No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CARL ALVIN CUSHING

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Law enforcement expert witnesses have become an increasingly indispensable staple for the government in criminal trials. The first witness is a uniformed officer appearing as the government's 'overview' witness, who tells jurors what the government's case is expected to be. The last witness is another uniformed officer appearing as the government's 'summary' witness, who neatly packages the government's case in a way designed to make it unnecessary for jurors to deliberate at all. Interspersed between these first and last witnesses are often countless officers who inject key buzzwords into the trial that remind jurors of the inherent danger posed by persons similar to the defendant. The use of so many law enforcement 'experts' can make it possible for the government to present its case without the need for actual percipient witnesses at all.

The issue in this case involves just such a situation. Where all the percipient witnesses in a case have testified in a manner unsatisfactory to the government's prosecution, under Federal Rule of Evidence 702, which requires an expert's testimony to "help the trier of fact to understand the evidence or to determine a fact in issue," may the government be allowed to introduce law enforcement 'experts' to provide testimony that contradicts its own percipient witnesses in order to make its case? Should these officers have any limitations placed on their testimony?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Carl Alvin Cushing, was a defendant in the district court and was the appellant in the Tenth Circuit. Mr. Cushing is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Carl Alvin Cushing respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's controlling decision is reported at *United States v. Cushing*, see page 26, at 10 F.4th 1055 (10th Cir. 2021).

JURISDICTION

The Tenth Circuit issued its decision on August 24, 2021, Appx. at 26. Mandate was issued in the case on September 15, 2021. This Court has jurisdiction under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of Federal Rule of Evidence 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

Petitioner was charged in a single count indictment in the Eastern District of Oklahoma that alleged drug conspiracy under 21 U.S.C. Sections 846, 841(a)(1) and 841(b)(1)(A). After a seven-day trial, Petitioner was convicted. He received the mandatory minimum 180-month sentence. Petitioner filed a timely appeal.

STATEMENT OF FACTS

Waylon Williams was a small-town businessman and rancher in Stilwell, Oklahoma (CA 10, Vol. III, pg. 368). He separated from his wife in 2013 (III:473) and his life took a regrettable turn. Williams had served as a courier of marijuana for several years to Eastern Oklahoma (III:370). When he got behind on his payments in 2013, his Mexican contact had Williams switch to methamphetamine to pay off his debt (III:373).

Williams developed a local clientele of methamphetamine customers in Stilwell. "I just knew people that were involved in meth. Mostly friends," he said. "I had done it with them" (III:377). "We were usually getting high or looking for a way," Williams said (III:387). Many of these friends would come to Williams' house to play pool, darts and get high (III:411). Williams' barn, which had a bar, was the place to hang out (III:484). Most who came were addicts. *Id.* Kris Hall, a co-defendant at Petitioner's trial,

once texted Williams to say it was his 40th birthday and he wanted to know if he could "swing by" (see Supplemental Record: at page 20). "Probably wanted to come by and have a drink or get high," Williams responded when asked what the message meant (III:419-420). Brianna Smith lived in walking distance across a creek from Williams' house (III:989). The two commonly texted each other to say they would "come by" (Supp:19). This meant, according to Williams, that the other wanted to come over to get high (III:418-19).

Williams rapidly became an addict himself. Williams used methamphetamine heavily by 2014 (III:390). "The longer you use, the more it takes to get high," he testified (III:390). Williams described the various quantities that he distributed, from "teeners," which were 1.75 grams of meth, to 8-balls, which were 3.5 grams of meth, to ¼, ½ and full ounces (III:391). Other witnesses described other recreational quantities. Megan Watkins said a half gram cost $50 (III:693). Donnie Burke said a ¼ gram cost $25, and an 8-ball cost $120 ((III:732, 741). The quantities had little to do with how much a user, particularly an addict, would consume. The quantity sold to a person "depended on the buyer's usage," Williams said (III:507). "Everybody's usage is different," he said. *Id*. "Heavy users take more to get their high." *Id*. Williams testified he consumed an 1/8 of an

ounce every day, which meant an ounce at least every eight days (III:506). "So basically, on your own, you were pouring through an ounce or more a week?" Williams was asked. He replied, "Yes." *Id*.

