No.

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRE BROWN and ANTHONY WILSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether government agents can testify solely as lay witnesses under Rule 701 of the Federal Rules of Evidence, when they were not parties to the conversation and when their opinions are not rationally based on their perceptions, as held by the Ninth Circuit, in direct conflict with rules that the Fourth, Sixth, Eighth, and D.C. Circuits have adopted?

RELATED PROCEEDINGS

United States District Court

United States v. Andre Brown and Anthony Wilson, CR-13-822-ODW (C.D. Cal.)

Ninth Circuit Court of Appeals

United States v. Andre Brown and Anthony Wilson, Ninth Circuit Nos. 19-50025 and 19-50037

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PETITION FOR WRIT OF CERTIORARI

Petitioners Andre Brown and Anthony Wilson respectfully ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on September 22, 2020. The decision is unpublished.

OPINION BELOW

On November 2, 2020, the Court of Appeals entered its decision affirming Brown and Wilson's drug trafficking convictions. Appendix A. (memorandum decision) The petition for rehearing was denied on January 13, 2021. Appendix B.

JURISDICTION

On September 22, 2020, the Court of Appeals affirmed Petitioners' conviction and sentence. Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition for rehearing was denied on January 13, 2021. Appendix B. This petition is due for filing on June 14, 2021. Supreme Court Order of March 19, 2020. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Court of Appeals for the Ninth Circuit under 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

Federal Evidence Rule 701 (lay opinion testimony) provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to a clear understanding of the witness' 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 Evidence Rule 702 (expert testimony) provides that a witness:

> who is qualified as an expert by knowledge, skill, experience, training, or education" may testify in the form of an opinion if it will help the trier of fact to understand the evidence; the testimony is based on sufficient facts; is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case.

STATEMENT OF THE CASE

Petitioners Brown and Wilson were convicted of trafficking in PCP [21 U.S.C. §§ 841, 846]. The primary evidence against them (approximately one-third of the government's case) was numerous intercepted phone calls interpreted by DEA Agent Zapata, who was not a party to the calls. Zapata was allowed to testify solely as a lay witness over defense objection under *United States v. Gadson*, 763 F.3d 1189, 1206 (9th Cir. 2014).

On the first day of testimony, DEA Agent Justin Watt testified as an expert witness on PCP. (8/7/18 RT 61-91.) On the second day of testimony, DEA Agent Hector Zapata testified for an entire day solely as a lay witness about the numerous recorded calls. (2-ER-181-408.)

Zapata detailed his extensive experience as a DEA Agent since 1991, including training, task force participation, and drug busts. He explained how the DEA utilizes surveillance, pole cameras, search warrants, wiretaps, criminal informants, and controlled drug buys. He said a PCP conspiracy is "not your typical organization," like a Mexican drug cartel. It has no hierarchy, and PCP is made in this country. (2-ER-188.)

After detailing his expertise, Zapata explained all the different people intercepted on the wiretaps. He tapped Brown's phone after getting

"great conversation" between a man named Hawkins and Brown "about PCP drug trafficking." (2-ER-199.)

Zapata interpreted some coded language based on his review of the wiretaps:

- "starters" (Exhibit 356a) means "ether." (2-ER-294.)

  "Starter" could mean different things to different callers depending on context. (2-ER-308.)

Zapata interpreted some coded language based on his DEA expertise:

- "He said to ask him is his 'stones' weak?" (Exhibit 426a, 3-ER-553). Zapata said "stones" is an old-school word, "street language for referring to PCP crystals." (2-ER-331.)
- When the informant asked Brown how much for 32 ounces of "juice," Brown responded, "$2,400." (Exhibit 137a, 3-ER-409) Zapata said that "price" was "consistent with "market price for PCP at that time." (2-ER-259.)

Zapata interpreted some language (e.g. "snitch") that the ordinary juror could understand:

- After Clarence Taylor was stopped by police on a bus in El Paso with PCP, but not arrested, Brown told both Taylor and Hester: "I

can't hang out with you no more because you putting a bad name on me ... that you a *snitch* or something. That the – that the police called my phone, and you let me talk to the police and – and I'm still hanging with you." (Exhibit 364a, 3-ER-467, emphasis added.)

