 7. And Marquez presents no other challenge to the sufficiency of the evidence for these counts. Thus, viewed in the light most favorable to the government, the evidence was sufficient for a rational jury to conclude that Marquez, speaking on Target Telephone 7, used a phone to facilitate a drug felony. *See Dahda*, 853 F.3d at 1106.

B. Conspiracy

Marquez also challenges the sufficiency of the evidence supporting his conspiracy conviction. To convict Marquez on this count, the government had to prove that (1) "two or more persons agreed to violate the law," (2) Marquez "knew the essential objectives of the conspiracy," (3) Marquez "knowingly and voluntarily participated in the conspiracy," and (4) "the alleged co[]conspirators were interdependent." *Id.* at 1107. Additionally, to establish the scope of the charged conspiracy, the government had to prove that it involved "500 grams and more" of methamphetamine. R. vol. 1, 2. Marquez challenges all but the first of these elements, and his overarching argument is that the government failed to prove that he participated in a broad, 18-person conspiracy involving over 500 grams of methamphetamine.

First, Marquez points out that the evidence showed he interacted only with Christner and not with any of the other 17 people charged in this conspiracy. He argues that his separation from the rest of the group means that he didn't "kn[o]w the essential objectives of the conspiracy." *Dahda*, 853 F.3d at 1107. But being separate

from the remainder of the conspiracy isn't determinative: "A conspirator 'need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy.'" *United States v. Evans*, 970 F.2d 663, 669 (10th Cir. 1992) (quoting *United States v. Metro. Enters., Inc.*, 728 F.2d 444, 451 (10th Cir. 1984)). Instead, a conspirator must simply be generally aware of the conspiracy's scope and objective. *Id.* at 670.

Here, contrary to Marquez' argument, the government's evidence showed that Marquez was generally aware of the full scope and objective of the conspiracy, which was to distribute over 500 grams of methamphetamine. True, the evidence showed that Marquez himself distributed methamphetamine from Christner only in ounce quantities, not in pounds. But several of the intercepted phone calls showed that Marquez helped Christner locate a new methamphetamine supplier—one who was willing to sell Christner two pounds of methamphetamine per week. Specifically, Marquez reported to Christner, "I got us two a week. We're talking the p's at least, not three, but I got us two." Supp. R. 76. Law-enforcement officers testified that "p's" means "pounds," R. vol. 3, 332, that this conversation was about pounds of methamphetamine, and that there are "about 454 grams in a pound," *id.* at 322. So when Marquez reported that he "got [them]" two pounds of methamphetamine per week, he was referring to an amount well over the 500 grams charged in the indictment.

From these facts, viewed in the light most favorable to the government, a reasonable jury could conclude both that (1) the essential objective of the conspiracy

was to distribute over 500 grams of methamphetamine and (2) Marquez knew as much. That the evidence didn't show Marquez interacting with other charged coconspirators isn't determinative: a conspiracy requires only "two or more" people, and the evidence showed Marquez conspired with Christner. *Dahda*, 853 F.3d at 1107.

This same evidence supports the conclusion that Marquez "knowingly and voluntarily participated" in this conspiracy. *Id.* He both helped Christner find a new supplier and distributed methamphetamine that Christner provided. In short, this evidence showed that Marquez played at least "a minor role in the conspiracy [sufficient] to make him a co[]conspirator." *United States v. Pickel*, 863 F.3d 1240, 1252 (10th Cir. 2017).

Marquez challenges the interdependence element as well, for which "the evidence must show the 'coconspirators intend[ed] to act together for their shared mutual benefit within the scope of the conspiracy charged.'" *Id.* (alteration in original) (quoting *United States v. Caldwell*, 589 F.3d 1323, 1329 (10th Cir. 2009)). To determine whether the government presented sufficient evidence of this element, we ask whether Marquez' actions "facilitated the endeavors of other alleged co[]conspirators or facilitated the venture as a whole." *Id.* at 1252–53 (quoting *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1124 (10th Cir. 2011)).