"At the end of the day, everybody was an addict?" Williams was asked. He replied, "That's correct." Williams supplied his local addict friends with methamphetamine. Jesse Catron got an ounce each month, as did Josh Simmons and Samantha Ferguson; Deanna Philpot, Sharon Davis and Kris Hall each got ½ ounces (III:399). These were all *fractions* of what Williams consumed himself. "It's none of my business what they do with it," Williams said (III:485). Referring to his customers, Williams was asked, "They didn't really depend on you, except they got some drugs from you once in a while?" Williams responded, "Correct" (III:506).

One of Williams's customers was Petitioner Carl Cushing. According to Williams, Petitioner first started purchasing two ounces of methamphetamine on roughly a monthly basis from Williams in late 2014 or early 2015, stopped for close to a year, then began purchasing again in 2016, and continued until December 18, 2017 (III:390, 405, 508), about six weeks before Williams was arrested and the conspiracy ended on January 29, 2018, according to the indictment. Williams testified he had no knowledge Petitioner distributed methamphetamine to anyone (III:509). He never saw

Cushing sell drugs; the two never discussed distribution to others. *Id*. Williams conceded he did not know Cushing even had any customers. *Id*. Williams supplied Cushing because he was an addict (III:510). Cushing never delivered methamphetamine for Williams; he never collected any of Williams' drug debts, and he never filled in for Williams in his distribution business when Williams was away (III:510). "So, in essence, the relationship between you and Mr. Cushing was that ultimately what one would call a buyer/seller; is that right?" Williams was asked. "Correct," he replied. *Id.*

Cushing's girlfriend, Amanda Murray, confirmed Cushing's substantial personal drug use. She said she saw ounce quantities at the house three to four times over the course of 2014 to 2018 (III:632). The methamphetamine was in a desk in the bedroom, where she and Cushing smoked it (III:628). Officers, in fact, found a little methamphetamine residue, which they never even weighed, on the desk when they served a search warrant at the house in March, 2018 (III:611, 617). Murray said 28 grams would last only about a week to two weeks (III:633). A backpack at the residence found in the living room had a smoking pipe that she and Cushing used (III:622). She never saw Cushing sell methamphetamine to anyone (III:631). Cushing had a modest house off Highway 59 with a pool table and foosball game, where

people commonly congregated to get high and watch sporting events, just like people did at Williams' house (III:538, 541). When the search warrant was served in March, 2018 at Cushing's house, the officers found no evidence of drug distribution by Cushing. The warrant, of course, was served some six weeks after the conspiracy charged had ended (III:617), but, even so, officers found no baggies, no large sums of money, no drug ledgers, no "consumable" quantities of methamphetamine, and certainly no large quantities (III:269-70).

The government relied on telephone and text messages to make its case that Petitioner was in an illegal drug distribution agreement with Williams. The government introduced a single record of an intercepted telephone call that Williams made to Cushing on December 18, 2017 (Supp:115(Ex.2)) and another ten text messages from unidentified callers made between January 3 and January 8 involving five different telephone numbers (Supp:42-49, 51). The Government never bothered to contact any of the text messengers to determine just exactly what any of the text messages were about (III:894).

The call from Williams to Cushing on December 18, 2017 was a common exchange heard every day by thousands of Americans:

Williams: Hey, uh, I'm in your neighborhood here. Can I stop by for a second?
Cushing: You bet, you betcha.

Williams: You ain't busy?
Cushing: Alright.

Williams: Alright then. I'll see you in a minute. Thank you.

Williams explained the call. "He would either call me or I would call him when I needed money," he said. "The call was about putting up money" (III:409). "Picking up money for meth," he said (III:396). Williams did not say the money was from sales Cushing had made to others for him.

Other text messages introduced by the government contained similarly-worded content. Two calls were made by a telephone number ending in 3473:

Ex. 36 1/3 12:38 Caller: Here's my new number. Had to change it because of Jeremy.
1/4 08:44 Caller: Hey, holler when you get up.
1/4 11:14 Caller: Hey, it's Trina, it's an emergency are you home? (Supp:43)

Ex. 39 1/7 08:08 Caller: U guys still up
1/7 08:09 Caller: Was going to come get some stuff
1/7 09:05 Caller: Swing by my house on your way through or holler when you go through (Supp:48)

Two calls were made from a telephone number ending in 7752:

