No. _____

In The
Supreme Court of the United States

LENIN LUGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Federal Rule of Evidence 702, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in opinion form if the testimony is shown to be reliable. Federal Rule of Evidence 701 offers an exception for opinions based on a lay witness's perception: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c).

The Eleventh Circuit held below that law enforcement officers could opine as lay witnesses under Rule 701 without satisfying Rule 702 when their testimony was based on their professional experience. *See* App. 7-8 ("The USCG personnel's lay opinion testimony was admissible under Rule 701 as their testimony was rationally based on the USCG personnel's professional experiences, rather than scientific or technical knowledge."). This conflicts with a contrary holding of the Second Circuit. *See United States v. Garcia*, 413 F.3d 201, 216 (2d Cir. 2005) ("We hold that the foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion so based and formed if the agent's reasoning process depended, in whole or in part, on his specialized training and experience."). Other circuits have joined opposite sides of this split of authority.

The question presented is whether an opinion of a law enforcement officer that depends on the witness's professional experience is admissible as Rule 701 lay opinion or must meet Rule 702's expert opinion requirements.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Lugo*, No. 8:17-cr-222-T-27JSS, United States District Court for the Middle District of Florida, Judgment entered April 12, 2018.
- *United States v. Lugo*, No. 18-11616, United States Court of Appeals for the Eleventh Circuit, Judgment entered October 8, 2019.

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Petitioner Lenin Lugo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1) is unpublished but available on Westlaw at 2019 WL 4940590. The opinion of the United States District Court for the Middle District of Florida (App. 10) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 2019. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES OF EVIDENCE INVOLVED

Federal Rule of Evidence 701 provides:

Rule 701. Opinion Testimony by Lay Witnesses

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:

Rule 702. Testimony by Expert Witnesses

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

This petition presents a recurring and important question that has divided the federal courts of appeals: whether a law enforcement officer may offer opinion testimony as a lay witness under Federal Rule of

Evidence 701, without satisfying the expert opinion requirements of Federal Rule of Evidence 702, when the opinion depends on the officer's professional experience. The Eleventh Circuit below answered in the affirmative, allowing witnesses who had been in a United States Coast Guard surveillance aircraft to opine that packages they had seen being jettisoned from a boat contained cocaine (as opposed to gasoline that petitioner claimed to be transporting). App. 7-8. Based largely on that opinion testimony, the jury convicted petitioner of conspiracy to distribute and possess with intent to distribute cocaine while on board a vessel subject to the jurisdiction of the United States even though: no cocaine was ever recovered; scientific testing of petitioner's boat was negative for any trace of cocaine or narcotic; and, no drug contraband was ever seen by any witness. App. 117, ¶ 6–App. 118, ¶ 8.

Because the Government never proffered the Coast Guard officers as expert witnesses, their opinion testimony was never put to the critical requirement of Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) that the proponent show that the methodology supporting the witness's opinion is sufficiently reliable. This, despite the fact that in defending the admission of the opinion testimony, the Government underscored that the testifying witnesses had "two and one-half to 15 years' experience in interdicting drug-smuggling vessels." App. 107. The Government's implication being that personnel with this experience in encountering contraband could reliably ascertain

whether a sealed and unrecovered package contained cocaine even though an eyewitness lacking that professional experience could not have done so. The testifying agents also insisted on cross-examination that their opinions were based on their training and years of experience on patrol with the Coast Guard. App. 136-137; App. 141.

The opinion below perpetuates an entrenched circuit split pitting the First and Eleventh Circuits on an opposite side of the Second, Seventh, Eighth, and District of Columbia Circuits. The former hold that law enforcement officers may testify in opinion form as lay witnesses under Federal Rule of Evidence 701 when their opinions are based on the officers' professional experience. By contrast, the latter treat such testimony as expert opinion subject to the requirements of Rule 702, *Daubert*, and *Kumho Tire*. The opinion below also squarely contradicts the 2000 amendment to Federal Rule of Evidence 701, which added section (c) to the Rule to underscore that, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: . . . (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c).