Contrary to Marquez' argument, the government presented sufficient evidence of interdependence. First, Marquez' assistance in finding Christner a new methamphetamine supplier was undoubtedly intended to facilitate the drug

conspiracy. *See id.* at 1253 ("[A] single act can be sufficient to demonstrate interdependence." (quoting *Caldwell*, 589 F.3d at 1329)); *Evans*, 970 F.2d at 671 ("What is needed is proof that [the conspirators] intended to act *together* for their *shared mutual benefit* within the scope of the conspiracy charged."). The government bolstered this conclusion by presenting intercepted calls that Christner made to four of his other distributors immediately after learning that Marquez had reached a deal with the supplier for two pounds of methamphetamine a week. In these calls, Christner told his distributors that he obtained some "groceries," which investigators testified meant methamphetamine. Supp. R. 82. He also told his distributors that he would be getting more methamphetamine in the future: "I think I found uh, uh, somebody with those groceries all the time." *Id.* at 83. This was sufficient evidence from which the jury could conclude that Marquez' actions "were necessary or advantageous to the success of the activities of co[]conspirators," satisfying the interdependence element of conspiracy. *Pickel*, 863 F.3d at 1253 (quoting *United States v. Daily*, 921 F.2d 994, 1007 (10th Cir. 1990), *abrogated on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995)).

Marquez also frames his sufficiency argument in a different light, insisting that a fatal variance occurred because the evidence at trial only proved that he participated in smaller, individual conspiracies and not the large, 500-gram conspiracy charged in the indictment. *See United States v. Carnagie*, 533 F.3d 1231, 1237 (10th Cir. 2008) ("A variance arises when an indictment charges a single conspiracy but the evidence presented at trial proves only the existence of multiple

conspiracies."). But as we have outlined, the government's evidence was sufficient for a jury to conclude that Marquez knew the conspiracy's essential objective and knowingly and voluntarily participated in it because he helped Christner find a supplier of two pounds, or 908 grams, of methamphetamine per week. That conclusion dooms Marquez' variance argument. *See United States v. Griffin*, 493 F.3d 856, 862 (7th Cir. 2007) ("We treat a conspiracy variance claim as an attack on the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy.").

Thus, we reject Marquez' contention that a variance occurred in this case. *See United States v. Fishman*, 645 F.3d 1175, 1191 (10th Cir. 2011) (finding no variance because "record amply support[ed] the jury's determination that there was only a single conspiracy"). And because we find no variance, "we do not reach the second question of whether [the] variance substantially prejudiced" Marquez. *United States v. Serrato*, 742 F.3d 461, 468 (10th Cir. 2014).

C. Possession with Intent to Distribute

Marquez next argues that the government's evidence was insufficient to prove that he possessed methamphetamine with the intent to distribute it. The indictment charged Marquez with possessing and intending to distribute methamphetamine "[o]n or about March 16, 2013." R. vol. 1, 18. The government's only evidence for this count was one intercepted phone call between Marquez and Christner on March 16. It introduced no other evidence to show that Marquez possessed drugs on that date.

In the call, Christner and Marquez didn't specifically use the words "drugs" or "methamphetamine." But government witnesses testified that they were discussing methamphetamine in coded language. Essentially, the two discussed Marquez' progress in distributing a prior batch of low-quality methamphetamine and a new batch of high-quality methamphetamine. Marquez told Christner—in reference to the low-quality batch—"I still have it." Supp. R. 25. Christner replied that if people were complaining about the low quality, Marquez should sell the new, higher-quality batch. Marquez told Christner that people weren't complaining. And about the high-quality batch, Marquez said, "I haven't even got to that yet." *Id.*

Marquez contends that this intercepted call wasn't sufficient to prove that he possessed methamphetamine on March 16. In support, he cites two cases from this Circuit, *United States v. Hall*, 473 F.3d 1295 (10th Cir. 2007), and *United States v. Baggett*, 890 F.2d 1095 (10th Cir. 1989); and one Second Circuit case, *United States v. Bryce*, 208 F.3d 346 (2d Cir. 1999). He then nakedly asserts, in an argument section spanning just over one page, that these authorities stand for the proposition that "phone calls indicating meth[amphetamine] possession, standing alone" are *never* sufficient to prove possession. Aplt. Br. 26.