Zapata said Brown was "conveying" that "there is rumors" that "Taylor is now working with law enforcement." (2-ER-292.)

Zapata also interpreted conversations that showed Brown was obviously guilty:

- Brown told Taylor: "What happened? I told him there ain't shit. What the fuck they messing with you for? You ain't did nothing .... So what? They trying to set up you up?" (Exhibit 352a, 3-ER-438.)

  Zapata said this "just tells me they are kind of like trying to get a story together like – are they being law enforcement, are they trying to set you up or place drugs on you or something like that." (RT 128, 2-ER-288.)

Zapata led the jury to believe he had information that it did not have:

- As to calls between the informant and Brown (1/26/11), Zapata's "understanding" was that "Hester brought the PCP with him from the residence." (RT 112, 2-ER-272.) Hester did not testify and was never seen carrying anything, much less PCP. (RT 262, 264, 2-ER-400, 402.)
- Zapata said "Hawkins was not involved" in the deal. (RT 260, 2-ER-398.) Hawkins did not testify and there was no evidence introduced to back up that statement.

The jury was instructed that some witnesses testifying as experts gave opinions. The jury was not instructed who the experts were. Nor were they told about the difference between expert opinions and lay opinions.

In *Gadson*, 763 F.3d at 1206, a divided panel of the Ninth Circuit held that it was not plain error to allow a law enforcement agent to interpret coded language in wiretaps solely as a lay witness. The dissent thought *Gadson* should be revisited by an en banc court because it was in conflict with decisions from several other circuits: *United States v. Marcus Freeman*, 730 F.3d 590 (6th Cir. 2013); *United States v. Hampton*, 718 F.3d 978 (D.C. Cir. 2013); *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010); *United States v.*

Grinage, 390 F.3d 746 (2d Cir. 2004); and *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001).

Petitioners argued on appeal that even under *Gadson*, their convictions should be reversed because Zapata had "unmerited credibility" as an expert given his lengthy testimony about his background and credentials. *Gadson*, 763 F.3d at 1212. Zapata also interpreted language that the ordinary juror would understand, led the jury to believe that he had information they did not have that the defendants were guilty, and gave testimony that amounted in its entirety to a lengthy government closing argument. Zapata simply "regurgitated the government's theory of the case." *Id.* at 1211.

Zapata's lay testimony was particularly prejudicial to Brown's distribution count (number 7), as the government conceded the informant had no credibility, because she had a lengthy history of fraud and making false statements. She was deactivated and not kept under surveillance during the buy walk.

The Ninth Circuit addressed the *Gadson* issue very briefly, stating only that the district court did not abuse its discretion in allowing Zapata to provide lay opinion testimony. Appendix A at 9-10. "Our precedents firmly allow an agent to interpret coded language and phone calls

based on his experience with the investigation and familiarity with the calls." Appendix A at 10, citing *United States v. Barragan*, 871 F.3d 689, 704 (9th Cir. 2017). The court failed to acknowledge that *Barragan* relied on *Gadson,* which marked a clear departure from previous precedent.

Petitioner Brown detailed at length that he was severely prejudiced as to the distribution count because the evidence was insufficient -- the informant was not kept under surveillance and the government conceded she had no credibility. The court concluded the evidence was not insufficient based on the phone calls and Zapata's testimony. Appendix A at 12.

REASONS FOR GRANTING THE WRIT

GADSON IS IN CONFLICT WITH OPINIONS FROM FOUR OTHER CIRCUITS

A. *Gadson* Held an Agent Can Testify about Coded Language Solely as a Lay Witness Based on His Investigation

Federal Evidence Rule 701 (involving lay opinion testimony) provides that the witness' opinion testimony is limited to one that is rationally based on the witness's perception, helpful, and not based on expertise.