Proceedings Before The District Court

1. Petitioner was indicted on one count of conspiracy to distribute and possess with intent to distribute cocaine while on board a vessel within the jurisdiction of the United States and one count of knowingly and

willfully possessing with intent to distribute cocaine. Dkt. No. 1; App. 116, ¶ 2.

2. Petitioner and two co-defendants were spotted on board a boat in the Caribbean Sea off the coast of Colombia by United States Coast Guard surveillance aircraft.[1] App. 115-116, ¶ 1. Coast Guard personnel in the aircraft saw containers being jettisoned off the boat, recognized some of these containers as gasoline barrels, and also saw other items tossed overboard. *Id*.; App. 117, ¶ 5. Eventually, a Coast Guard boat crew arrested the three. App. 116, ¶ 1.

3. In interviews with law enforcement, petitioner's co-defendant denied transporting cocaine. App. 118, ¶ 9. He explained that the crew instead was transporting gasoline from Venezuela to Colombia, an activity illegal under Colombian law given the amount of gasoline being transported. *Id*. The defendants claimed that the items tossed overboard when they were spotted by the Coast Guard aircraft were gasoline containers. App. 117, ¶ 4.

4. Coast Guard officers searched the boat but found no cocaine. App. 117, ¶ 7. Nor did the Coast Guard find any hidden compartments aboard the vessel. App. 118, ¶ 8. Instead, search of the boat uncovered many containers of gasoline. App. 117-118, ¶ 7. A Coast Guard vessel also searched the debris field where the aircraft had seen the items being jettisoned. App. 12;

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[1] At the start of petitioner's trial, the district court granted the Government's motion to dismiss without prejudice all charges against petitioner's two co-defendants. Dkt. No. 179.

App. 117, ¶ 6. No bales of cocaine were recovered. App. 117, ¶ 6. Scientific IonScan testing of the boat and the three defendants performed by the Coast Guard came back negative for any trace of cocaine. App. 12; App. 118, ¶ 8.[2]

5. With no direct evidence of cocaine and with all IonScan testing yielding negative results for cocaine, the Government planned on having Coast Guard personnel involved in the surveillance and interdiction of the boat testify that, based on their experience, some items jettisoned off the boat were bales of cocaine. Petitioner moved in limine to preclude the Government from mentioning in opening statements or through any speculative testimony during its case-in-chief that petitioner was spotted tossing bales of cocaine. App. 115-120.

6. The district judge first addressed this issue before opening statements. Without ruling on admissibility, the court forbade the Government from mentioning cocaine in opening statements and expressed doubt that Coast Guard personnel could opine as lay witnesses under Rule 701 as to the presence of cocaine:

> MR. RUDDY [Prosecutor]: Well, Your Honor, I anticipate that they will testify that in their opinion based on their observations and experience is that the bales that were thrown were bales of cocaine.

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[2] An IonScan device relies on the scientific technique of ion mobility spectrometry, and is used to detect and isolate minute quantities of illegal drugs. *See* Admissibility of Ion Scan Evidence, 124 A.L.R.5th 691, at § 2 (2004).

> THE COURT: Well, I don't know that that's admissible testimony because that borders on expert testimony and I haven't heard the testimony yet.
>
> MR. RUDDY: Right. I would submit it's admissible under 701.
>
> THE COURT: Lay opinion?
>
> MR. RUDDY: Yes, sir.
>
> THE COURT: I don't think so. Not in a criminal trial. All I'm suggesting—and I'm directing as well as suggesting—is that you not make any statements during opening statement using the word cocaine or attributing to any of the witnesses a statement of fact that will not be within their direct testimony. It's not a ruling on the admissibility yet, but I would be very careful about attributing opinion testimony to those on board the aircraft.

App. 122-123.

7. The next day, however, the Government presented the district court with *United States v. Williams*, 865 F.3d 1328 (11th Cir. 2017), in which the Eleventh Circuit held that Coast Guard agents could offer lay opinion testimony under Rule 701, based on their experience in conducting drug interdictions, that packages they saw being jettisoned from a defendant's boat appeared to be cocaine bales. *Id*. at 1341; App. 126. The district court questioned whether *Williams* was distinguishable because, in that case, IonScan testing returned positive results for cocaine on the defendant's

boat and person, whereas IonScan testing had detected no trace of cocaine on petitioner or the boat he had occupied. App. 127-128. But the district court ultimately felt bound by *Williams* and permitted the Coast Guard agents to offer their "lay" opinion under Rule 701 that, based on their experience and training, some packages they witnessed thrown overboard were bales of cocaine. App. 129-130; App. 139-140.