As Marquez points out, in both *Hall* and *Baggett*, this court found intercepted phone calls to be insufficient, standing alone, to support possession convictions. *See Hall*, 473 F.3d at 1309; *Baggett*, 890 F.2d at 1096–97. But Marquez overstates the holdings of those cases, especially in light of critical factual distinctions. For instance, the phone calls in both *Hall* and *Baggett* involved individuals arranging to

buy drugs. *See Hall*, 473 F.3d at 1307; *Baggett*, 890 F.2d at 1096. Standing alone, those calls established only that the defendants attempted to purchase drugs, not that they ever actually possessed them. As a result, the calls weren't sufficient, on their own, to establish a possession crime. *See Hall*, 473 F.3d at 1309; *Baggett*, 890 F.2d at 1096–97. Here, the call didn't show Marquez arranging to *buy* methamphetamine from Christner—on the contrary, Marquez specifically discussed distributing the methamphetamine he already possessed.

The facts in *Bryce* are similarly distinguishable. In the phone calls at issue there, the defendant said that he "possess[ed] a large quantity of powder cocaine, maintained that he had sold or otherwise distributed several kilograms to others, and agreed to sell one kilogram . . . for $22,500." 208 F.3d at 353. The Second Circuit determined that the defendant's statements, standing alone, weren't sufficient to support a possession conviction because they "raise[d] questions as to whether or not [the defendant] actually possessed or distributed cocaine on the relevant dates." *Id.* at 356. Specifically, although the defendant appeared to agree to sell some drugs that he possessed, he then (1) became unavailable to the buyer, (2) backtracked on the amount he possessed, (3) only reluctantly agreed to make the sale, and (4) never met with the buyer as planned. *See id.* In light of such equivocal statements and behavior, the Second Circuit concluded that a rational jury could not have found beyond a reasonable doubt that the defendant possessed cocaine on the date alleged. *See id.*

In contrast, Marquez' statements here were unequivocal. He plainly told Christner that he possessed two batches of methamphetamine and that he had been

distributing only the low-quality batch. And here, unlike in *Bryce*, there was no evidence to undercut Marquez' straightforward assertion of possession.

In short, we reject Marquez' argument that *Hall*, *Baggett*, and *Bryce* stand for the proposition that phone calls are never sufficient, standing alone, to support a possession conviction. In each of those cases, the government presented only circumstantial evidence of possession, such as phone calls showing a plan to purchase drugs or containing unreliable statements of possession. From such circumstantial evidence, a jury could only determine possession by inferring that the drug purchase actually took place or that some other evidence corroborated the unreliable statement. Indeed, the *Baggett* court noted that "[i]f the prosecution is not going to present direct evidence of drug possession, its circumstantial evidence must include some testimony linking defendant to an observed substance that a jury can infer to be a narcotic." 890 F.2d at 1097.

But in this case, the government *did* present "direct evidence of drug possession." *Id.* "Direct evidence is evidence [that], if believed, resolves a matter in issue" without further inference. *United States v. Cardinas Garcia*, 596 F.3d 788, 796–97 (10th Cir. 2010) (quoting 16 McCormick on Evidence § 185 (6th ed. 2006)); *see also Evidence*, Black's Law Dictionary (10th ed. 2014) (defining "direct evidence" as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption"). If the jury believed Marquez' statements that he "still" had the low-quality methamphetamine and "ha[d]n't even got[ten] to" the high-quality methamphetamine, no further inference

was necessary to conclude that he possessed methamphetamine. Supp. R. 25; *see also United States v. Levario*, 877 F.2d 1483, 1485 (10th Cir. 1989) (describing defendant's statement about what he was transporting—"I didn't think it was that [cocaine], I thought it would be marijuana"—as "direct evidence" of drug possession (alteration in original)), *overruled on other grounds by Gozlon-Peretz v. United States*, 498 U.S. 395 (1991). Thus, Marquez' statements on the intercepted call, viewed in the light most favorable to the government, were sufficient for a jury to conclude beyond a reasonable doubt that on March 16, 2013, he possessed methamphetamine with intent to distribute.