1. Prior to *Kevin Freeman* and *Gadson*, Law Enforcement Officers Typically Testified as Experts Regarding Coded Drug Jargon

In *United States v. Mejia*, 545 F.3d 179, 188 (2d Cir. 2008), the Second Circuit discussed the "emergence of the officer expert." In the 1980s, the government used law enforcement as experts about the nature and structure of organized crime families (e.g. "capo," "regime," "crew"). *Id.* at 189. The officers soon broadened their expertise to describe gang membership rules and codes of conduct as well as "the meaning of certain jargon." *Ibid.*

Explaining the meaning of "capo" to the defendant's criminality, "the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense." *Mejia*, 545 F.3d at 191.

Case agents testifying as experts are prone to making "sweeping conclusions" about the defendant's activities. *Mejia*, 545 F.3d at 191, citing *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003). The officer expert might "stray from the scope of his expertise" to testifying about the meaning of conversations in general, "beyond the interpretation of code words." *Dukagjini* at 54. Or, the expert might interpret ambiguous slang terms based

on knowledge gained through involvement in the case, rather than by reference to the "fixed meaning" of those terms "either within the narcotics world or within this particular conspiracy." *Id.* at 55.

2. Prior to *Gadson*, in the Ninth Circuit, a District Court Needed to Instruct the Jury How to Evaluate an Officer's Testimony When He Is Both an Expert and a Lay Witness

Law enforcement officers testify as experts in interpreting the meaning of code words in intercepted telephone calls in drug cases, based on their training and experience. *United States v. Reyes Vera,* 770 F.3d 1232, 1241 (9th Cir. 2014). To interpret the meaning of coded language encountered for the first time in a particular investigation, the officer's qualifications were not alone sufficient to satisfy Rule 702. The district court needed to assure that the expert's methods for interpreting the new terminology were both reliable and adequately explained. *Ibid.*

Because expert testimony "is likely to carry great weight with the jury ... care must be taken to assure that a proffered witness truly qualifies as an expert." *Jinro America Inc. V. Secure Investments, Inc*, 266 F.3d 993, 1004 (9th Cir. 2001). The court must act as the "vigilant gatekeeper" of expert testimony "to ensure that it is reliable." *Kevin Freeman*, 498 F.3d at 904. The gatekeeping requirement of *Daubert v. Merrell Dow Pharmaceuticals*, 509

U.S. 579, 589 (1993), entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that methodology can be properly applied to the facts of the case. *Id*. at 592-93.

A law enforcement officer testifying as an expert about drug jargon could also testify as a lay witness if he were involved in the investigation. *Reyes Vera*, 770 F.3d at 1242, citing *Kevin Freeman*, 498 F.3d 893, 904 (9th Cir. 2007). In *Freeman*, the officer testified as both an expert as to words he was familiar with before that case and as a lay witness regarding words he deciphered during the course of that investigation. *Id*. 899.

An officer could give lay opinion testimony about the meaning of intercepted phone calls, "but those opinions [were] subject to the requirements of" Rule 701, which require the opinion testimony to be rationally based on the witness's perception. *Reyes Vera,* 770 F.3d at 1243.

Therefore, when a law enforcement officer gave lay opinion testimony by interpreting drug jargon on intercepted phone calls based on his general knowledge of the investigation, he could not rely on hearsay. *Kevin Freeman*, 498 F.3d at 904. If the agent, "relied upon or conveyed hearsay evidence when testifying as a lay witness or if [the case agent] based his lay testimony on matters not within his personal knowledge, he exceeded the bounds of properly admissible testimony." *Ibid.*

When law enforcement gave both expert and lay opinion testimony about intercepted telephone calls, the district court needed to instruct the jury how to properly evaluate the difference. *Reyes Vera*, 770 F.3d at 1235. "Because these risks are reduced 'if jurors are aware of the witness's dual roles, the jury must be instructed about 'what the attendant circumstances are in allowing a government case agent to testify as an expert.'" *Id.* at 1242. The district court had the ultimate responsibility for ensuring the reliability of expert testimony and for instructing the jury about how to evaluate dual role testimony. *Reyes Vera*, 770 F.3d at 1243.