8. Without being designated as an expert witness, Agent Tison Velez testified about his role in the surveillance aircraft that spotted the boat and its occupants. After narrating the events that transpired, including witnessing through a scope containers of various shapes and sizes being thrown from the boat, Agent Velez testified, over petitioner's repeated objections, that in his opinion some packages were bales of cocaine. App. 133-136. On cross-examination, Velez defended his opinion as supported by his experience and training:

> Q: Is it fair to say you're not 100 percent positive that what was being thrown from that boat were bales of cocaine, are you?
>
> A: Based off of my training and 10-plus years and what I've seen from these patrols, I would say that it was a bale of cocaine.
>
> Q: And you don't think it could have been anything else.
>
> A: Not based off of where they're at, their activity, their demeanor, condition of the boat, I

> would not speculate it to be anything other than bales of cocaine.
>
> Q: You would not speculate.
>
> A: I would not.
>
> Q: But it is speculation, isn't it?
>
> A: Based off any training I believe it was a bale of cocaine.
>
> Q: So you're firm on that, but you never actually physically touched any of the items that were on that boat?
>
> A: On that boat, no, sir.
>
> Q: Would it be fair to say your opinion is an educated guess?
>
> A: I would not call it a guess, sir, no.
>
> Q: You wouldn't call it an educated guess, based on your training?
>
> A: I would say based off my training it was a bale of cocaine.

App. 136-137.

9. A second Coast Guard officer, Bob Baquero, testified along the same lines, offering the same opinion—admitted as lay opinion under Rule 701—that containers tossed from the boat by petitioner or the other crewmembers were cocaine bales. App. 137. Like

Velez, Officer Baquero based his opinion on his training and experience. App. 137, 139.[3]

10. The jury acquitted petitioner of knowingly and intentionally possessing with intent to distribute cocaine but found him guilty of the conspiracy count. App. 13. The district court denied petitioner's motion for judgment of acquittal, explaining that while no trace of cocaine was ever found, the Coast Guard witnesses opined "based on their experience" that items tossed from petitioner's boat "appeared to be cocaine bales." App. 17.

Proceedings Before The Eleventh Circuit And The Decision Below

1. On appeal, petitioner argued that admission of the Coast Guard agents' testimony under Rule 701 as lay witness opinion was error. App. 56-62. He cited authority from the Ninth Circuit holding that opinions of drug surveillance officers that a defendant's conduct was consistent with activities of drug traffickers amounted to expert testimony subject to the requirements of Rule 702. *See* App. 59-62 (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997)). The Government dismissed petitioner's reliance on *Figueroa-Lopez*, arguing that the Eleventh Circuit was required to follow its own precedent in *Williams*. App. 108. The

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[3] A third Coast Guard officer, Guillermo Velasquez, was not involved in the interdiction and was proffered as an expert witness to testify and opine about the IonScan testing and its results. *See* App. 8, n.2.

Government pointed out that, like *Williams*, an earlier Eleventh Circuit panel had upheld admission of law enforcement opinion testimony under Rule 701 and, in doing so, had "noted the contrary holding in *Figueroa-Lopez* and declined to adopt it." *Id.* (citing *United States v. Novaton*, 271 F.3d 968, 1008 (11th Cir. 2001)).

2. The Eleventh Circuit affirmed. Citing *Williams*, the court below held that:

> The USCG personnel's lay opinion testimony was admissible under Rule 701 as their testimony was rationally based on the USCG personnel's professional experiences, rather than scientific or technical knowledge. Each of the testifying USCG personnel participated directly in the interdiction of the go-fast vessel and testified as to their opinions of what they actually observed, and were entitled to draw on their professional experiences to guide their opinions.