II. District Court's Witness Examination

Marquez next asserts that the district court erred when it questioned Agent Billhymer in front of the jury. As Marquez acknowledges, he did not object to this questioning below, so we review for plain error. *See United States v. Ibarra-Diaz*, 805 F.3d 908, 916 (10th Cir. 2015). To obtain relief under the plain-error standard, Marquez must show (1) that error occurred, (2) that the error is plain, (3) that the error affected his substantial rights, and (4) that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1137 (10th Cir. 2017) (en banc) (quoting *United States v. Mike*, 632 F.3d 686, 691–92 (10th Cir. 2011)). As we explain, Marquez cannot show that the district court erred.

First, although Marquez insists that it was "unusual" for the district court to question a witness, Aplt. Br. 10, 30, a district court's "authority to question witnesses

is . . . beyond dispute," *United States v. Albers*, 93 F.3d 1469, 1485 (10th Cir. 1996); *see also* Fed. R. Evid. 614(b) ("The [district] court may examine a witness regardless of who calls the witness."). Here, the district court asked Billhymer one question. Billhymer testified, when discussing one of the intercepted calls, that Marquez' reference to "four for 32," was a reference to purchasing four ounces of methamphetamine for $3,200 as opposed to four pounds for $32,000. R. vol. 3, 182. The district court asked her how she reached that conclusion, in light of earlier testimony that Christner previously purchased one pound for $8,000, such that four pounds would have been $32,000. In response, Billhymer admitted that the reference to "four for 32" could have been to four pounds but explained that the context indicated it was a reference to four ounces; Christner, who usually dealt in pounds, hadn't seemed satisfied with the quantity.

Marquez insists that the district court's question was improper and prejudiced the jury against him. Specifically, he contends that the question made it appear to the jury that the court thought Marquez was dealing in pounds of methamphetamine. Marquez is correct that judges can overstep the bounds of their authority in questioning witnesses. *See, e.g.*, *United States v. Bland*, 697 F.2d 262, 264–66 (8th Cir. 1983) (finding that judge's questioning constituted reversible error because court essentially took over cross-examination for government). For example, when questioning witnesses, judges should "take care not to create the appearance that [they are] less than totally impartial." *Albers*, 93 F.3d at 1485; *see also* Fed. R. Evid.

614(b) advisory committee's note to 1972 proposed rules (noting that district court can't "abandon[] [its] proper role and assume[] that of advocate").

But contrary to Marquez' assertion, the district court's question here didn't create the appearance of impartiality; it merely clarified a factual matter. *See Albers*, 93 F.3d at 1486 ("We have noted the propriety of questioning by the court to clarify testimony . . . ."); *cf. United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989) (finding no error in district court's suggestion that government call another witness because "[i]t is the very function of the trial court to establish the facts as clearly and completely as possible"; explaining that "[b]y seeking additional evidence . . . the court in no way displayed a predisposition towards the government's position"). In fact, when Marquez' counsel began his cross-examination of Billhymer immediately following the district court's question, he noted: "That's actually one of the things I was going to ask you, too." R. vol. 3, 183.

Marquez doesn't cite any cases from this Circuit to support his argument that the district court erred in asking this question, and the cases he does cite are easily distinguishable: each involved a district court going far beyond asking a single question clarifying a factual matter. *See Quercia v. United States*, 289 U.S. 466, 468, 472 (1933) (reversing conviction because district court told jury that he believed witness lied); *United States v. Ottaviano*, 738 F.3d 586, 595–98 (3d Cir. 2013) (finding error in extensive and aggressive questioning by court but declining to reverse because the questions occupied a fraction of record and the evidence against defendant was overwhelming); *United States v. Godwin*, 272 F.3d 659, 674–75, 679–

81 (4th Cir. 2001) (assuming district court erred by extensively cross-examining testifying defendant, expressing doubt about defendant's veracity, and rehabilitating government witnesses but finding no prejudice); *United States v. Beaty*, 722 F.2d 1090, 1095–96 (3d Cir. 1983) (reversing one conviction because district court's "overzealous examination" of key defense witness, including questions unrelated to crimes charged or substance of witness' testimony, gave impression that judge didn't believe witness).

