No. _____

In the
Supreme Court of the United States

CLIVE PATRICK BOWEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented

1. Does a district court violate the Sixth Amendment or otherwise err when it grants a defendant's motion to represent himself shortly before trial but, without good cause, denies him a continuance to prepare his defense?

2. May a witness present lay opinion testimony identifying the defendant in photos or videos if the witness's purported familiarity with the defendant was based solely on review of other photos or videos, or on a law enforcement officer's brief contact with the defendant at the time of his arrest?

Related Proceedings

United States Court of Appeals for the Ninth Circuit

United States v. Clive Patrick Bowen, Case No. 19-50184.

Memorandum Decision Entered: October 9, 2020; Mandate Entered: December 23, 2020.

United States District Court for the Central District of California

United States v. Clive Patrick Bowen, Case No. CR-16-00715-GW.

Judgment Entered: June 6, 2019.

Table of Contents

Table of Authorities

Cases

U.S. Constitution

Statutes

Rules

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

Clive Patrick Bowen petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's memorandum decision in *United States v. Bowen*, Case No. 19-50184, was not published. App. 1-8a.[1] The district court did not issue any relevant written decision.

[1] "App." refers to the attached appendix. The following abbreviations refer to documents filed in the Ninth Circuit: "ER" refers to the appellant's excerpts of record (docket nos. 17 & 21); "AOB" refers to the appellant's opening brief (docket no. 16); "GAB" refers to the government's answering brief (docket no. 25); "ARB" refers to the appellant's reply brief (docket no. 31); "PFR" refers to the appellant's petition for panel rehearing / rehearing en banc (docket no. 43).

Jurisdiction

The Ninth Circuit issued its memorandum decision on October 9, 2020. App. 1a. It denied a petition for panel rehearing / rehearing en banc on December 15, 2020. App. 9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[2]

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. VI provides:

> 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.

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[2] On March 19, 2020, the Court (due to the pandemic) issued an order providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing."

Fed. R. Evid. 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.

Statement of the Case

Clive Patrick Bowen was charged with bank fraud, use of unauthorized access devices, and aggravated identity theft based on fraudulent withdrawals from Bank of America ATMs.[3] After some counsel-requested continuances,[4] his trial was scheduled for January 29, 2019.[5] On January 14, his court-appointed attorney informed the district court that Bowen wanted to represent himself at trial.[6] Three days later, the district court held a hearing on the matter and granted the request, appointing that attorney as standby counsel.[7] At that time, the district court

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[3] ER 86-90; AOB 4.

[4] AOB 53-54.

[5] ER 211-13; AOB 45.

[6] ER 240-41; AOB 45.

[7] ER 3-20; AOB 45.

asked if Bowen would be ready for trial "by either the 29th of January or the 26th of February" (the latest trial date under the most recent Speedy Trial Act stipulation).[8] He said yes.[9] At the end of the hearing, when the government requested a one-week continuance for its own convenience, the district court granted it and set the trial for February 5.[10]

At the next hearing on January 28, the government noted that Bowen wanted to continue the trial.[11] In response, the district court said it would grant a continuance (albeit not an "extensive" one) if both sides agreed, but in the absence of such an agreement, trial would start eight days later on February 5.[12] After a short recess where the parties conferred, the government told the district court it opposed *any* continuance because the case had been filed in September 2016 and Bowen previously said he would be ready to proceed but then said he needed more time to review the 550 pages of discovery, even though he had the discovery for 2½ years and previously reviewed it with counsel.[13] Bowen said he thought the discovery he had just received was "more stuff than [he] already had" because he "didn't look through everything further" and "felt like [he] got pieces."[14] The district court told Bowen that one week was enough time to

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8 ER 4 (emphasis added); AOB 45-46.