Ex. 51 1/3 03:39 Caller: Hey friend whenever you get ready just let me know. I'll be up that way this morning if you need me to swing by.
1/3 13:27 Cushing's telephone number ("Cush #): Damn my friend. I just got up but j sure would like to see u. I under-

stand I am probably too late for
your trip.
1/3 14:05 Caller: Well yes and no (Supp:61)

Ex. 52 1/7 20:53 Caller: Hey bud let me know when my friend
get here ok
Cush#: He just left here. Thank you so much.
Caller: You are welcome my friend (Supp:62)

Two calls were made from a telephone number ending in 2914:

Ex. 37 1/3 17:39 Caller: Hey bud can I swing by?
1/3 18:06 Caller: U home bud
1/3 18:23 Cush#: Headed back from Springdale
1/3 18:25 Caller: Ok u got anything on u? Got cash
1/3 18:26 Caller: I can meet u at Atwood's again if so
1/3 18:29 Cush#: Nothing with me
1/3 18:30 Caller: Kk man I'll head to your house in a bit
Cool?
1/3 18:30 Cush#: Ok
1/3 18:42 Caller: Getting gas at station 2 then headed
that way
1/3 18:56 Caller: I just pulled in
1/3 18:58 Cush#: We're just coming tru siloam
1/3 18:58 Caller: Ok
1/3 18:58 Caller: It's cool man I'll wait
1/3 18:58 Cush#: Ok (Supp:44)

Ex. 38 1/5 16:17 Caller: Hey man can I swing by later?
Cush#: Be fine (Supp:47)

One call was made from a number ending in 9742:

Ex. 35 1/5 14:22 Caller: What's up
1/5 14:23 Caller: Coochie coo
1/5 14:23 Cush#: Who is this?
1/5 15:59 Caller: Carl, this is Sheila I ne3d just 20
can I grab it
1/5 15:59 Caller: Please wouldn't ask but down and out
(Supp: 42)

Not only was no attempt made by the government to determine who the callers were or what their messages meant. No evidence was introduced as to whether the person actually using the phone (i.e., Cush#) at any given time was Petitioner Carl Cushing. No effort was made, for instance, to eliminate Amanda Murray as the person receiving the text messages.

The government sought to enhance its case through the introduction of police officer expert testimony that was not required to assist the jury and was conclusory. Prior to trial, Petitioner's co-counsel filed a motion in limine to prohibit the introduction of such police officer expert testimony (Supp:116). During the pretrial conference, the court again was reminded of the importance of the issue. Text messages and recordings should be the evidence and the jury should interpret intent, co-defendant Hall's counsel stated (III:27). At that time, the government had only designated one witness, Agent Brian Epps, as its expert. The district court acknowledged that use of such expert testimony "can get dicey" (III:29), but no further effort was made to address the limitations on police officer expert testimony.

When the trial began, the government called an entirely different police officer witness, Agent Morrison, an Oklahoma Bureau of Narcotics detective who had previously served eleven years with the Muskogee Police Department, as its witness to sponsor the text messages and recordings.

Although Agent Morrison's testimony was generally non-biased through the introduction of its only phone call and 14 text messages involving Petitioner, he began to express legal conclusions by the time he sponsored the recorded calls and text messages made by or to co-defendant Hall. When he sponsored the text message from Hall to Williams asking if he could "come by" on his 40th birthday, Morrison declared the message was "consistent with short term traffic" in drugs (III:150), a conclusion altogether different from what Williams would later testify during the trial. By the time Morrison finished his testimony, he declared unequivocally based on his 17 years of experience as a police officer that he was "absolutely positive" all the texts sponsored relating to Hall involved the distribution of drugs (III:365). No effort had been made by the district court to qualify Morrison to render such opinions relating to such a critical element of the case, and no effort was made to question whether the jurors themselves even needed Agent Morrison's guidance in the first place.