Here, the district court's question did not advocate for the government or create the impression of impartiality. Rather, the question merely sought clarification of a factual matter—a factual matter that even defense counsel thought would benefit from such clarification. *See Albers*, 93 F.3d at 1486. Thus, we conclude that the district court did not err. And because we find no error, we need not consider the remaining steps of plain-error review. *See United States v. Fabiano*, 169 F.3d 1299, 1305 (10th Cir. 1999).

III. The DEA Agents' Testimony

Marquez next challenges the admission of certain testimony from Agents Billhymer and Becknell. We consider each of his challenges in turn.

A. Christner's Out-of-Court Statements

Marquez first suggests that some of Billhymer's testimony violated the Confrontation Clause.[2] We review this issue de novo. *United States v. Garcia*, 793

[2] Marquez' opening brief includes a single sentence on this issue and fails to explain why Billhymer's testimony violated the Confrontation Clause. Nor does

F.3d 1194, 1211 (10th Cir. 2015).

The specific testimony at issue here involved a single question and a single answer. The prosecutor asked Billhymer what she learned during an interview that she conducted with Christner before his death.[3] Marquez' counsel objected on Confrontation Clause grounds, and the district court ruled that it would permit the government to "go a little bit down this path, but [it didn't] know how far." R. vol. 3, 243. The prosecutor then rephrased her question and asked Billhymer, "Did that conversation [with Christner] confirm generally what you believed you understood from the investigation about the structure of . . . Christner's drug business?" *Id.* Billhymer said, "Yes." *Id.* And then the prosecutor moved on. Later, on cross-examination, Marquez' counsel elicited from Billhymer that Christner never implicated or named Marquez during the interview.

The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to confront the witnesses against them. *See* U.S. Const. amend VI; *Crawford v. Washington*, 541 U.S. 36, 42 (2004). And the primary concern of the Confrontation Clause is "testimonial hearsay," which includes out-of-court

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Marquez provide the applicable standard of review. *See* Fed. R. App. P. 28(a)(8) (requiring argument to include "appellant's contentions and the reasons for them" as well as "a concise statement of the applicable standard of review"). As such, we could consider this argument waived and decline to consider it. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that . . . are inadequately presented[] in an appellant's opening brief."). Nevertheless, we elect to consider the argument on the merits. *See United States v. Pam*, 867 F.3d 1191, 1200 n.7 (10th Cir. 2017) (noting that appellate court has discretion to consider merits of inadequately briefed argument).

[3] Recall that, several months before the government indicted Marquez, Christner died from complications following heart surgery.

statements, offered for their truth, made during a police interrogation. *Crawford*, 541 U.S. at 53. Here, the government conceded at oral argument that Billhymer's statement involved testimonial hearsay and violated the Confrontation Clause.

But not all Confrontation Clause violations warrant relief; such errors can be harmless, as the government argues is the case here. A Confrontation Clause violation is harmless if it's clear beyond a reasonable doubt that "the properly admitted evidence of guilt is so overwhelming" that "the prejudicial effect of the improperly admitted evidence is . . . insignificant by comparison." *United States v. Edwards*, 782 F.3d 554, 560–61 (10th Cir. 2015) (quoting *United States v. Becker*, 230 F.3d 1224, 1230 (10th Cir. 2000)).

Here, Billhymer's limited testimony about what Christner told her was insignificant in the context of the other evidence against Marquez. *See United States v. Chavez*, 481 F.3d 1274, 1278 (10th Cir. 2007) (finding Confrontation Clause violation harmless in part because the testimony "was relatively unimportant to the government's case" and "[t]he government provided ample evidence to support the conspiracy charge"). The government presented 21 intercepted phone calls and 11 text messages involving Marquez—calls and texts that, in context, show Marquez participating in conversations with Christner and others about buying and selling methamphetamine. Thus, as Marquez' counsel argued to the jury in closing and argues elsewhere in this appeal, the case against Marquez turned largely on whether the jury believed it was Marquez' voice on the calls. And Billhymer's brief description of the interview with Christner didn't identify either Marquez or the

substance of any of the intercepted calls. Further, Marquez' counsel elicited on cross-examination that Christner didn't name Marquez as a coconspirator.