9 ER 4; AOB 46.

10 ER 20-22; AOB 46.

11 ER 31; AOB 46.

12 ER 31; AOB 46.

13 ER 32-33; AOB 46.

14 ER 33; AOB 46-47.

review the discovery and ruled, "So if there is not an agreement to continue the trial, I will not continue the trial."[15]

At the next hearing three days later, the district court summarized the trial process for Bowen—jury selection, opening statements, presentation of evidence, closing arguments, and jury instructions—and asked, "Are you familiar with any of those steps?"[16] Bowen responded, "Not really."[17] The district court said, "Well, that is the problem. I mean, you are representing yourself, and even though you have standby counsel, you have to be prepared for all those steps."[18] A short time later, Bowen again brought up a continuance, saying, "I just became my own lawyer."[19] The district court responded, "One of the reasons why I had the discussion with you about you going in pro per status, I indicated that I would not use your going to pro per status to change the date of trial. Discovery has already been, for all intents and purposes, supposedly done in this matter, and the matter was set for trial."[20] When asked what Bowen hoped to do with a continuance, he said, "I could accomplish a lot."[21] "Like what?", the district court asked, and Bowen responded, "That is what I need time to figure out."[22] The district court

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15 ER 33-34; AOB 47.

16 ER 44-45; AOB 47.

17 ER 45; AOB 47.

18 ER 45; AOB 47.

19 ER 47-48; AOB 47.

20 ER 48; AOB 47-48.

21 ER 48; AOB 48.

22 ER 48; AOB 48.

said, "Well, that is – you have a standby counsel to assist you in this matter."[23] Bowen responded, "My standby counsel can't assist me. I can just ask questions. That is it. ... I mean I can only ask him a limited amount of stuff. He has a limited role."[24] The district court agreed but asked again why Bowen needed a continuance.[25] "Because I need time to, you know, put everything together[,]" he replied.[26] The government opposed any continuance.[27] The district court correctly observed that Bowen felt "he needs more time to do something in terms of preparation of his case for trial[,]" but it nevertheless denied a continuance because he hadn't "indicated what exactly he needs to do precisely to prepare for the trial[.]"[28] Later in the hearing, after the district court told Bowen to file any additional motions by the end of the day, Bowen said, "everything is being rushed."[29] The district court responded, "Well, that is because of the fact that you elected to start representing yourself just before trial."[30]

Because the district court denied his motions for a continuance, Bowen's trial started on February 5, nineteen days after he began representing himself.[31] At trial, it was undisputed that

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[23] ER 48; AOB 48.

[24] ER 48-49; AOB 48.

[25] ER 49; AOB 48.

[26] ER 49; AOB 48.

[27] ER 49; AOB 48-49.

[28] ER 49-50; AOB 49.

[29] ER 68-69; AOB 49.

[30] ER 69; AOB 49.

[31] ER 360; AOB 49.

someone made fraudulent withdrawals from the BofA ATMs; the issue was whether Bowen was that person.[32] Long before the trial, however, BofA destroyed the surveillance videos of the ATM transactions at issue, preserving only some still photos from those videos.[33] The government presented 30 such photos to the jury, 11 of which concerned the eight charged transactions.[34] These photos are of poor quality.[35] Rather than let the jury decide for itself whether Bowen was the person depicted in those photos, the government presented purported lay opinion testimony from two witness who told the jury that they identified Bowen as the perpetrator.[36]

First, BofA fraud investigator Karen Finocchiaro testified that she reviewed videos from BofA's ATM surveillance system and identified 155 transactions she concluded were fraudulent and conducted by the same person based on "common attributes," which (depending what was visible in any particular video) amounted to some vague combination of the suspect's "facial structure," his facial hair, the way he "carried" himself during "the approach and the descent," his clothing, and his car.[37] Using these so-called common attributes, Finocchiaro also identified the suspect accessing Bowen's BofA account.[38] She concluded that these were "valid"

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[32] AOB 5-18.

[33] ER 468-70; AOB 10.

[34] AOB 10-12.

[35] ER 835-64.

[36] AOB 10-18.

[37] ER 417, 421-24, 444-46, 449-51, 473-76, 482, 507-14, 1026-31, 1036; AOB 10-14.

[38] ER 448-51; AOB 13.

transactions and therefore told the jury that Bowen was the person who made each of the 155 fraudulent withdrawals.[39] She also identified Bowen as the perpetrator in court.[40]

Finocchiaro presented the results of her investigation to U.S. Postal Inspector Wilford Claiborne.[41] Claiborne told the jury that he agreed with Finocchiaro's conclusion that the photos of Bowen purportedly accessing his own account depicted the same person seen in the fraudulent-transaction photos in evidence.[42] The postal inspector's only other exposure to Bowen was an unspecified but brief encounter at the time of his arrest.[43] Like Finocchiaro, Claiborne identified Bowen as the perpetrator in court.[44]

The government asked the district court to give a jury instruction on dual-role testimony (where a witness testifies as both a fact witness and an expert) as to Finocchiaro and Claiborne.[45] Although Bowen objected, correctly noting that they were not expert witnesses, the district court gave the instruction anyway because "they did testify as to their opinions as to certain things based upon their experiences[.]"[46]

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[39] ER 446-53, 507-14; AOB 13-14.

