

No. _____

In The
Supreme Court of the United States

MARCUS PHILLIPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This court has not decided whether expert testimony about mental acuity is admissible to show a person's ability to observe and to act to exercise dominion and control over a home in which he was a guest. Psychological expert testimony regarding perceptive ability is a matter of first impression in this Court.

Contrary to every court of appeals that has admitted expert drug agent testimony, the Fifth Circuit admitted the testimony of an experienced drug enforcement agent who had no knowledge of the facts of this case and who expressed no opinion about any matter in this case.

PARTIES TO THE PROCEEDINGS

Petitioner, Marcus Phillips, was the defendant in the district court proceedings and appellant in the court of appeals proceedings. Respondent, the United States of America, was the plaintiff-appellee below.

RELATED CASES

- The United States of America v. Marcus Phillips, No. 5:17-CR-00837-OLG-1, United States District Court for the Western District of Texas—San Antonio Division. Judgment entered on July 24, 2019.
- The United States of America v. Marcus Phillips, No. 19-50694, United States Court of Appeals for the Fifth Circuit. Judgment entered on May 20, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Marcus Phillips respectfully petitions for writ of certiorari to review the judgement of the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The opinion of the Court of Appeals regarding petitioner's appeal is attached: *United States v. Marcus Phillips*, No. 19-50694 (5th Cir. May 20, 2021). The Fifth Circuit's analysis of the issues is brief. The court simply relied on the district court's pre-trial rulings to uphold Phillips's convictions. *United States v. Marcus Phillips*, No. 19-50694 (5th Cir. May 20, 2021).

JURISDICTION

The Fifth Circuit entered judgment on May 20, 2021. App. 1–3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI.

INTRODUCTION AND STATEMENT OF THE CASE

This case raises Mr. Phillips’ Sixth Amendment right to compulsory process and to present, in his defense, an expert on his experiential perception abilities. This case also, presents the question of whether the government may properly call as an expert witness a drug enforcement officer with a great deal of experience with other drug cases to testify about what he observed in those other cases without any familiarity of the facts in this case and without expressing any opinion about this case.

The San Antonio Police Department investigated Petitioner, Marcus Phillips (Phillips), and his brother by using a confidential informant. Phillips was homeless and slept on family member’s or

acquaintance's couches when they permitted it. On the day of his arrest, his girlfriend's car he had borrowed was repossessed. So, he was stranded with a laundry basket of his old mail and was sleeping on a couch in a back room of his aunt's, Tryphosa Nichols' home. She and her husband paid the utilities and rent. Phillips did not have any toiletries or clothing in the home and he was its only occupant at the time it was raided. However, he had written and posted a few letters for collection by the mailman using his aunt's address as the return address. He used other relatives addresses to receive mail as well. ROA.19-50694.1091-1092.

When law enforcement raided the home, they found Phillips in the back room laying in a prone position on the floor. Although law enforcement found drugs and firearms hidden under heavy furniture and in closets and cabinets in other locations of the home, no drugs or firearms were discovered in the room where Phillips was nor were any on his person. ROA.19-50694.558.

The government charged only Phillips with possession with intent to distribute crack and cocaine, possession of firearms by a felon, and use of a firearm during a drug offense. Phillips was tried and convicted of possession with intent to distribute crack, possession of a firearm by a felon, and use of a firearm during a drug offense. The jury acquitted Phillips of possession with intent to distribute cocaine. The

United States of America v. Marcus Phillips, No. 5:17-CR-00837-OLG-1, United States District Court for the Western District of Texas—San Antonio Division. Judgment entered on July 24, 2019. He appealed his convictions and sentence to the Fifth Circuit Court of Appeals. It affirmed his convictions and sentence. The United States of America v. Marcus Phillips, No. 19-50694, United States Court of Appeals for the Fifth Circuit. Judgment entered on May 20, 2021.