Marquez asserts that Billhymer's testimony about Christner's interview was "the lynchpin used by the [g]overnment and its law[-]enforcement witness to 'confirm' its theory of the case and speculations against Marquez." Rep. Br. 16 (quoting R. vol. 3, 243). But the intercepted calls in which Marquez discussed buying and selling methamphetamine were far more essential to the government's case and more damning to Marquez' defense. And notably, in its closing argument, the government didn't even mention Billhymer's interview of Christner. Instead, it replayed excerpts from the intercepted calls. *See Chavez*, 481 F.3d at 1278 (noting as part of harmlessness inquiry that neither party mentioned improper testimony in closing). In sum, any prejudicial effect created by Billhymer's testimony that Christner "confirm[ed] generally" the details of her investigation was insignificant when compared to the overwhelming evidence against Marquez as reflected in the intercepted calls. R. vol. 3, 243. Thus, any error in the district court's decision to admit that testimony was harmless beyond a reasonable doubt. *See Edwards*, 782 F.3d at 560–61.

B. Marquez' Role in the Conspiracy

Marquez next challenges the admission of Billhymer's testimony about Marquez' role in the conspiracy.[4] Billhymer twice testified specifically about Marquez' role. First, early in the trial, Billhymer testified that as of March 2013, based on intercepted calls and surveillance, she believed that Marquez distributed methamphetamine he received from Christner. Billhymer later repeated this assertion, testifying that as of June 2013, she believed that Marquez was one of Christner's distributors.

Because Marquez' counsel objected below, we review the admission of this evidence for an abuse of discretion. *See United States v. Brooks*, 736 F.3d 921, 929 (10th Cir. 2013). A district court abuses its discretion when its decision is "arbitrary, capricious, whimsical[,] or manifestly unreasonable." *United States v. Banks*, 761 F.3d 1163, 1197 (10th Cir. 2014).

Federal Rule of Evidence 701 governs lay opinion testimony, which must be (1) "rationally based on the witness's perception," (2) "helpful to clearly understanding the witness's testimony or to determining a fact in issue," and (3) "not based on scientific, technical, or other specialized knowledge." The purpose of Rule 701 is "to exclude testimony where the witness is no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions [that] merely tell the jury what result to reach." *Brooks*, 736 F.3d at 931 n.2 (quoting

[4] We note, again, that we elect to consider the merits of Marquez' argument despite his inadequate opening brief, which does little more than recite the testimony he purports to challenge. *See Pam*, 867 F.3d at 1200 n.7.

United States v. Meises, 645 F.3d 5, 16 (1st Cir. 2011)).

Relying on *United States v. Williams*, 827 F.3d 1134 (D.C. Cir. 2016), Marquez asserts that because Billhymer had no personal knowledge of Marquez' role in the conspiracy, she couldn't testify about that role as a lay opinion witness. *See* Fed. R. Evid. 701(a) advisory committee's notes to 1972 proposed rules (noting "the familiar requirement of first-hand knowledge or observation"). In *Williams*, the D.C. Circuit concluded that certain lay opinion testimony wasn't proper because the witness didn't disclose the "objective bases" for his opinions. *See* 827 F.3d at 1159.

We're not bound by the D.C. Circuit's objective-basis rule. *See Jordan v. Sosa*, 654 F.3d 1012, 1034 (10th Cir. 2011) (noting that this court isn't "bound by opinions handed down in other circuits" (quoting *Hill v. Kan. Gas Serv. Co.*, 323 F.3d 858, 869 (10th Cir. 2003))). And even assuming we agreed to follow that rule here, Marquez wouldn't be entitled to relief. As the government points out, Billhymer had an objective basis for her conclusions in this case: she testified based on her own perception of Marquez' role, which she gleaned from personally listening to "[h]undreds of hours of [intercepted] calls." R. vol. 3, 38; *cf. Brooks*, 736 F.3d at 934 (noting that "witness[ing] a controlled drug purchase" would establish an officer's "firsthand knowledge").