[40] ER 411-12; AOB 14.

[41] ER 447, 593-95; AOB 15. Neither of them could produce their email correspondence, claiming it had been destroyed. ER 462-65, 470-71, 627-34; AOB 15.

[42] ER 601; AOB 15-16.

[43] ER 609-12, 632-33, 646-49; AOB 17-18.

[44] ER 597-99; AOB 18.

[45] ER 745-48; AOB 19.

[46] ER 752-53, 902, 953-54; AOB 19.

Shortly after the jury began deliberating, it asked for "the exhibit number of Mr. Bowen making legitimate withdrawals – (picture of)."[47] The district court responded by pointing to the three photos identified by Finocchiaro as Bowen making valid ATM withdrawals from his own account.[48] Ultimately, the jury found Bowen guilty of five acts of bank fraud, use of unauthorized access devices, and aggravated identity theft; it found him not guilty on one other bank-fraud charge and could not reach a verdict on two more.[49]

On appeal, Bowen raised several issues challenging his convictions and sentence.[50] Two of them are relevant to this petition. First, Bowen argued that the district court erroneously denied him any continuance after he began representing himself, thereby depriving him of his right to meaningful self-representation, which requires time to prepare.[51] Second, he argued that the district court erroneously allowed two unqualified witnesses to present purported lay-opinion testimony identifying him as the culprit depicted in the ATM surveillance photos.[52]

In an unpublished memorandum decision, the Ninth Circuit affirmed Bowen's convictions and sentence, except to remand for the district court to fix some supervised-release conditions.[53]

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47 ER 804, 885; AOB 19.

48 ER 808-11, 866-68; AOB 19.

49 ER 827-30, 906-16; AOB 19-20.

50 AOB 1-2, 29-74; ARB 1-37.

51 AOB 45-59; ARB 15-24

52 AOB 36-42; ARB 6-10. He also argued that the district court compounded the problem by giving an expert-witness instruction as to those people. AOB 41-42; ARB 11-13.

53 App. 1-8a.

The Ninth Circuit rejected Bowen's claim that the denial of a continuance shortly after he invoked his right to represent himself presented a constitutional problem, instead treating his pro se request no differently than if the continuance had been requested by counsel.[54] It also held that the district court did not plainly err in allowing Finocchiaro and Claiborne to identify Bowen as the perpetrator of the crimes because Fed. R. Evid. 701's criteria for lay witness opinion were purportedly satisfied.[55] The Ninth Circuit later denied Bowen's petition for panel rehearing / rehearing en banc.[56]

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[54] App. 4-5a.

[55] App. 2-3a. Bowen explained below that because of the advisements he was given before being allowed to represent himself and because his pro se filings must be liberally construed, the plain-error standard did not apply. AOB 26-27, 36-37; ARB 1-3, 6 n.16. The Ninth Circuit did not address that argument. App. 1-8a.

[56] App. 9a.

Reasons for Granting the Writ

1. The Court should grant review to address the important question of whether a district court violates the Sixth Amendment or otherwise errs when it grants a defendant's motion to represent himself shortly before trial but, without good cause, denies him a continuance to prepare his defense.

Nine days after Clive Patrick Bowen began representing himself and nine days before his scheduled trial, he asked for a continuance and the district court said it would grant one, but only if the government agreed; the government refused to do that, so the court denied any continuance.[57] Doing so violated the Sixth Amendment.[58]

In *Faretta v. California*, the Court held that the Sixth Amendment not only guarantees a criminal defendant the right to counsel but also allows a defendant to waive that right and represent himself. 422 U.S. 806, 807 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id*. at 819-20. Thus, "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Id*. at 834 (quotation marks omitted).

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[57] AOB 45-49.

[58] AOB 50-58; ARB 15-23; PFR 17-19.