At the conclusion of the trial, the government called Agent Brian Epps. Both Hall and Appellant objected. Hall's attorney again reminded the district court of his motion in limine. "He's going to talk about weights – what a user amount is," the prosecutor stated (III:853). "He has been an agent for 25 years and he has been involved in narcotics," he added. *Id.*

"And we are going to have a conversation about the content of certain communications," the prosecutor said. Hall's attorney responded, "I submit that Waylon Williams was offered as an expert on quantities. He's used an ounce every eight days and I believe this officer is going to say that gram quantities are user amounts" (III:854). He added, "And for this agent to say that gram amounts are user amounts and anything more than that is distribution amounts is…tantamount to directing a verdict on an issue where even their star witness would dispute that" (III:855). Appellant's attorney agreed. "I share the same concerns that (Mr. Hall's attorney) does." *Id.*

Initially, the district court said, "I don't think I can leave it up to the jury. I've got that gatekeeper thing that I…" (III:856). After minimal additional evidence was presented about Agent Epps' background, however (III:858-59), the district court was satisfied. "I think the foundation laid (by the prosecutor) has been sufficient under rule 702," the court ruled (III:863). "A witness who is qualified as an expert by knowledge, skill, experience, training and education may testify in the form of opinion or otherwise." Id. "And I believe there have been sufficient facts and data relied upon by the witness to give these opinions in this case." Id. The district court never addressed Petitioner and Hall's concern that the expert's opinion, based on all the previous substantial testimony about weights and the meaning of

certain communications, would not assist the trier of fact. The prosecutor was not required to divulge one opinion the officer would make, much less did the district court make any effort to determine whether it was supported by any preexisting treatise or other objective study of expertise not tied to the officer's opinion of the information from the case at hand.

Agent Epps thereafter rendered a series of conclusory opinions about weights and communications. In spite of Williams testimony that a text message or telephone recording saying the person might "come by" or "swing by" meant nothing more than a social visit that might well include getting high, Agent Epps opined, with the assistance of the prosecutor's leading questions, something far more sinister was taking place. "And I believe that in your experience with narcotics organizations that they have used oblique language…or language that's secretive in many ways,…Is that consistent with that?" Epps was asked. "Yes, it is," he replied (III:866).

When the prosecutor arrived at Exhibit 35 (SuppI:42), where "Sheila" had sent Appellant a message asking for a "twenty" because she was "down and out," Agent Epps declared unequivocally, despite Donnie Burke's testimony that a ¼ gram went for $25.00, that Sheila wanted to purchase a quarter gram from Petitioner for $20.00 (III:872-73). The possibility that Sheila might have just needed a $20 bill so she could get something to eat

was never even contemplated. Every other ambiguous term, phrase, or detail, whether it was a torn plastic baggie (III:873), a gallon-sized plastic bag (III:876), a request to "come by" as in Exhibit 37 (SuppI:44)(III:877) or picking up "some stuff" (III:880), were all unquestionably tied to the distribution of drugs according to Agent Epps. He never tied his opinion to any published article, to any consortium of associates in his field or any other tether that might corroborate his own personal conclusions, which, as always, were based exclusively on his years of experience as a police officer. If Petitioner or Hall had the misfortune to be in possession of a gallon-sized plastic bag, such a larger bag indicated that a defendant was "higher in the organization" (III:885). Agent Epps freely admitted it was not even necessary to track down any of the persons who had sent any of the ambiguous texts, even though it might provide more accurate information about what the text meant (III:925).

The Tenth Circuit Opinion

The Tenth Circuit Court's opinion, found at 14 F.4th 1055 (10th Cir. 2021), just like the district court before it, failed to address the key phrase in Rule 702 affecting Petitioner's case: whether the officer expert's testimony was necessary to "help the trier of fact to understand the evidence." The jurors already had heard ample testimony from the Government's percipient

witnesses Waylon Williams, Amanda Murray, Donnie Burke and others about the buyer/seller relationships involved in the case and the quantity of drugs required to satisfy the personal demand of each of the addicts who used methamphetamine. Williams himself personally used an ounce of methamphetamine every week. Petitioner personally used two ounces a month. Others personally used an ounce a month. None of these quantities involved distribution. Testimony similarly was heard from those same percipient witnesses that persons who texted Williams, Breanna Smith, or Petitioner to "stop by" or "come by" simply wanted to come over to get high. What justification was given to have a law enforcement expert, who had no direct involvement with anyone in the case, say whatever was necessary to make the government's distribution case, even if it meant contradicting everything that the percipient witnesses had testified to previously? The district court gave no justification whatsoever. The district court, although it said it was concerned about "that gatekeeper thing," was satisfied exclusively by Agent Epps' long-term experience as a police officer to allow him to testify. "In its gatekeeper role, the district court must make findings…that the expert testimony is reliable and relevant," the Tenth Circuit opinion stated. "In assessing whether testimony will assist the trier of fact," the opinion stated, "district courts consider several factors,