Specifically, one of the first calls the government played for the jury included Marquez and Christner discussing the distribution of methamphetamine that Marquez received from Christner. Shortly thereafter, on redirect examination, Billhymer testified that the intercepted calls up to this point led her to believe that Marquez was

a distributor for Christner. Likewise, Billhymer's second statement about Marquez' role was also based on an intercepted call. The government played a call in which Marquez asked Christner to save him an ounce and a half of methamphetamine. Billhymer then explained that, based on this call, she believed Marquez' role was distributing methamphetamine for Christner. Thus, Billhymer's lay opinion testimony was based on her personal observations, and the district court did not abuse its discretion in admitting it.[5]

C. Billhymer's Code-Word Testimony

Marquez next challenges Billhymer's testimony about the meaning of code words used in the intercepted calls. Because Marquez didn't object to this testimony during trial, we apply plain-error review. *See Brooks*, 736 F.3d at 929–30.

Marquez argues that Billhymer's code-word testimony was expert testimony improperly masquerading as lay testimony. He insists that her explanation of code-word meanings was based on her general law-enforcement experience rather than her

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[5] In his opening brief, Marquez also argues that "[a]fter nearly every recording played, the prosecutor asked . . . Billhymer to tell the jury what it really meant." Aplt. Br. 38. In support, he provides a string cite to various locations in the record where Billhymer made these additional and allegedly impermissible statements.

But we need not consider this broader argument. Marquez forfeited any challenge to the statements listed in his string cite because his counsel failed to object to them at trial. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011). And although we can review forfeited arguments for plain error, Marquez "fail[ed] to argue for plain error" on appeal. *Id.* at 1131. He therefore waived any argument that admitting these statements satisfied this standard. *See McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) (concluding that if appellant forfeits an argument and then "fail[s] to explain in [his or] her opening appellate brief . . . how they survive the plain[-]error standard," appellant thereby "waives the argument[] in *this* court").

personal knowledge and was therefore inadmissible under Rule 701. *See United States v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011) (noting that someone "may testify as a lay witness *only if* [her] opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person" (emphasis added) (quoting *Lifewise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004))). But as just explained, Billhymer's testimony about Marquez' role in the conspiracy was based on the personal knowledge she acquired from listening to "[h]undreds of hours of calls" while overseeing this investigation. R. vol. 3, 38. It's likewise reasonable to conclude that while listening to these calls, Billhymer became personally familiar with the meaning of the coded language that Marquez and Christner used to discuss methamphetamine.

Contrary to Marquez' assertion, this was not a situation in which Billhymer's knowledge about the meaning of coded drug language was based on past investigations; her testimony was based on what she learned during *this* investigation. *See United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (noting that law-enforcement officer could testify as nonexpert about meaning of code words based on personal perception developed from his "extensive participation in the investigation of [the] conspiracy, including . . . the monitoring and translating of intercepted telephone conversations"). Moreover, even if we were to assume that the district court erred in admitting some part of Billhymer's testimony, we would decline to find that the error was plain. To be plain, an error must violate the well-settled law of the Supreme Court or this circuit. *See Brooks*, 736 F.3d at 930. And Marquez hasn't

pointed us to any Supreme Court or Tenth Circuit authority finding error in testimony like this. Thus, we decline to find that the district court erred, plainly or otherwise, in admitting Billhymer's testimony about the meaning of the code words in this case.

D. Agent Becknell's Lay and Expert Testimony

Marquez also challenges some of Agent Becknell's testimony, asserting that it improperly conflated lay and expert testimony. Marquez again acknowledges that he didn't object to this testimony below and urges us to find plain error. *See id.* at 929–30.

Like Billhymer, Becknell testified about the meaning of certain code words in drug culture. But unlike Billhymer, Becknell testified as an expert under Federal Rule of Evidence 702. His particular expertise was "in organizational structure and the use of terminology in methamphetamine organizations." R. vol. 3, 307.

A district court may permit expert testimony if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). In drug cases, expert testimony is often admitted to help the jury understand drug terminology. *See United States v. Quintana*, 70 F.3d 1167, 1171 (10th Cir. 1995) ("This [c]ourt has repeatedly held that in narcotics cases, expert testimony can assist the jury in understanding transactions and terminology.").

Relying on *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014), Marquez complains that Becknell's testimony was both generalized from his work as a law-enforcement officer with experience investigating methamphetamine crimes *and*

specifically derived from his supervision of Billhymer's investigation in this particular case. In *Garcia*, the Fourth Circuit reversed the defendant's convictions because an expert who testified about the meaning of coded language conflated that expert testimony with fact testimony based on her knowledge of the case. *See id.* at 391–92.