"A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). "The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id*. Accordingly, "[i]n determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a *fair chance* to present his case in his own way." *Id*. at 177 (emphasis added). This fair chance to *meaningfully* represent oneself requires adequate time to prepare for the trial. *Cf. Powell v. Alabama*, 287 U.S. 45, 59 (1932) ("It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.") (quotation marks omitted). Therefore, without adequate preparation time, a defendant is effectively denied his Sixth Amendment right to meaningful self-representation.

"Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle*, 465 U.S. at 177 n.8. In other words, improper denial of this right is "structural" error. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). The conclusion should be the same whether a district court improperly denies a *Faretta* motion or grants the motion but improperly denies a continuance that would give the newly pro se defendant adequate time to prepare. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees

that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). "Thus, the defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Id.* (quotation marks omitted). For example,

> an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, usually increases the likelihood of a trial outcome unfavorable to the defendant. That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error.

Id. at 1908 (citations and quotation marks omitted). This same rationale applies where a defendant is allowed to represent himself at trial but without getting adequate preparation time. The fundamental right is the defendant's "fair chance to present his case in his own way" (*McKaskle*, 465 U.S. at 177) regardless of whether that defense might be successful. Moreover, because it will usually be impossible to know what defense might have been presented had a pro se defendant been given adequate preparation time, that also supports the conclusion that the error is structural. *See Weaver*, 137 S. Ct. at 1908 ("[A]n error has been deemed structural if the effects of the error are simply too hard to measure.").

In accordance with this authority, Bowen argued on appeal that the district court's denial of his post-*Faretta*-hearing request for a continuance violated the Sixth Amendment, a structural constitutional error subject to de novo review and not amenable to harmless-error analysis.[59] The Ninth Circuit summarily rejected that argument, relying on its prior decision in *Armant v. Marquez*, 772 F.2d 552 (9th Cir. 1985), and distinguishing its prior decision in *United States v. Farias*, 618 F.3d 1049 (9th Cir. 2010).[60]

In *Armant*, a habeas case, the defendant (on the day set for trial) asked to represent himself and for a three-week continuance to prepare. 772 F.3d at 554-55. The trial court denied the *Faretta* request as untimely because it would not continue the trial. *Id*. at 555. The Ninth Circuit held that the *Faretta* request was timely and that the trial court abused its discretion in denying a continuance. *Id*. at 955-58. Although it did not treat the denial of a continuance as structural error, it took the Sixth Amendment into account when applying the general test for reviewing such rulings. *Id*. at 556-57. First, the Ninth Circuit concluded that "the continuance, if granted, would have served a useful purpose" because it "would have allowed for the exercise of a right guaranteed by the United States Constitution." *Id*. at 557. Second, it found that the defendant's "request for a continuance was in essence a request to meaningfully assert the right to self-representation[,]" so the prejudice he suffered "was no less than the effective denial of his Constitutional right to self-representation." *Id*. In short, "[t]o deny him a continuance which

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[59] AOB 27, 50-58; ARB 15-23; PFR 17-19. He also argued in the alternative that reversal was required even if the error was not structural. AOB 58-59; ARB 23-24; PFR 19-21.

[60] App. 4-5a.

would have allowed him to prepare for trial effectively rendered his right to self-representation meaningless." *Id*. at 558.

The Ninth Circuit applied *Armant* to a direct appeal in *Farias*, where the defendant asserted his *Faretta* right the day before the scheduled trial but equivocated when the district court said it would not continue the trial. 618 F.3d at 1051, 1054. The Ninth Circuit recognized that a "criminal defendant does not simply have the right to represent himself, but rather has the right to represent himself meaningfully. Meaningful representation requires time to prepare." *Id*. at 1053-54 (citing *Armant* and other cases). "Where a district court improperly denies time to prepare for trial," it concluded, "the harm is no less than the effective denial of a defendant's Constitutional right to self-representation." *Id*. at 1054 (quotation marks omitted). Therefore, at least absent a finding that the defendant asserted his *Faretta* right for the purpose of delay or that other circumstances justified not postponing the trial, a district court's refusal of a continuance effectively denies the defendant's "right to *meaningfully* represent himself as guaranteed by the Sixth Amendment." *Id*. at 1054-55 (emphasis added). The Ninth Circuit further held that the district court's denial of the defendant's request to proceed pro se under these circumstances was structural error. *Id*. at 1055.