3. *Gadson* Makes it Unnecessary for Agents to Qualify as Experts on Drug Jargon, and Permits Lay Testimony about Entire Conversations to Which They Were Not a Party

In *Gadson*, the appellants complained that allowing an officer to testify as a lay witness about the content of telephone calls violated Rule 701, because his testimony was based on the investigation as a whole, his interpretation of vague testimony usurped the jury's role as trier of facts, and his interpretation of one phone call relied on hearsay. 783 F.3d at 1206. A divided Ninth Circuit panel held this was not plain error because the officer had the requisite personal experience and knowledge of the investigation,

reviewed the phone calls in the context of that knowledge, and did not "merely regurgitate the government's theory of the case." *Id*. at 1210-1211.

An officer's interpretation of phone calls may meet Rule 701's "perception" requirement, the majority held, when it is an interpretation of ambiguous conversations based on the officer's direct knowledge of the investigation. *Gadson*, 763 F.3d 1206, citing *Kevin Freeman*, 498 F.3d at 904-905. Such lay interpretation was based on direct perception of listening to hours of conversations, direct observation of the defendants, and other facts learned during the investigation. *Id.* at 1207, relying on *United States v. El-Mezain*, 664 F.3d 467, 513-14 (5th Cir. 2011) (lay opinion interpreting phone calls limited to personal perceptions from investigation of case); *United States v. Rollins*, 544 F.3d 820, 830-33 (7th Cir. 2008) (no error when agent testified to his "impressions" of recorded conversations based on his investigation of this particular conspiracy); *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011) (lay witness testimony permissible even though agent did not personally observe or participate in defendants' conversations); *United States v. Garcia*, 994 F.2d 1499, 1507 (10th Cir. 1993) (admitting officer's opinion based only on listening to the conversations of coconspirators).

Lay opinion falls outside Rule 701, if it is based on hearsay, or if it merely provides interpretation of clear statements that are within the

common knowledge of the jury. *Gadson*, 763 F.3d at 1207, citing *United States v. Dicker*, 853 F.2d 1103, 1109 (3rd Cir. 1988) (officer impermissibly testified parties were discussing "phony paperwork" when the conversation itself did not say that and when there was no indication that documents were not genuine); *United States v. Marcus Freeman*, 730 F.3d 590, 597 (6th Cir. 2013) (Rule 701 barred officer's testimony that essentially spoon-fed his interpretation of government's theory of the case to jury, even interpreting ordinary language).

Gadson disagreed with other circuits that barred officer lay opinion testimony about telephone conversations. *Gadson*, 763 F.3d at 1208, citing *United States v. Hampton*, 718 F.3d 987, 981-83 (D.C. Cir. 2013) (Rule 701 violated when FBI agent testified regarding intercepted conversations where agent was in charge of the investigation, monitored wiretaps, and reviewed some 20,000 wiretapped calls because there was a risk that the agent was testifying on information not before the jury and therefore it could not independently verify his inferences or reach its own interpretations); *United States v. Grinage*, 390 F.3d 746, 750-51 (2d Cir. 2004) (same). The Ninth Circuit departed from these circuits believing that the drafters of Rule 701 intended an expansive view of lay testimony. *Gadson*, 763 F.3d at 1208.

The district court, the *Gadson* majority held, should minimize problems that may arise with lay opinion testimony, but a witness's years of experience makes his testimony helpful to the jury. *Gadson*, 763 F.3d at 1209, citing *United States v. Albertelli*, 687 F.3d 439, 447 (1st Cir. 2012) (listing dangers and safeguards).

As for drug jargon, the majority held, while the officer testifying as an expert may have "unmerited credibility" with the jury, "the converse is not true: a lay witness's testimony carries no special weight, even if at points the lay witness has recourse to relevant background and training." *Gadson*, 73 F.3d at 1212. The officer in *Gadson* referenced his training and police experience only when defining a single term "nine of leaded." *Id.* at 1213.