App. 7-8 (citing *Williams*, 865 F.3d at 1341).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's opinion conflicts with opinions of other circuits and perpetuates an entrenched split of authority among the courts of appeals. The opinion also is directly contrary to the 2000 amendment to Federal Rule of Evidence 701. That amendment added section (c) to Rule 701 to clarify that, besides the other already existing limitations on lay opinion testimony

(namely, that the opinion be rationally based on the lay witness' perception and be helpful to understanding the testimony), lay "opinion is limited to one that is: . . . (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). Under this amendment to Rule 701, the Eleventh Circuit's acknowledgment that the Coast Guard agents' opinions were "based on the USCG personnel's professional experiences," App. 7, cannot be squared with the court's ruling that the testimony should be treated as lay opinion. The decision below reached a wrong result on a recurring and important question, and this case presents an ideal vehicle for this Court to resolve the question presented.

A. There Is An Entrenched Circuit Split Over Whether Opinions Of Law Enforcement Witnesses Based On Their Professional Experience May Be Admitted As Rule 701 Lay Witness Testimony Or Must Meet The Expert Opinion Requirements Of Rule 702.

Recurring reliance on law enforcement opinion testimony has resulted in a split of authority among the federal courts of appeals. On the one hand, the Eleventh Circuit in this and other opinions post-dating the 2000 amendments to Federal Rule of Evidence 701, along with the First Circuit, have held that law enforcement opinion testimony is properly admitted as lay witness opinion under Rule 701, even where the opinion is based on the officer's specialized training and experience. *See* App. 7-8; *United States v. Jeri*, 869

F.3d 1247, 1265 (11th Cir. 2017) (opinion testimony of Homeland Security Investigation Officer regarding drug seizure properly admitted as Rule 701 lay opinion even where opinion drew on the witness's "familiarity with narcotics investigations and his experience interviewing drug couriers, which had been developed during his tenure as a law-enforcement officer"); *United States v. Valdivia*, 680 F.3d 33, 50-51 (1st Cir. 2012) (upholding admission of police officer's opinion formed "by virtue of his position as a drug enforcement agent" regarding drug traffickers' mode of masking real identity of cellphone users and holding that such testimony "fall[s] comfortably within the boundaries of permissible lay opinion testimony.").

By contrast, the Second, Seventh, Eighth, and District of Columbia Circuits have held that any opinion of law enforcement personnel that depends on an officer's professional experience or training may only be admitted as expert opinion testimony subject to the requirements of Federal Rule of Evidence 702. The Second Circuit underscored that, "the foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion so based and formed if the agent's reasoning process depended, in whole or in part, on his specialized training and experience." *Garcia*, 413 F.3d at 216. Citing *Garcia*, the District of Columbia Circuit likewise has agreed that, "if an agent is testifying based on his experience in other investigations and his experience as a narcotics investigator, as opposed to simply his personal perceptions in the case, . . . [he] would have to satisfy Rule 702." *United States*

v. Smith, 640 F.3d 358, 365 (D.C. Cir. 2011) (citing *Garcia*, 413 F.3d at 216-17). And, the Seventh Circuit has addressed the precise fact pattern at issue here—a narcotics officer who participated in the investigation of the accused's case but whose trial testimony also related opinions based on the officer's specialized knowledge gained from his professional experience in prior criminal investigations. It held, contrary to the Eleventh Circuit's decision below, that such testimony may only be admitted as expert opinion upon meeting Rule 702's requirements. *United States v. Oriedo*, 498 F.3d 593, 603 (7th Cir. 2007).

Perhaps the most succinct guiding standard to determine whether opinions of law enforcement officers are to be subject to expert or lay opinion admissibility requirements was offered by the Eighth Circuit: "Lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001).

This split of authority has developed over the twenty years since Federal Rule of Evidence 701 was last amended. That divide remains entrenched. Even within the Eleventh and First Circuits that stand alone on one side of this split, judges have openly disagreed with their circuit's precedent but felt bound to adhere to it absent review en banc or by this Court. In *Valdivia*, for

example, Judge Lipez authored a separate concurrence in which he lamented that:

> Bound by the precedents of our circuit, my colleagues and I must affirm the ruling of the trial court that Special Agent Carpio's testimony about the cell phone practices of drug traffickers was lay opinion testimony admissible under Rule 701, rather than expert testimony governed by Rule 702. However, we should reexamine these precedents in a future en banc proceeding.