In Bowen's case, the Ninth Circuit called *Farias* inapposite because that case concerned a threat to deny a continuance to dissuade the defendant from exercising his self-representation right, whereas Bowen requested a continuance several days after his *Faretta* hearing.[61] But the Ninth Circuit had recognized in *Farias* that the "same rationale animates both" the scenario

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[61] App. 5a.

where "a district court improperly denies time to prepare for trial" and one where the court "improperly threatens to deny such time" because, in each case, "the harm is no less than the effective denial of a defendant's Constitutional right to self-representation." 618 F.3d at 1054 (quotation marks omitted).

Finding no structural error, the Ninth Circuit went on to find no abuse of discretion in denying Bowen a continuance, treating his pro se request no differently than if the continuance had been requested by counsel.[62] For example, it overlooked Bowen's argument that (unlike with a represented defendant) the primary usefulness of a continuance, and accordingly the primary prejudice from its denial, to a pro se defendant is the effect on his opportunity to meaningfully represent himself—*regardless of how successful his defense might have been*—because the *Faretta* right is rooted in the principle that a defendant has the right to meaningfully represent himself even if "ultimately to his own detriment[.]" *Faretta*, 422 U.S. at 834.[63] Accordingly, a court cannot ignore a defendant's pro se status as the Ninth Circuit did here when finding that "Bowen failed sufficiently to explain how the continuance would be useful" and "failed to show that he was materially prejudiced by the district court's denial."[64] The Ninth Circuit's approach disregarded the significant difference between a represented defendant proceeding to trial and one who must litigate the trial himself.

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[62] App. 5a.

[63] AOB 58-59; ARB 23-24; PFR 19-21.

[64] App. 5a.

The Seventh Circuit recently made the same mistake in *United States v. Young*, 955 F.3d 608 (7th Cir.), *cert. denied*, 141 S. Ct. 940 (2020). In that case, the defendant began representing himself in mid-April, and on May 3 (still 11 days before the scheduled trial) he asked for a continuance so he could prepare for trial, but the district court denied the request. *Id*. at 611-12. The Seventh Circuit reviewed that decision in light of a district court's generally broad discretion to grant or deny continuances, without acknowledging that such discretion is constrained when a defendant's Sixth Amendment rights are implicated. *Id*. at 612. On the contrary, the Seventh Circuit justified denial of a continuance as a de facto penalty for invoking the *Faretta* right, citing its precedent stating: "'We are particularly reluctant to find an abuse of discretion where, as in this case, a court denies a continuance to a defendant who decides to proceed pro se but then complains of not being prepared for trial.'" *Id*. It went on to hold: "When Young elected to represent himself, he was warned that one of the consequences would be the difficulty of preparing for trial. ... Young proceeded pro se anyway, and he now faces the consequences." *Id*.

The Ninth Circuit decision in Bowen's case and the Seventh Circuit's decision in *Young* demonstrate the need for guidance from this Court about how to review the denial of a pro se defendant's request for a continuance in the not-uncommon situation where the defendant invokes his *Faretta* right shortly before trial and needs time to prepare once he (not his attorney) is responsible for presenting his defense. As noted above, unjustified denial of a continuance in such circumstances violates the Sixth Amendment and amounts to structural error requiring reversal. At a minimum, the defendant's *Faretta* right must weigh strongly in any traditional error analysis by, for example, making the ability to meaningfully exercise that right the primary

focus of whether the requested continuance would have been useful or whether its denial caused prejudice, instead of focusing (as with counsel-requested continuances) on whether the continuance would have resulted in a demonstrably-better defense.

Bowen's case presents an excellent vehicle for addressing these issues. The record contains no evidence that he asserted his *Faretta* right for the purpose of delay.[65] Nor did other circumstances justify the refusal to grant a continuance.[66] Indeed, when Bowen requested a continuance eight days before trial, the district court said it would grant that request, *but only if the government agreed* (which it did not).[67] Thus, this case squarely presents the important question of whether a district court violates the Sixth Amendment or otherwise errs when it grants a defendant's motion to represent himself shortly before trial but, without good cause, denies him a continuance to prepare his defense.

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[65] AOB 45-49, 52; ARB 19-22.