4. The Dissent Noted that the Majority's Rule Conflicted with Approaches Taken by Several Sister Circuits Regarding Rules 701 and 702

The dissent thought that *Kevin Freeman* "goes much too far in allowing law officer testimony concerning recorded conversations." *Gadson*, 763 F.3d at 1223 (Berzon, J., dissenting). "This court broadly permits an officer to interpret ambiguous conversations based on his direct knowledge of the investigation. *Id.* at 1224, citing *Kevin Freeman*, 498 F.3d at 904. "That aspect of *Kevin Freeman* is, in my view, wrong" and inconsistent with caselaw

in other circuits. *Id.* citing *Marcus Freeman*, 730 F.3d 590 (6th Cir. 2013); *United States v. Hampton*, 718 F.3d 978 (D.C. Cir. 2013); *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010); *United States v. Grinage*, 390 F.3d 746 (2d Cir. 2004); and *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001).

In *Grinage*, for example, the lay officer witness, "was presented to the jury with an aura of expertise and authority which increased the risk that the jury would be swayed by his testimony, rather than his interpretation of the calls." *Gadson*, 763 F.3d at 1226, citing 390 F.3d at 751.

The *Gadson* majority read *Kevin Freeman* as "providing blanket approval for" the police to give "lay opinion testimony, even though he failed to explain the basis for his opinions and often invoked, without any detail as to his source, his knowledge of evidence not presented at trial." *Gadson*, 763 F.3d at 1226. "That understanding – which may well be an accurate reading of *Kevin Freeman* – confirms that our case law has sanctioned a major breakdown in the limits properly placed on lay opinion testimony." *Ibid.* "How can the jury be expected to evaluate the reliability of lay opinion testimony when the experience the agent has that the jurors do not themselves have is not identified for the jury." *Ibid.*, citing *Marcus Freeman*, 730 F.3d at 597. When the case agent is not required to provide the factual basis for his testimony, the district court has no way of knowing whether he is

relying upon or conveying hearsay or other improper bases for lay opinion testimony. *Gadson*, at 1226. The officer also gave interpretations of common words used in common ways. *Id.* at 1230, citing *Marcus Freeman*, 730 F.3d at 398.

The *Gadson* dissent also pointed out that "we actually have no idea, nor did the jury or judge," whether the officer's testimony was based on his perception under Rule 701(a) or instead what he heard from others during the course of the investigation. *Gadson*, 763 F.3d at 1227. The jury itself heard the tapes, but the officer instead told the jury the meaning he ascribed to them, rather than leaving that determination to the jury. *Ibid*. Nor was the officer an ordinary lay witness, but likely to be regarded as an expert even if he was not testifying as one. *Ibid*.

B. Agent Zapata's Testimony Amounted to a Lengthy Closing Argument by the Government's Expert Witness, Therefore Illustrating Why this Case is an Ideal Vehicle for Resolving the Circuit Split Here

Because Zapata detailed his background and credentials as a longtime DEA agent, he was clearly viewed as an expert who enjoyed "unmerited credibility." *Gadson*, 763 F.3d at 1212. He went beyond interpreting jargon like "juice" or "ticket" or "stones," and explained ordinary

language like "snitch." He told the jury that a person named Hester brought the PCP, but that a person named Hawkins was not involved. Just how Zapata knew all this was never explained either by him or by any other evidence.

Zapata's testimony was a lengthy running commentary on why the defendants were guilty. Although the government could give a closing argument piecing all the calls together to argue they were guilty, Zapata could not do that under any authority. Zapata "regurgitat[ed] the government's theory of the case." *Gadson*, 783 F.3d at 1211.

* * * *

Certiorari should be granted to resolve a clear split in the circuits. It bears emphasizing that in *Gadson,* the defendants did not object to the agent testifying as a lay witness, whereas here the defendants strenuously objected to Zapata testifying as a lay witness. *Gadson* has now gone from holding there was no plain error to holding that even over an objection, an agent may testify solely as a lay witness interpreting telephone calls to which he or she was not a party. The Court should grant certiorari to examine whether the Ninth Circuit's majority rule in *Gadson* contravenes the more reasoned approach that several of its sister circuits have taken regarding Rules 701 and 702.

CONCLUSION

For the reasons expressed above, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: June 8, 2021

Respectfully submitted,

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