In his defense, Phillips argued he did not constructively possess the firearms and drugs in the home, as he was not near the drugs or guns when they were found. He was located elsewhere in the home in a room where there were not any drugs or guns. To demonstrate that he is dull and lacks an inquisitive nature, Phillips sought to present expert testimony from Dr. John Fabian. At a pre-trial hearing, Dr. Fabian testified about Phillips's low IQ and his multiple learning disorders. Dr. Fabian further testified that, based on his professional opinion, Phillips was unlikely to be inquisitive. And that his experiential perception was low. The Court excluded this expert testimony, which deprived Phillips of presenting a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

The testimony is distinct from *Clark v. Arizona*, 548 U.S. 735, 126 S.Ct. 2709, 165 L. Ed. 2d 842 (2006) in which this Court held that evidence of a mental disease or defect was properly excluded in a capital

murder case in which the defendant, who hired someone to kill his wife, relied on the affirmative defense of insanity. There, Mr. Crane was attempting to disprove *mens rea*. Mr. Phillips offered testimony about his perceptive ability. Just as a person who wears prescription glasses may not see very well without them, a person with a low IQ and learning disorders may not reach the same conclusion about his perceptive abilities as a person with a high IQ and no learning disorders. He should have been permitted to put on evidence of his abilities.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's brief opinion excludes defense evidence regarding Phillips' perception abilities and thus important characteristics the jury would need to use to decide whether he exercised dominion and control over his aunt's three-bedroom home and thus the guns and drugs found in rooms which he did not occupy. This Court has not yet decided this issue. Further, the Fifth Circuit decided the admissibility of an expert drug agent who did not apply his knowledge to the facts of this case and who did not render an opinion about this case in contrast with every circuit court of appeals that require both matters before admitting such expert testimony.

I. THIS COURT HAS NOT DECIDED WHETHER EXPERT TESTIMONY ABOUT MENTAL ACUITY IS ADMISSIBLE TO SHOW A PERSON'S ABILITY TO OBSERVE.

A. Psychological Expert Testimony Regarding Perceptive Ability is a Matter of First Impression in This Court

The First, and Eleventh Circuit Courts of Appeal hold that expert testimony is proper to show a psychological condition or one's mental acuity to prove a witness's ability to perceive. *United States v. Butt*, 955 F.2d 77, 82(1st Cir.1992)[expert testimony is admissible to show one's ability to perceive]; *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983) [same]. However, the Fifth Circuit without discussion in this case held such evidence was properly excluded. In *Greene v. Lambert*, 288 F.3d 1081, 1090(9th Cir. 2002)the Ninth Circuit Court of Appeals held that in a Washington State case, expert testimony to show diminished capacity as a result of disassociative disorder was consistent with this Court's holdings in "*Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), and *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)" *Greene v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002). It reasoned that these opinions uphold the right to present a defense in circumstances where a co-defendant desired to testify on the defendant's behalf in *Washington, supra*, and in which the

witness's memory was enhanced with hypnosis in *Rock, supra*. But the Ninth Circuit also held that its opinion was confined to the narrow circumstances before it; where a treating mental health nurse who was attacked by one of the defendant's alter personalities experienced the attack and where the defendant also testified.

In *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988) the Fifth Circuit determined as a matter of first impression that expert psychiatric testimony may be admitted to demonstrate that a mental disease, defect, or subnormal intelligence makes a defendant peculiarly susceptible to inducement. However, the court held that the trial court had not abused its discretion in excluding the evidence because it was not clear that the government received adequate notice to address the matter. Here, the government had adequate notice and the trial court conducted a *Daubert* hearing. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 508 US. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Also, Mr. Phillips' case does not involve entrapment or susceptibility to inducement as did *Newman, supra*. It does not appear that the Fifth Circuit has decided this issue before it was presented with the issue in this case. However, the admission of psychological evidence showing the characteristic of susceptibility to inducement can be compared to admission of evidence of one's observational abilities. These are characteristics about the Petitioner that jurors would want to know

when deciding if Phillips had dominion and control over the home where he was an overnight guest and whether he constructively possessed the guns and drugs in other rooms in the home. It is evidence of his abilities not evidence of his knowledge.

