No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID WILLIAM SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

(CA4 No. 19-4321)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

This Petition will permit the Court to resolve two profound splits among the federal courts of appeals.

The first circuit split concerns when, if at all, law enforcement can draw upon their professional experience when offering lay opinions under Fed. R. Evid. 701. The published decision below from the Fourth Circuit holds that Fed. R. Evid. 701 "allow[s] officers to bring to bear their accumulated experience when testifying as lay witnesses." [App. 19]. That decision conflicts with decisions from other federal courts of appeals, which hold that "knowledge derived from previous professional experience falls squarely within the scope of Rule 702 and thus by definition outside of Rule 701." *United States v. Smith*, 640 F.3d 358, 365 (D.C. Cir. 2011). *See also James River Ins. Co. v. Rapid Funding, Ltd. Liab. Co.*, 658 F.3d 1207, 1215 (10th Cir. 2011) (quoting *Smith*); *United States v. Gaytan*, 649 F.3d 573, 582 (7th Cir. 2011) ("[A]n officer testifies as an expert when he brings the wealth of his experience as a narcotics officer to bear on [his] observations…." (quotation omitted)).

The second circuit split concerns the burden of proving that a witness has relied upon testimonial hearsay in violation of the Confrontation Clause, U.S. Const. Amend. VI. The published decision below affirmed the conviction at issue because Petitioner David Smith had shown "no reason to think" that the agent was relaying testimonial hearsay to the jury via his opinion testimony, [App. 23], despite the agent's conclusions explicitly drawn upon "experience"

that included custodial interrogations. *E.g.*, [App.68]. By contrast, other circuits hold that "government bears the burden of defeating [a defendant's] properly raised Confrontation Clause objection by establishing that its evidence is nontestimonial." *United States v. Jackson*, 636 F.3d 687, 695 (5th Cir. 2011) (quoting *United States v. Arnold*, 486 F.3d 177 (6th Cir. 2007) (*en banc*)).

The two questions presented for consideration are, therefore, the following:

1. Did the district court below err in allowing a law enforcement officer to offer a "lay" opinion based upon professional knowledge and experience gained in other cases?

2. Where an officer's opinions explicitly draw upon prior experience interrogating suspects, did the officer's opinion testimony below violate the Confrontation Clause where the Government did not show that the opinion was not based upon non-testimonial hearsay?

LIST OF PARTIES

In the Court of Appeals, Daniel Patrick filed an amicus brief in support of Mr. Smith's petition for rehearing *en banc*.

LIST OF RELATED PROCEEDINGS

United States v. Smith, No. 19-4321, U.S. Court of Appeals for the Fourth Circuit. Judgment entered June 16, 2020. Petition for Hearing *En Banc* denied July 14, 2020.

United States v. Smith, No. 1:18-cr-00115-MR-WCM-1, U.S. District Court for the Western District of North Carolina. Judgment entered April 24, 2019.

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TABLE OF AUTHORITIES

Cases

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Statutes

David William Smith respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit is reported at 962 F.3d 755 (4th Cir. 2020) and reproduced in the Appendix. The evidentiary rulings from the district court are unreported, but the relevant portions of the transcript concerning them are set forth in the Appendix.

JURISDICTION

The district court had jurisdiction over the federal crimes charged. 18 U.S.C. § 3231.

This Court has jurisdiction to review the judgment of the Fourth Circuit. 28 U.S.C. § 1254(1). Judgment below was entered on June 16, 2020. A timely petition for rehearing *en banc* was denied on July 14, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

***

Fed. R. Evid. 701:

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.

***

Fed. R. Evid. 702:

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

I. The Trial in the District Court

Mr. Smith was tried before a jury on a two-count indictment. Count 1 alleged that he possessed a quantity of methamphetamine with the intent to distribute on August 21, 2017. Count 2 alleged that he possessed with intent to distribute a mixture or substance containing methamphetamine weighing more than 50 g on September 4, 2017. A summary of the trial follows.

A. The Events of August 21

According to Angela Smith, Mr. Smith drove to her property to see her son on August 21, 2017. After the son and Mr. Smith began arguing, Mr. Smith walked to his truck, and she saw him put something under the bumper. Supposedly before he did so, he asked whether "anybody else out here want[ed] any?"

When law enforcement arrived, Mr. Smith's car was searched. Inside a box found under the vehicle, law enforcement recovered approximately 11 grams of a substance that tested positive for methamphetamine. Law enforcement also retrieved empty Ziploc baggies, a digital scale, and $2,108 in cash.

B. The Events of September 4

On September 4, 2017, law enforcement conducted a consent search of the van that Mr. Smith had been driving, which smelled of marijuana. Under the passenger seat, where Jessica McCoy had been sitting, was a red box. It contained empty Ziplock baggies, a few small bags of a green leafy substance, and

a white crystal substance, which later testing revealed was 51.02 g of methamphetamine of undetermined purity. Additionally, $453 in cash was recovered.