including whether the testimony is within the juror's common knowledge and experience, and whether it will usurp the juror's role in evaluating a witness' credibility." *Id.,* at 1079. Did Epps have any expertise in rural drug purchasing practices? Had he ever seen texts with words used in texts found in this case, or was he just expressing a personal opinion that any juror could have made himself? The district court required no explanation. The mere fact that Epps was a law enforcement offer was enough. The Tenth Circuit opinion required no more. "(K)nowledge derived from experience on the job is 'squarely' within the scope of expert testimony," the opinion stated. *Id.,* at 1080. The fact that an officer like Agent Epps was a regular on the Government's roadshow of law enforcement experts and had appeared to testify in other cases previously bolstered, rather than hindered, his being allowed to repeat the same testimony in an entirely different case. "We have explicitly allowed not only this type of testimony, but this type of testimony from the same law enforcement officer," the opinion stated.

REASON FOR GRANTING THE WRIT

THE DISTRICT COURT'S ACCEPTANCE OF LAW ENFORCEMENT EXPERT TESTIMONY, WHERE SUBSTANTIAL TESTIMONY HAD ALREADY BEEN PRESENTED BY PERCIPIENT WITNESSES, FAILED TO SATISFY FEDERAL RULE OF EVIDENCE 702'S REQUIREMENT THAT AN EXPERT "HELP THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR DETERMINE A FACT IN ISSUE."

THE INCREASINGLY PERVASIVE USE OF SUCH LAW ENFORCEMENT EXPERTS POSES A RISK THAT THEY BECOME THE HUB OF THE GOVERNMENT'S CASE AND THEREBY USURP THE JURY'S FUNCTION TO EVALUATE THE EVIDENCE AND TO DETERMINE GUILT

Ever since the Supreme Court decided *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 US 579, 113 S.Ct. 2786 (1993), trial courts have been responsible to first evaluate that an expert's proffered testimony will assist the jury in understanding the evidence and to determine the factual issues in the case. A district court has to decide not only whether the expert is qualified to testify, but also whether the opinion testimony is the product of reliable methodology. In its gatekeeper role, a court must assess the reasoning and methodology underlying the expert's opinion, and determine whether it is relevant to the facts of the case and helpful to the trier of fact. *Id.,* 509 U.S. at 594-95. *Daubert* set out a list of factors for a court to consider: "(1) whether the method has been tested, (ii) whether the method has been published and subject to peer review, (III) the error rate; (iv) the existence of standards and whether the witness applied them in the present

case; and (v) whether the witness' method is generally accepted as reliable in the relevant medical and scientific community." *Id.* The court is also to consider whether the witness' conclusion represents an "unfounded extrapolation" from the data, whether the witness has alternatively accounted for alternative explanations for the effect at issue; whether the witness reaches the opinion for the purpose of litigation or as the result of independent studies; and whether it unduly relies on anecdotal evidence. *General Election Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512 (1997). The district court must ensure that the proffered testimony advances a material aspect of the case. *Daubert,* 509 U.S. at 597. This gatekeeper function applies not only to technical issues, but to other specialized knowledge as well, *Id.,* and it must be tied to the particular case. *Kumho Tire Co., v. Carmichael,* 526 U.S. 137, 150, 119 S.Ct. 1167 (1999). The focus must be on the methodologies and not on the conclusions generated. *Daubert,* 509 U.S. at 595.

Even if reliability is established, a district court must still determine whether the expert testimony will be helpful to the trier of fact. A court should consider the testimony's relevance, the jurors' common knowledge and experience, and whether the expert's testimony may usurp the jury's primary role as the evaluator of the evidence. See *United States v.*

Rodriquez-Felix, 450 F.3d 1117, 1123 (10th Cir. 2006). A court is not required "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric,* 522 U.S. at 146.