Here, Dr. Fabian testified at a pre-trial hearing about evaluating Phillips and concluded that Phillips had a low IQ and multiple learning disorders. According to Dr. Fabian, because of Phillips's upbringing—being raised in a home with eight other kids, where food was scarce—Phillips was not an inquisitive individual and would not look through others' belongings. Dr. Fabian's testimony was evidence of abilities and characteristics. By denying Phillips the opportunity to present Dr. Fabian's testimony, the Court violated Phillips's Sixth Amendment right to compulsory process and to present a defense. U.S. Const. amend. VI. ROA19-50694.588.

Under Fifth Circuit precedent, the Government is required to prove by "circumstantial evidence that is suspicious in nature or demonstrates guilty knowledge." *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996) *see also United States v. Cano-guel*, 167 F.3d 900, 904 (5th Cir. 1999). Because Fabian interviewed Phillips and conducted psychological testing, there was an adequate basis for him to form an expert opinion about Phillips's subnormal intelligence, learning disorders, and observational abilities.

The district court improperly excluded Dr. Fabian's proffered testimony by finding it irrelevant and that it would confuse the jury. ROA19-50694.588. Dr. Fabian did not opine that Phillips could not form the requisite mental state for the offense conduct. Rather, Dr. Fabian's testimony was that Phillips was not inquisitive and was dull with a low IQ. ROA19-50694.729-730. The Court found that there was a tenuous connection between Mr. Phillips' IQ testing and his constructive possession of guns and drugs. Dr. Fabian's testimony was based on specialized knowledge as a forensic psychiatrist after interviewing and testing Phillips at length. There was no suggestion that his testimony was not the product of reliable principles and methods, nor that Dr. Fabian failed to reliably apply those principles and methods to the facts. And the court described the relevance of the testimony, that if Mr. Phillips had been more intelligent and looked around to discover the guns and drugs, he would have left the home. ROA19-50694.734-735.

Dr. Fabian was the only defense witness that could testify about Phillips's brain functioning and low IQ. Nevertheless, the jury was deprived of hearing testimony that would inform them of his intellect and perceptual abilities. This Court should grant certiorari to provide guidance to the Circuit Courts and establish uniformity in the law concerning this issue. Also, similar to this case, but not on point, is the

Riggins v. Nevada, 504 U.S. 127, 138, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) case discussing the effect of antipsychotic medication on one's cognition and outward appearance as affecting Riggins' liberty interest in being free of forced antipsychotic drugs. This Court also discusses the drug's effects on Riggins' cognition and outward appearance to the jury as he interacted with counsel and trial participants as part of his liberty interest and right to a fair trial. Mr. Phillips has an interest in his jury hearing the defense evidence of his perceptual abilities. Exclusion of Dr. Fabian's testimony denied him the right to put on a defense to compulsory process.

B. CONCLUSION

Thus, Mr. Phillips' mental ability and ability to perceive and make observations about the home where he slept as an overnight guest was important information for the jury to know about him when deciding the facts in his case. This Court should grant his petition for a writ of certiorari to decide this issue of first impression.

**II. THE GOVERNMENT PRESENTED AS AN EXPERT A WITNESS WITH NO
KNOWLEDGE OF THE FACTS OF THIS CASE AND WHO EXPRESSED NO
OPINION ABOUT ANY MATTER IN THIS CASE.**

The government called Agent Chad Lloyd [Lloyd] as an expert regarding his experience, in general, with drug organizations. Lloyd did not know any of the facts of Phillips's case, did not conduct any investigation into this case, and did not express an opinion about this case.