Ms. McCoy—a drug addict with pending criminal charges—denied any prior knowledge of the drugs' provenance or purpose. She testified that she usually smoked about a fingernail full of methamphetamine at a time and that the drugs recovered from the box would "probably last [her] a good four months, five" and would cost about $1000. She agreed that if the methamphetamine were of lower quality than she normally smoked, she would use more at a time.

C. Sgt. Leopard's "Lay" Opinions

Sgt. Brian Leopard testified about the items that had been retrieved on August 21 and September 4.

When the Government sought to ask Sgt. Leopard to draw upon his law-enforcement experience, Mr. Smith objected to the lack of pretrial disclosure, including the missing "summary of his qualifications and his opinions and bases therefor." [App. 39]. Further, Mr. Smith objected that, to the extent Sgt. Leopard was going to opine based upon custodial interrogations, the Confrontation Clause would bar that testimony. [App. 40]. The Government disclaimed resort to expert opinion, [App. 41], and the district court overruled the objection. To avoid another bench conference, Mr. Smith agreed to reincorporate his objections from the bench as the questioning proceeded before the jury. [App. 44].

The Government then asked for Sgt. Leopard's experience-based opinions:

Q. We also discussed your 26 years of law enforcement experience. In those 26 years, do you have an estimate of how many drug-related offenses you've investigated?

A. I couldn't begin to put -- I would say they're well over 1,500 to 2,000.

…

Q. From your training and experience, is there any connection between scales and controlled substances?

MR. ANDERSON: Objection, Your Honor.

THE COURT: Basis.

MR. ANDERSON: Same as before.

THE COURT: Overruled.

[…]

THE COURT: You may answer.

THE WITNESS: Yes, there is.

BY MS. SOLHEIM:

Q. Based on your training and experience, is there any connection between drugs and baggies of the shape and size that were contained in Government's Exhibit 6?

MR. ANDERSON: Objection, Judge. I'd like some foundation as to what "experience" means.

THE COURT: Overruled….

THE WITNESS: Yes, there is.

BY MS. SOLHEIM:

Q. Based on your training and experience, what is that connection?

MR. ANDERSON: Objection, Judge, for the same reasons we've talked about before, and particularly the lack of foundation as to what "experience" means here.

THE COURT: Overruled….

THE WITNESS: The different sizes of bags will indicate that -- a couple of different things on the street. Size of bag could indicate the type of drug, the weights of drug that it could be used, even locations that the drugs are coming from. Typically, the size of bag that we have there is probably going to be like what you would call, like, a gram bag. Probably wouldn't get – in which a gram is one gram. It would be about the amount of a pack of sugar that you get. The little paper pack of sugar, that's a gram.

So on the street you would typically buy – if you're going to be buying a gram, or a couple of grams, that size of bag is what we would generally see it in. You have larger bags, of course, larger weights, smaller bags, your smaller weights and, also, different types of drugs that would be sold by the different weights. Some drugs you don't need as much so you don't need as big a bag. Other drugs you need a little bit more so you need a bigger bag.

BY MS. SOLHEIM:

Q. What about the scale?

MR. ANDERSON: Same objection, Judge.

THE COURT: Overruled.

THE WITNESS: The scales? Of course if you're going to be buying you want to make sure that you're getting what you paid for. You want to weigh it and make sure if you're buying a gram that you're getting a gram, because drugs today aren't cheap.

BY MS. SOLHEIM:

…

Q. What is a -- what does it mean when someone says a user amount of methamphetamine?

MR. ANDERSON: Same objection, Judge.

THE COURT: Overruled….

> THE WITNESS: From my experience, user amounts of methamphetamine – if you have just start using you're not going to be using as much. It doesn't take as much to get that high, so you might start out with a tenth of a gram, two-tenths of a gram, or you might just smoke a little bit of it if smoking is what you do. The more that you – the more that you use, as the saying goes, you're chasing the dragon. You're never going to catch it again. So you use more and more and more to try to get that original high that you're not going to get. So user amounts will vary on the amount of time that you've been using the drugs.

[App. 53-57].

As a lay witness, Sgt. Leopard was not subject to *voir dire* before his "lay" opinions. But on cross-examination, he confirmed his reliance upon testimonial hearsay:

> Q. Earlier in your testimony you talked about your experience with baggies and why they're used; is that right?
>
> A. Yes, I did.
>
> Q. And you talked about experience with scales as to why they were used; is that right?
>
> A. Yes, I did.
>
> Q. Okay. And you talked about experience for the quantity of drugs that are used at a time; is that right?
>
> A. Typical user amount. Yes, I did.
>
> Q. When we talked about experience from those things, does that experience include your interrogations of suspects?
>
> A. Yes, it would.
>
> Q. And debriefings?
>
> A. Yes, it would.