Numerous Circuit Courts have found the unfettered use of law enforcement experts to be especially problematic. The most vocal Circuit Court has been the Second Circuit. In *United States v. Mejia,* 545 F.3d 179 (2nd Cir. 2008), the court held, "An increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinions for factual evidence," the court wrote. *Id.,* at 190. "If the officer expert strays beyond the bounds of appropriate 'expert' matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as short cuts to proving guilt." *Id.* The *Mejia* court then described why the government's practice of relying on a stable of officer experts to make its case, even if it requires contradicting the testimony of all the percipient witnesses who testified previously, has constitutional ramifications:

> As the officer's purported expertise narrows from 'organized crime' to 'this particular gang,' from the meaning of 'capo' to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroboration of the fact

> witness, and thus more like a summary of facts than an aide in understanding them. The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt. In such instances, it is a little too convenient that the Government has found an individual who is an expert on precisely those facts the Government must prove to secure a guilty verdict—even more so when that expert happens to be one of the Government's own investigators.

This language was presented to the Tenth Circuit. It described Agent Epps' function precisely. He was the law enforcement "expert" who closed out every case, appearing again and again on the Government roadshow, spouting conclusory opinion after conclusory opinion—to "stop by" in a text could only mean a drug transaction, or getting a "twenty" for someone who was "down and out" had to be a purchase of drugs and nothing else. The size of baggies at a defendant's house showed how high up in the drug-dealing organization that person was. The idea such ridiculous testimony was "reliable," contrary to the Tenth Circuit holding, strains credulity. Agents Epps and Morrison could be expected to take the facts of any case and turn them into a drug crime, even when the Government's percipient witnesses may have testified totally differently and even though the jurors could have sorted out the same evidence themselves. Yet, as officers appearing in uniform, Agents Epps and Morrison had the imprimatur of the

law itself, and, as a result, their credibility was virtually beyond redoubt as to anything they said. See *Mejia,* at 192, citing *United States v. Dukagjini,* 326 F.3d 45 (2nd Cir. 2003). "When the Government skips the intermediate steps and proceeds directly to internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of facts needed to satisfy the elements of the charged offense." *Id.,* at 191, citing *United States v. Nersesian,* 824 F.2d 1294, 1308 (2nd Cir. 1987) ("In the past we have upheld the admission of expert testimony to explain the use of narcotics codes and jargon…We acknowledge some degree of discomfiture when this practice is employed, since uncontrolled, such use of expert testimony may have the effect of providing the government with an additional summation by having the expert interpret the evidence.").

No vetting of the Government's officer experts in Petitioner's case was required at all. There were no "standards" to review; no peer review required. The process of permitting the officers to testify, where the prosecutor had not even been required to provide a summary of their expert opinions or anticipated testimony prior to trial, was truly "uncontrolled." Agent Epps testified, based on the district court's findings, for no reason

other than that he was a law enforcement officer with years of experience. The Tenth Circuit approved this simple gatekeeping finding of the district court. In a similar case, the Second Circuit cautioned, "(T)he testimony should be carefully circumscribed to ensure that the expert does not usurp either the role of the judge in instructing on the law, or the role of the jury in applying the law to the facts before it." *United States v. Locasio,* 6 F.3d 924, 939 (2nd Cir. 1998). In this case, the officer experts took over the case with their off-the-cuff conclusory opinions, seemingly derived by nothing more than their own gut reactions to certain texts or events, and their need to satisfy their government employers so they could continue to participate in the roadshow.

The Second Circuit is joined by several other Circuit Courts who have expressed similar concerns about such overly broad law enforcement expert testimony. *United States v. Amuso,* 21 F.3d 1251, 1263 (2nd Cir. 1994) ("A district court may commit manifest error by admitting expert testimony where evidence impermissibly mirrors the testimony offered by fact witnesses, or the subject matter of the expert's testimony is not beyond the ken of the average juror."); *United States v. Rahm,* 993 F.2d 1405 (9th Cir. 1993) (same); *United States v. Montas,* 41 F.3d 775, 784 (1st Cir. 1994). These decisions illustrate how an increasing number of courts more and

more reject the automatic permission extended to officer experts to testify in the manner that occurred in this case.

CONCLUSION

Petitioner's case offers the Court the opportunity to examine the all too common and increasingly pervasive practice of the use of law enforcement officer experts in criminal trials, often without proper vetting as required by *Daubert,* and questionably necessary to "help the trier of fact." The use of such testimony under Fed.R.Evid. 702 often becomes a mechanism to short circuit the jury's function to evaluate the evidence of percipient witnesses and reach a conclusion on its own about the guilt of a defendant.

Respectfully submitted,

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