Valdivia, 680 F.3d at 56 (Lipez, J., concurring).

Judge Lipez's concurrence explained that:

> We need to rethink these precedents. We need to apply the bright line rule that the language of Rule 702 provides in deciding whether a police officer is testifying as a fact witness or an expert witness. If the officer is being asked to draw on specialized knowledge acquired through experience and training to offer an opinion on the inculpatory significance of the particular conduct of the defendant, that officer is testifying as an expert witness.

Id., at 61.

Warning about the consequences of the First Circuit's precedents (which align with the Eleventh Circuit precedents relied on by the decision below) incorrectly treating law enforcement officers' opinion testimony as lay opinion, instead of expert opinion subject to Rule 702 standards, Judge Lipez cautioned that this

reasoning "has created in some of our precedents an unwarranted police exception from the requirements applicable to expert testimony." *Id*. Although he favored re-examination of this precedent, Judge Lipez observed that "[t]his case is not a good candidate for an en banc proceeding because any error here was harmless." *Id.*, at 56, n.15.

Nearly three years later, in an opinion authored by Judge Lipez and joined by Justice Souter sitting by designation and Judge Selya, the First Circuit cited and followed *Valdivia* in affirming the trial court's admission under Rule 701 of a police detective's lay opinion testimony that drugs seized from defendant were heroin and cocaine. *United States v. Moon*, 802 F.3d 135, 146 (1st Cir. 2015) (citing *Valdivia*, 680 F.3d at 50-51). The First Circuit denied the petition for rehearing en banc. *United States v. Moon*, 823 F.3d 102 (1st Cir. 2016). This time, Judge Lipez was joined by Judges Torruella and Thompson in a Statement Regarding Denial of En Banc Review that called for overruling the First Circuit's precedent on the admission of police officers' opinions under Rule 701 for lay witness opinion testimony:

> I am disappointed that a majority of the active judges have rejected the opportunity presented by this case to reconsider en banc our aberrant and misguided law on the admission of opinion testimony by police officers. In my concurrence four years ago in *United States v. Valdivia*, I pointed out that our approach has 'created in some of our precedents an

> unwarranted police exception from the requirements applicable to expert testimony.' 680 F.3d 33, 61 (1st Cir. 2012). That approach not only seriously misconstrues Federal Rules of Evidence 701 and 702, but it is also 'at odds with [the law of] virtually every other circuit.' *United States v. Moon*, 802 F.3d 135, 147 n. 9 (1st Cir. 2015) (citing *Valdivia*, 680 F.3d at 56 n. 16 (collecting cases)). It is now well past the time when we should have confronted our flawed law and eliminated the ongoing unfairness to defendants.

Id. (Lipez, J., Statement Regarding Denial of En Banc Review).

The "aberrant and misguided law on the admission of opinion testimony by police officers" assailed by Judges Lipez, Torruella, and Thompson as being "at odds with [the law of] virtually every other circuit" and warranting review is the same law adopted by the Eleventh Circuit in the decision below, *Williams*, and *Novaton*. It is telling that when initially presented with the Government's plan to admit the opinion testimony of Officers Velez and Baquero under Rule 701 as lay witness opinion, the district court believed this to be improper. App. 122-123. Only when the Government presented the district court with the Eleventh Circuit's opinion in *Williams*, did the district judge feel compelled to admit the testimony under Rule 701 due to that binding precedent. App. 129-130; App. 139-140.

This Court should grant certiorari to resolve this intractable split of authority.

B. The Decision Below Conflicts With The Latest Amendment To Federal Rule Of Evidence 701.

Besides perpetuating an existing circuit split, the decision below also is directly at odds with the latest amendment to Federal Rule of Evidence 701 enacted in 2000 precisely to address the issue raised by this petition. That amendment added section (c) to Rule 701 to clarify that, besides the other already existing limitations on lay opinion testimony, lay "opinion is limited to one that is: . . . (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). The Advisory Committee on the Federal Rules of Evidence explained that the purpose of this addition was to prevent witnesses who rely on their expertise to avoid the requirements of Rule 702 by testifying as mere lay opinion witnesses:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by

> simply calling an expert witness in the guise of a layperson.
>
> . . . .
>
> The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

Advisory Committee Notes to 2000 Amendment to Fed. R. Evid. 701 (internal citation omitted).