[66] AOB 52-58; ARB 22-23.

[67] ER 31-34; AOB 46-47; ARB 20-21; PFR 17.

2. The Court should grant review to resolve circuit conflicts concerning whether a witness can present lay opinion testimony identifying the defendant in photos or videos if the witness's purported familiarity with the defendant was based solely on review of other photos or videos, or on a law enforcement officer's brief contact with the defendant at the time of his arrest.

It was undisputed that someone made fraudulent withdrawals from Bank of America's ATMs; Bowen's trial was all about whether he was that person.[68] To prove its case, the government presented 30 ATM surveillance photos,[69] which were of poor quality.[70] Moreover, Bowen is African-American,[71] and cross-racial identifications "are particularly suspect." *United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007) (en banc). In the end, the jury acquitted Bowen as to one of the charged transactions and hung as to two others.[72] Given the jury's struggle with the disputed identity issue, the convictions on the remaining counts were tainted by the decision to allow two witnesses—a BofA fraud investigator and a U.S. postal inspector—to testify that *they* identified Bowen as the person depicted in the photos.[73]

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[68] AOB 5-18.

[69] AOB 10-12.

[70] ER 835-64.

[71] ER 411.

[72] AOB 19-20.

[73] AOB 36-42; ARB 6-10; PFR 6-14.

Under Fed. R. Evid. 701, a non-expert witness may testify in the form of an opinion only if that opinion is rationally based on her perception, is helpful to clearly understanding her testimony or to determine a fact in issue, and is not based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702. The Ninth Circuit has explained that "a lay witness may give an opinion regarding the identity of a person depicted in a photograph if that witness has had sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful[.]" *United States v. Beck*, 418 F.3d 1008, 1014 (9th Cir. 2005) (quotation marks omitted). In the present case, the Ninth Circuit approved such testimony given at Bowen's trial based on two novel theories that are inconsistent with the caselaw of other circuits.[74]

A. The government's primary witness—BofA fraud investigator Karen Finocchiaro—never met Bowen but concluded that he engaged in 155 fraudulent ATM transactions based on her review of surveillance videos.[75] The 30 photos the government presented at trial, 11 of which concerned the eight charged transactions, were still images from these videos.[76] Allowing Finocchiaro to identify Bowen as the person depicted in these photos was inconsistent with this observation of the Seventh Circuit: "Our sister circuits have consistently held that Rule 701 does not extend so far as to allow a witness to serve as the thirteenth juror and compare two pieces of evidence that are already available to the jury." *United States v. Earls*, 704 F.3d 466, 472 (7th

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[74] App. 2-3a.

[75] AOB 10-14.

[76] AOB 10-12.

Cir. 2012). In that case, officers improperly testified that the defendant was the man depicted in photos even though their knowledge of his physical features stemmed from reviewing photos of him during their investigation. *Id*. at 473. In another case, the Third Circuit similarly found a Rule 701 violation where "agents were no better equipped than the jurors to compare the suspect's appearance with that of" the defendant and another man, so their "testimony performed exactly the function Rule 701 is designed to prevent. They assumed the role of juror in comparing photographs of [the two men] to the surveillance footage and concluding [the defendant] looked more like the robber than [the other man]." *United States v. Fulton*, 837 F.3d 281, 297-99 (3d Cir. 2016).

Here, Finocchiaro did not know Bowen except for comparing surveillance images of him purportedly making valid withdrawals from his own account with images of the suspect making the fraudulent withdrawals.[77] She was no better equipped than the jurors to compare the admitted surveillance photos pertaining to the fraudulent transactions with the admitted photos of Bowen purportedly accessing his own account, not to mention his appearance in court. The district court therefore erred in allowing Finocchiaro to effectively "serve as the thirteenth juror[.]" *Earls*, 704 F.3d at 472.

The Ninth Circuit accepted the government's argument that Finocchiaro's testimony was admissible because she "observed numerous surveillance videos" of both the fraudulent transactions and Bowen purportedly using his own account, whereas "[t]he jury could not

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[77] AOB 10-14.

observe such videos and had only still photographs."[78] It ignored that Finocchiaro preserved only some still photos from the videos, allowing the videos themselves to be purged from BofA's system after 90 days despite Bowen's arrest only two months after the charged transactions.[79] Thus, the videos were unavailable not only to the jury but to Bowen as well, so there was no way for anyone to check her work, so to speak. Moreover, the government was allowed to have its cake and eat it too by acquiescing in the destruction of the videos and yet still introducing Finocchiaro's testimony about her comparison of those unavailable videos based on "common attributes" without qualifying her as an expert with the skills to do so.