[App. 68].

Mr. Smith renewed his Confrontation Clause objection, which was overruled. [App. 68-71].

D. The Partial Acquittal

The jury convicted Mr. Smith of only simple possession involving the August 21 episode, despite the evidence of scales, the box hidden under the truck, the $2,108 in cash, and empty Ziplock baggies. But it convicted him as charged regarding the September 4 episode, which involved only $453 in cash and a quantity of drugs that Ms. McCoy said could last her 4-5 months.

II. The Appeal to the Fourth Circuit

Among other things, Mr. Smith argued on appeal to the Fourth Circuit that the district court erred in allowing Sgt. Leopard to offer lay opinion. The Fourth Circuit disagreed. On that point, it held that Sgt. Leopard's testimony qualified as lay opinion under Rule 701, or, alternatively, was harmless. [App. 18-21].

Mr. Smith also argued that Sgt. Leonard's testimony violated the Confrontation Clause. The Fourth Circuit disagreed because Mr. Smith had not proven that the statements violated the Confrontation Clause (rather than holding that the Government had proven that the testimony comported with the Confrontation Clause). [App. 22-23].

REASONS FOR GRANTING THE PETITION

As shown below, the two Questions Presented are the subject of disagreement in published decisions from the federal courts of appeal. Each is, therefore, appropriate for this Court's consideration. Sup. Ct. R. 10(a).

I. The Circuit Courts Are Divided About When Law Enforcement Can Offer Lay Opinion.

The Federal Rules of Evidence draw a distinction between lay and expert opinion. Fed. R. Evid. 701, 702. The distinction is an important one in at least two respects. First, "[u]nlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dowl Pharms. Inc.*, 509 U.S. 579, 592 (1993) (citations omitted). Given the expansive scope of potentially permissible expert opinion, this Court has required trial judges to ensure the reliability of an expert opinion before the jury hears it. *See id.* Second, both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure require pretrial disclosure of expert testimony, to avoid trial by ambush and to enable the parties to litigate the reliability of the expert opinion before the jury trial begins. *See* Fed. R. Civ. Pro. 26(a)(2); Fed. R. Crim. Pro. 16(a)(1)(G).

Despite the important difference between lay witnesses and expert witnesses, this Court has not, however, had the opportunity to tell the lower courts how to differentiate between the two. In the absence of any definitive rule, "circuits, and indeed decisions within a circuit, are often in some tension." *United States v. Hilario-Hilario*, 529 F.3d 65, 72 (1st Cir. 2008). In no area is

that tension greater than the area presented in this Petition: the dividing line between lay and expert opinion from law enforcement, as shown below. This case would be an appropriate vehicle to decide that question.

A. *The Lower Courts Are Divided About When Law Enforcement Can Offer Lay Opinion.*

Under the plain text of the rules, the only permissible lay opinions are those "(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." Fed. R. Evid. 701. Those requirements are strict. "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) (footnote omitted)

Fed. R. Evid. 701(c)'s prohibition against lay opinions "based on scientific, technical, or other specialized knowledge within the scope of Rule 702," was added under the 2000 amendments to the Federal Rules. *See* Fed. R. Evid. 701 (1999). Substantive and procedural reasons existed for the change. As to the former, the drafters wanted to "to eliminate the risk that the requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 Advisory Committee Note on

2000 amendment. As for procedural concerns, the drafters added Fed. R. Evid. 701(c) "to ensure[] that a party will not evade the [pretrial] 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." Fed. R. Evid. 701 Advisory Committee Note on 2000 amendment.

The published decision from the Fourth Circuit below held that a district court has discretion to allow law enforcement officers to offer lay opinions based upon "their accumulated experience." [App. 19].

Other Circuits, however, have a bright-line rule for law enforcement that ensures that the parties know when pre-trial disclosure is required: "[K]nowledge derived from previous professional experience falls squarely within the scope of Rule 702 and thus by definition outside of Rule 701." *Smith*, 640 F.3d at 365. *See also United States v. Wilson*, 605 F.3d 985, 1025-26 (D.C. Cir. 2010) ("At issue here is whether a lay witness may testify about drug operations outside the scope of lay knowledge based on past personal experience with other, similar drug operations. At least three Circuits have found that such witnesses may testify only when qualified as experts. We agree….") (collecting cases from 1st, 7th, and 9th Circuits); *Rapid Funding*, 658 F.3d at 1215 (quoting *Smith*); *Gaytan*, 649 F.3d at 582 ("A law-enforcement officer's testimony is a lay opinion if it is limited to what he observed or to other facts derived exclusively from a particular investigation. On the other hand, an officer

testifies as an expert when he brings the wealth of his experience as a narcotics officer to bear on those observations…." (quotation and alteration omitted)).