The decision below conflicts with this latest amendment to Federal Rule of Evidence 701. As amended in 2000, the Rule clarifies that lay opinion testimony is limited to those opinions "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). The decision below, however, affirmed the admission of the Coast Guard officers' opinion testimony under Rule 701 even while it acknowledged these opinions were "rationally based on the USCG personnel's *professional experiences*, rather than scientific or technical knowledge." App. 7-8 (emphasis added). While it distinguished these "professional experiences" from "scientific or technical knowledge," *id.*, the decision did not differentiate "professional experiences" from "specialized knowledge," which also is included in the text of Rule 701(c).[4] The

[4] At least one federal judge and commentator has advocated that guidance by this Court may be required to discern when

"professional experiences" gained by the testifying Coast Guard agents imparted them with "specialized knowledge" that led to their opinion testimony. *See* App. 136 (cross-examination trial testimony of Agent Velez to the effect that his opinion was "[b]ased off of my training and 10-plus years and what I've seen from these patrols"). Their opinion testimony therefore should have been subjected to the requirements of expert opinion testimony under Rule 702.

This Court should grant certiorari to resolve the conflict between the decision below and the text of the latest amendment to Federal Rule of Evidence 701.

C. The Decision Below Reached A Wrong Result On An Important Question.

Undeniably, under the standard in effect in the majority of the circuits, the opinion testimony offered against petitioner would not have been admissible as

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"experience" may amount to "specialized knowledge" within the meaning of Rule 701(c):

> Questions that remain for further development and problem solving are: 1) when does experience become specialized knowledge sufficient to be considered expertise? and 2) is the existence of such experience something judges can leave to the cross examination of a witness to allow the trier of fact to make the final determination? Only time, and another decision by the Supreme Court, will tell the further definition of the overlap of Rule 701 and Rule 702.

Hon. Manuel Real, "*Daubert*—A Judge's View—A Reprise," American Law Institute Civil Practice and Litigation Techniques in Federal and State Courts (Jan. 19-21, 2005).

lay opinion. It was precisely the Coast Guard officers' experience in prior drug interdictions that permitted them to opine that the packages they saw being tossed overboard contained drug contraband (as opposed to smuggled gasoline that petitioner claimed). The Coast Guard officers' "two and one-half to 15 years' experience in interdicting drug-smuggling vessels" touted by the Government on appeal, App. 107, purportedly provided these witnesses with the specialized knowledge to discern what drug contraband containers looked like.

Had the same event been witnessed by untrained tourists on a passing boat, any "opinion" offered by such true laypersons as to what the containers housed would be pure guesswork or speculation. The officers' testimony therefore cannot be deemed a lay witness opinion. *See Peoples*, 250 F.3d at 641 (opinion testimony cannot be deemed Rule 701 lay opinion where it provides "explanations or interpretations that an untrained layman could not make if perceiving the same acts or events"). Only the officers' experience in drug interdictions permitted them to form their opinions as to the contents of the containers. Because the testimony depended on the witnesses' specialized knowledge or experience, it should have been subject to Rule 702's expert opinion requirements before being admitted into evidence.

Failing to hold these witnesses to expert opinion evidentiary standards was significant. Had the courts below applied Rule 702 instead of Rule 701, the Government would have had to make a preliminary showing

not merely of the officers' expertise, but of the reliability of the methodology that led the Coast Guard officers to opine as to the contents of the containers tossed from petitioner's boat—contents not seen by these witnesses nor ever recovered by anyone. And that showing would have been required before the testimony could be presented to the jury. *See Daubert*, 509 U.S. at 592-93.[5]