In short, to the extent the jury had the same photos, Finocchiaro improperly acted as the thirteenth juror by offering her opinions comparing them; and to the extent her opinions were based on the unavailable videos, she was testifying as an unqualified expert. The prejudice from this error was heightened because Finocchiaro did not just testify about the eight charged transactions. She claimed she identified Bowen making about 155 different fraudulent transactions, which were listed on a spreadsheet admitted as a trial exhibit.[80] For the vast majority of the uncharged transactions, there was no backup whatsoever, just Finocchiaro's unsubstantiated opinions that Bowen was the person who withdrew the money from the ATMs each time.

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[78] App. 3a; *see also* GAB 35-36, 40.

[79] AOB 10; *see also* AOB 5-9, 16-17.

[80] ER 421-24, 1026-27; AOB 12.

B. Finocchiaro presented the results of her investigation to U.S. Postal Inspector Wilford Claiborne, who told the jury he agreed with her conclusion that the photos of Bowen purportedly accessing his own account depicted the same person seen in the fraudulent-transaction photos, and he too identified Bowen as the perpetrator in court.[81] But given that Claiborne received the still photos but no videos,[82] the above-refuted rationale for allowing Finocchiaro's lay identification testimony is inapplicable to him. Therefore, as to Claiborne, the Ninth Circuit relied on his personal observation of Bowen on the day of his arrest.[83]

The Ninth Circuit ignored that the record contains *no meaningful details* about how long Claiborne's interaction(s) with Bowen lasted.[84] It was therefore *impossible* to conclude that he developed the level of familiarity required by Rule 701. Again, the Ninth Circuit's decision conflicts with authority from other circuits, which have recognized that an officer's incidental interactions with a defendant cannot satisfy that rule. *See United States v. Jett*, 908 F.3d 252, 271-72 (7th Cir. 2018) (officer's fleeting interaction with defendant during execution of search warrant insufficient); *Fulton*, 837 F.3d at 299 (officers' in-person interaction with defendant during post-arrest interview and exposure to him during trial insufficient); *United States v. Jadlowe*, 628 F.3d 1, 24 (1st Cir. 2010) (Rule 701 violated where officers were not in better position than jurors to make identity judgments).

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81 AOB 15-16, 18.

82 AOB 15.

83 App. 3a; *see also* GAB 36-37, 40.

84 ARB 10; PFR 12.

C. These issues merit the Court's attention because the Ninth Circuit's decision invites misuse of Rule 701 in both criminal and civil cases. Victims (like BofA), the government, or other litigants now have no incentive to preserve surveillance videos for discovery and trial because they know that destroying them means they can present untestable lay opinions from someone with no expert qualifications who will nevertheless claim that she became familiar enough with a person through review of the unavailable videos to reliably identify that person in photos. Moreover, in every criminal case, there will be officers who have some minimal contact with the defendant when he is arrested and booked. The government now knows it can present an officer to identify the defendant in photos the jurors should assess for themselves, thereby letting the officer effectively—and improperly—"serve as the thirteenth juror[.]" *Earls*, 704 F.3d at 472. Endorsing that practice is particularly problematic given that law-enforcement-officer testimony "often carries an aura of special reliability and trustworthiness[.]" *United States v. Valencia-Lopez*, 971 F.3d 891, 902 (9th Cir. 2020) (quotation marks omitted). The Court should therefore grant review to resolve the circuit conflicts concerning whether a witness can present lay opinion testimony identifying the defendant in photos or videos if the witness's purported familiarity with the defendant was based solely on review of other photos or videos, or on a law enforcement officer's brief contact with the defendant at the time of his arrest.

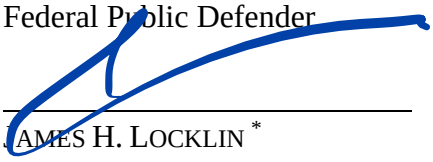
Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

April 14, 2021

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender



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