But even if we assume that Becknell similarly conflated lay and expert testimony, any error in admitting that testimony wasn't plain. For an error to be plain and contrary to well-settled law, either this court or the Supreme Court must have addressed the issue. *See Brooks*, 736 F.3d at 930. *Garcia*, a Fourth Circuit case, doesn't establish the well-settled law of this circuit. In fact, we've expressly approved the admission of similar testimony. *See Quintana*, 70 F.3d at 1171 (finding district court didn't abuse its discretion when it admitted expert testimony about "the meaning of the conversations recorded on the wiretap tapes"). Thus, the district court did not plainly err in admitting Becknell's testimony.

E. Overview Testimony

Finally, Marquez also generally objects to "[n]early the entirety of [Billhymer's and Becknell's] respective testimonies" as improper overview testimony. Rep. Br. 22. He didn't raise this objection below, so plain-error review again applies. *See Brooks*, 736 F.3d at 929–30.

Overview testimony is related to opinion testimony, but it's "a broader category of evidence." *Id.* at 930. It's generally offered at the beginning of a trial, "before there has been any evidence admitted for the witness to summarize." *Id.*

(quoting *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003)). Overview testimony usually comes from a government witness who previews the government's case by explaining how an investigation began, which law-enforcement agencies were involved, and which investigative techniques they used. *See id.* We generally permit overview testimony, but it is subject to abuse, such as when an overview witness testifies based on hearsay rather than on personal knowledge or when an overview witness offers an opinion on the defendant's guilt. *Id.*

Marquez argues against the use of overview testimony generally, stating that its use is "a disturbing trend in these drug conspiracy cases." Aplt. Br. 41. In support, he cites three cases from the First Circuit disapproving of such testimony. *See Meises*, 645 F.3d 5; *United States v. Flores-de-Jesús*, 569 F.3d 8 (1st Cir. 2009); *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004).

For two reasons, we reject Marquez' argument and reliance on these out-of-circuit cases. First, as the government asserts, Marquez doesn't identify any particular testimony from either Billhymer or Becknell that qualifies as overview testimony, let alone explain why that particular overview testimony was improper. *Cf. United States v. Kamahele*, 748 F.3d 984, 1000 (10th Cir. 2014) (rejecting Confrontation Clause challenge because appellants "generally describe[d]" the witness' testimony but didn't "identify the parts that involved the recitation of testimonial hearsay"). As such, we could treat this issue as inadequately briefed and decline to consider it. *See* Fed. R. App. P. 28(a)(8)(A) (requiring appellant's brief to contain "appellant's contentions and the reasons for them, with citations to the . . .

parts of the record on which the appellant relies"); *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1137 n.16 (10th Cir. 2014) (finding undeveloped argument waived).

Second, any error in admitting any alleged overview testimony wasn't plain because the First Circuit cases on which Marquez relies don't establish the well-settled law of this circuit. *See Brooks*, 736 F.3d at 930 ("[F]or an error to be [plain and] contrary to well-settled law, either the Supreme Court or this court must have addressed the issue." (quoting *Thornburgh*, 645 F.3d at 1208)). In *Brooks*, we referenced these three First Circuit cases, but we held that the defendant couldn't show plain error under Tenth Circuit caselaw because "none of our prior cases have condemned unobjected-to overview testimony to the extent defendants now request." *Id.* at 930–32, 931 n.2. Similarly, here, any error in admitting Billhymer's testimony wasn't plain under our prior caselaw. Thus, we reject Marquez' generalized assertion that Becknell's or Billhymer's testimony constituted improper overview testimony.

Conclusion

To summarize, we reject each of Marquez' challenges on appeal. The evidence was sufficient for a rational jury to conclude that Marquez used a phone to facilitate a drug felony on four occasions; that he was a member of a conspiracy to distribute over 500 grams of methamphetamine; and that on March 16, he possessed methamphetamine with intent to distribute. And the district court didn't err when it asked a witness one question to clarify a factual matter. Nor did it abuse its discretion

or plainly err in admitting testimony from government agents. Accordingly, we affirm.