In particular, because this "Court has [never] squarely addressed whether a law-enforcement officer's opinion testimony associating physical evidence with drug distribution can be admissible as lay opinion testimony under Federal Rule of Evidence 701" or Rule 702, the Circuits are divided on that point. *United States v. De Jesus Sierra*, 629 F. App'x 99, 102 (2d Cir. 2015) (collecting conflicting Circuit Court decisions).

B. This Case Presents a Good Vehicle to Resolve the Split.

This Court should accept this case to resolve the Circuit split. Mr. Smith repeatedly objected to the purported lay testimony from Sgt. Leopard; therefore, no error-preservation problems arise. Further, if the district court erred in agreeing that the opinion was mere lay opinion, Mr. Smith would be entitled to a retrial on Count 2. The district court did not exercise any discretion to select an appropriate sanction for the failure to disclose the expert in discovery—such as excluding the belated opinion, Fed. R. Crim. Pro. 16(d)(2)(C), or allowing Mr. Smith time to find a counter-expert to testify about ranges of personal use for heavy drug addicts. "[A] failure or refusal, either express or implicit, actually to exercise discretion" is an abuse of discretion. *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993). Given that the large amount of cash—five times as much—and baggies found on August 21 only established personal use, the jury could have concluded that Mr. Smith wanted to buy a four-to-five

month personal supply of meth on September 4, after the seizure of his prior personal-use stash.

II. The Lower Courts Are Divided About Who Bears the Burden of Proof Under the Confrontation Clause.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Sixth Amendment generally renders inadmissible testimonial hearsay—such as that obtained in interrogations of criminal suspects—unless the declarant is available for cross examination, U.S. Const. Amend. VI. While experts can rely upon inadmissible evidence to form their independent opinions, the lower courts have held that experts cannot "parrot out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion," so as not to "provide an end run around" the right of confrontation. *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009).

Where, as here, a defendant raises a *Crawford* objection, many courts require the Government to affirmatively establish compliance with the Confrontation Clause. *E.g.*, *Best v. United States*, 66 A.3d 1013, 1017 (D.C. 2013); *Jackson*, 636 F.3d at 695 (collecting cases). *Accord, e.g.*, *State v. Basil*, 998 A.2d 472, 487 (N.J. 2010); *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008); *State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007); *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006) (citation omitted).

The Fourth Circuit, in the published decision below, however, chose a different path. At trial, Mr. Smith repeatedly objected that the Government had

not laid the right foundation for Sgt. Leopard's testimony because it was not clear whether the "experience" he was relying on was his interrogation of suspects or something else. [JA 268-72]. Indeed, the Government itself argued that "[f]or all we know, [his opinion] could come from… law enforcement training classes or courses." [JA 256]. The Government could have asked why he thought that baggies indicate distribution or why user quantities top out at about a gram. *See* [JA 269-70]. Then the record would have been clear whether he said so because that is what drug dealers have told him in interrogation, or because he learned it in class, or because he arrived at those opinions based on observation. The Government did not, however, ask.[1]

Nonetheless, the Fourth Circuit below held that that gap in the record as to the "experience" being relied upon counted against Mr. Smith. [App. 20-21 (holding that "Smith has given us absolutely no reason to think" Sgt. Leopard was actually relaying information learned in custodial interrogations)].

The Fourth Circuit's minority position is incorrect. "[B]efore *Crawford* the government bore the burden of proving the admissibility of statements under the Confrontation Clause. Nothing in either *Crawford* or *Davis* [*v. Washington*, 547 U.S. 813 (2006)] states, or even hints, that the Supreme Court intended

[1] Had Sgt. Leopard been proffered as an expert, Mr. Smith could have inquired at the *Daubert* hearing outside the jury's presence, where the jury would not hear the proverbial bell being rung.

to alter this allocation of burdens." *Jackson*, 636 F.3d at 695 n.4 (quotation omitted).

Had the Fourth Circuit placed the burden on the Government, as other jurisdictions correctly do, a reversal on Count 2 would have also been required independent of whether Federal Rule of Evidence 701 otherwise permitted the testimony. Constitutional error must be harmless beyond a reasonable doubt. *E.g.*, *United States v. Holness*, 706 F.3d 579, 598 (4th Cir. 2013). As shown in the previous section, the case was already close enough to require a retrial under the more lenient test for non-constitutional error. Thus, this constitutional error certainly requires a retrial. The need for a retrial, and the clear error preservation, make this case an appropriate vehicle.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, reverse the judgment below, and remand with instructions to retry Mr. Smith on Count 2.

Dated: October 13, 2020

Respectfully submitted,

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