The Second Circuit has held that this type of general testimony is stereotypic about drug traffickers generally and is not relevant; it has very low probative value and is unfairly prejudicial. See *U.S. v. Castillo*, 924 F.2d 1227, 1231 (2d Cir. 1991) [admission of testimony by expert who "testified to the typical operating methods of Washington Heights drug dealers" was improper and jurors know that drug dealers use scales and put drugs in plastic baggies]. Every circuit court of appeals that admits drug expert evidence requires the person to apply their knowledge and experience to the facts of the case. *United States v. Echeverri*, 982 F.2d 675, 680 (1st Cir. 1993); *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2002); *United States v. Watson*, 260 F.3d 301, 309 (3d Cir. 2001); *United States v. Johnson*, 617 F.3d 286, 294(4th Cir. 2010); *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997);

United States v. Lopez-Medina, 461 F.3d 724, 745 (6th Cir. 2006) [excluding such testimony for inadequate limiting instructions but court discussed application of expertise to the facts at issue in the case]; *United States v. Parra*, 402 F.3d 752, 759 (7th Cir. 2005); *United States v. Vesey*, 338 F.3d 913, 916-917 (8th Cir. 2003) *United States v. Lopez*, 762 F.3d 852, 864 (9th Cir. 2014); *U.S. v. Muldrow*, 19 F.3d 1332, 1338 (10th Cir. 1994) *United States v. Butler*, 102 F.3d 1191, 1199 (11th Cir. 1997) *United States v. Smart*, 98 F.3d 1379, 1383 (D.C. Cir. 1996).

Before an expert witness' testimony is admissible, the expert witness must have the facts of the case to assess and then apply their expert knowledge to those facts. The testimony must also assist the jury. Otherwise, the testimony is not about "a fact in issue" nor is it applying "the principles and methods to the facts of the case" as required by FRE 702 (a) and (d).

Here the government's witness testified that he was not familiar with the facts of this case other than it involved gun and drug charges. He held up a kilo sized package even though this case did not involve kilogram quantities of cocaine. He testified about hand-to-hand drug purchases, methods to avoid the police when dealing drugs, and the use of weapons at the ready in trap and stash houses. However, no guns were at the ready in this location and no drug purchases were involved

in this case. It involved a lone person in the back room of a three-bedroom house and in a room in which no guns or drugs were found.

The government claimed Lloyd's testimony was relevant generally to drug trafficking. But no drug trafficking activity was in evidence. This was a constructive possession case. ROA19-50694.1068. Phillips was charged with possession with intent to distribute and the evidence of distribution was that the quantity of drugs found, in the home, was more than a user quantity. There was no testimony about street level sales or a drug organization's practices from the fact witnesses. In fact, Lloyd testified that he had no opinion in this case. ROA19-50694.1066-1067.

"The relevance and reliability of expert testimony turns upon its nature and the purpose for which its proponent offers it. See e.g. *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188 (5th Cir. 2006) ("of course, whether a proposed expert should be permitted to testify is case, and fact specific") (citing *Kumho Tire Co. v. Charmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167(1999)). So, the facts must be in issue, the expert must know those facts, and he must apply his expertise to those facts.

There may have been drugs and firearms in Tryphosa Nichols' home where Phillips was arrested. But Agent Lloyd did not know that, and his testimony did not relate to these facts in any way. Nor was the fact that this was not Phillips' home contested. The government

conceded it was not Phillips' home. And it was uncontested that drugs and weapons were found hidden in the Nichols' home in rooms where Phillips was not located. These were not facts in issue. There was some debate over whether one crack cookie was located on or in a kitchen cabinet at the front of the house. But SWAT Team members admitted they had moved, bagged, and staged the evidence for photographs. ROA.19-50694.968. Lloyd's testimony did not concern any of these things. Lloyd's testimony was not relevant, it was not helpful to the jury, it was inflammatory, and unfairly prejudicial. The use of such expert witnesses with a wealth of experience in other drug cases should be curtailed by this Court when the testimony is not applied to the facts of the case under consideration and allows in evidence testimony about inflammatory facts that are not part of the case.

CONCLUSION

The Supreme Court should, therefore, grant this petition for certiorari, establish uniformity in the law concerning this issue, and bring the Fifth Circuit in line with the other court of appeals that require the application of expertise to the facts of the case being tried.

Respectfully submitted,

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