The officers' opinions were premised on a dubious experiential "methodology" of concluding that because the officers had interdicted drug contraband housed in similarly looking bales previously, the containers at issue here also must have contained cocaine. Whether such a "methodology" would pass *Daubert* or *Kumho Tire* reliability gatekeeping standards is questionable. Possible factors relevant to an inquiry into the reliability (and, hence, admissibility) of the officers' opinion, had it been addressed as expert testimony, may have included how many false positives or negatives prior Coast Guard interdiction efforts encountered. *See Kumho Tire*, 526 U.S. at 151 ("some of *Daubert's* questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results."). None of this was even broached by the courts below, however, because the

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[5] Proper characterization of the law enforcement agents' opinions as expert testimony also would have required the Government to provide expert disclosures mandated by Federal Rule of Criminal Procedure 16(a)(1)(G).

testimony was deemed admissible as mere lay opinion. And that failure to undertake any judicial gatekeeping inquiry into the reliability of the Coast Guard officers' opinion testimony looms especially large where, as here, the only scientific evidence admitted into evidence through expert testimony—the IonScan testing of petitioner and the boat—yielded negative results for any trace of cocaine.[6]

The erroneous treatment of law enforcement agents' opinions as lay witness opinion testimony raises important concerns beyond the mere misclassification of the opinion testimony. Admitting into evidence opinions that derive from a witness's professional law enforcement experience and specialized knowledge without undertaking any scrutiny mandated by Federal Rule of Evidence 702 presents the jury with evidence bearing the imprimatur of the witness's expertise without any assurance that the expertise was used to ensure a sufficiently reliable opinion. By contrast, treating these opinions as expert testimony, as the Federal Rules of Evidence require, "increase[s] the likelihood that defense counsel will be able to fairly test the

[6] The Government argued in conclusory fashion that "[t]he officers could have testified as experts under Fed. R. Evid. 702, given their knowledge of and years of experience in maritime drug-smuggling interdictions." App. 91. That argument misses the mark because it focuses merely on the agents' qualifications while ignoring the required showing of reliability that the Government would have had to meet as a prerequisite to admitting any expert opinions. Petitioner was entitled to hold the Government to that showing and to challenge the reliability of the agents' proffered expert testimony under *Daubert* and *Kumho Tire* standards before its introduction to the jury.

reliability of the opinion testimony of police officers who draw on their experience and training to characterize the particular conduct of the defendant as classic criminal conduct. That is how the system should work." *Valdivia*, 680 F.3d at 61 (Lipez, J., concurring).

This Court should grant certiorari to correct the wrong result reached by the decision below on this important and recurring question.

D. This Case Is An Ideal Vehicle To Decide The Question Presented.

This case is an ideal vehicle to decide the question presented. With no direct evidence of cocaine, the Coast Guard agents' opinion testimony was central to proving the Government's case. That distinguishes this case from the mine-run of cases in which challenged evidentiary rulings amount to harmless errors, at best, given the force of other inculpatory evidence. *See, e.g.*, *Valdivia*, 680 F.3d at 56, n.15 (Lipez, J., concurring) (case not a proper candidate for further appellate review of whether law enforcement opinion testimony was properly admitted as lay testimony "because any error here was harmless."); *Jeri*, 869 F.3d at 1265 (regardless of whether law enforcement agent's opinion should have been characterized as expert testimony, "any claimed error would be harmless"); *Smith*, 640 F.3d at 366 (court erred in admitting law enforcement officer's opinion under Rule 701 instead of classifying it as expert opinion, but error was harmless). Although the Government argued below that any error

in admitting the Coast Guard agents' opinions under Rule 701 instead of subjecting it to Rule 702's evidentiary standards was harmless error, App. 108-110, the decision below declined to so find. App. 6-9.

The question presented was preserved and litigated at all stages below, providing a clear record for review by this Court. Petitioner moved in limine and argued against the admission of the Coast Guard officers' opinion testimony. App. 115-120; App. 122-123. He then interposed contemporaneous objections when the opinion testimony was elicited at trial. App. 133, 139. After the jury's verdict, petitioner renewed his objection in his motion for judgment of acquittal. App. 10. Petitioner's appeal likewise argued that the Coast Guard officers' opinions were improperly admitted as lay opinion testimony under Rule 701, App. 58-62, and the Eleventh Circuit addressed those arguments directly in affirming the district court's judgment. App. 6-8.

Given the clear record developed below, this Court should grant certiorari to address the question presented.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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