NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2021

AMIN WADLEY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court should set limits on what law enforcement testimony should be admitted as opinion evidence under Federal Rule of Evidence 701.

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

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Amin Wadley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The Third Circuit's opinion affirming Petitioner's conviction and sentence is unpublished but available at 2022 WL 1011693 (Pet. App. 1-6).

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on August 8, 2019. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and issued its unpublished opinion on April 5, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 701 ("Rule 701"), Opinion Testimony by Lay Witnesses, 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.

Federal Rule of Evidence 702 ("Rule 702"), Testimony by Expert Witnesses, provides:

> 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

A. Charges

On April 19, 2017, a grand jury sitting in the Eastern District of Pennsylvania returned a 21-count indictment charging Mr. Wadley and nine co-defendants with conspiring to distribute heroin and cocaine base ("crack"), as well as substantive counts of drug distribution. Specifically, Mr. Wadley was charged with: (1) conspiring to distribute more than 280 grams of crack and more than 100 grams of heroin, in violation of 21 U.S.C. § 846 (Count One (including more than 140 overt acts)); (2) distributing .494 grams of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (Count 18); and (3) distributing .494 grams of heroin within 1000 feet of a school, in violation of 21 U.S.C. § 860 (Count 19) (which was later dismissed at trial). The government alleged these co-defendants engaged in a conspiracy to distribute heroin and crack from April 2015 to March 2017 but conceded that Mr. Wadley's involvement was limited to a 74-day period from September 25 to December 8, 2016. Mr. Wadley, and three other co-defendants, Basil Bey, Tyrik Upchurch, and Reginald White, proceeded to trial.[1]

[1] Mssrs. Bey and Upchurch are simultaneously filing petitions raising a similar question to that presented by Mr. Wadley.

B. Trial and Sentencing

The central issue at trial was the legal significance of the co-defendants' use of two shared cellular phones over several months in the fall of 2016. The government's theory was that the co-defendants shared the phones in order to conspire to and distribute drugs together. The government presented: toll records of hundreds of thousands of calls on these phones; wiretap recordings from these phones during a 76-day period from September 12 to November 4, 2016, and again from November 17 to December 8, 2016; approximately 30 controlled purchases of heroin and crack from the co-defendants; and recovered heroin and crack found during arrests and vehicle stops and seized when search warrants were executed. From this evidence, the United States Attorney's Office and agents from the Federal Bureau of Investigation ("FBI") developed a process for methodically calculating not an estimate or an extrapolation but an exact amount of heroin and crack which was attributable to the conspiracy and to each defendant.

The District Court conducted an extensive hearing, outside the presence of the jury, when the government sought to re-call its case agents to testify at the trial about the government's methodology for calculating its theory for the precise amounts the conspiracy distributed, and then its attribution to each co-defendant.

Two case agents analyzed 19 days of calls from the 76-day wiretap, familiarizing themselves with the drugs purchased by particular customers and code language which distinguished between heroin and crack, for example, that "hard" meant crack. (*See* Pet. App. 9-10). The agents assigned what they

determined was a standard "conservative" number of bags to each call unless it was clear that a larger quantity had actually been ordered and transferred. Then, the agents reviewed lab reports for all of the bags of heroin or crack bought or seized from the conspiracy "as alleged by the government" and averaged the weight for a bag of heroin (.04 grams) and crack (.3 grams). (*See* Pet. App. 8). Then, they estimated how many bags of heroin and crack were sold each day they analyzed and divided that by 19 to come up with a precise weight that the conspiracy distributed each day: 4.418 grams of heroin and 12.55 grams of crack. (*See* Pet. App. 9-10). The government then determined when a co-defendant joined the conspiracy (for Mr. Wadley, for example, based on the first day he was captured on the wiretap), when the conspiracy ended, and thus how many days of distribution could be attributed to each co-defendant. The agents then multiplied those numbers by the number of days they determined each co-defendant on trial was involved in the conspiracy to calculate their culpability. The District Court deemed this "a coherent and intellectually sound methodology."

Under this theory, the government alleged Mr. Wadley was legally responsible for a precise amount: 928.7 grams of crack and 326.932 grams of heroin. (Pet. App. 7). The government asserted this precise conclusion about crack even though there was scant evidence connecting Mr. Wadley to crack sales. The jury heard one call in which Mr. Wadley told a buyer that he had "hard," but the government did not show that the buyer had actually ordered or that Mr. Wadley had provided crack to her. Of the 35 controlled buys the FBI orchestrated during

the investigation, only 9.473 grams of crack (and 51 grams of heroin) were seized. From two controlled buys from Mr. Wadley, only 0.6 grams of crack and 2.7 grams of heroin were purchased. When Mr. Wadley's family home, where he resided, was searched, law enforcement seized 502 bags of heroin and 15 grams of loose heroin, most without the distinctive plain baggies associated with the conspiracy, and no crack. Mr. Wadley was arrested in a car with a co-defendant who was found with 37.72 grams of heroin and 0.6 grams of crack. Thus, Mr. Wadley was in the vicinity of 1.2 grams of crack and the government's theory was that he was responsible for 774 times that amount.

Ultimately, the government's theory of culpability was admitted as what was at various times called "testimony," "personal observation," "summary," "calculation," and "opinion" under Federal Rule of Evidence Rule 701. Even though it approved of the "methodology" the agents used to reach their conclusions, the District Court determined it was not expert testimony under Rule 702, and that charts setting forth this precise theory were permissible under Federal Rule of Evidence 1006. (*See* Pet. App. 7-10). Explaining the role of the case agents' "personal opinions" to the jury, the District Court instructed that the situation was analogous to taking a group tour at an art museum and being provided "commentary" by an art enthusiast, "not an art historian or professional guide." The District Court explained the jury might find the art enthusiast's commentary helpful or not. The instruction eliminated the obvious special status that law enforcement officers, in general, and case agents, in particular, hold in a case.

The jury found Mr. Wadley guilty of conspiracy to distribute heroin and crack and a substantive count of distributing heroin. In a special interrogatory for the conspiracy count, the jury found that at least 28 but less than 280 grams of crack were attributable and reasonably foreseeable to Mr. Wadley, lower than the more than 280 grams of crack the government had sought. It also found that more than 100 grams of heroin were attributable and reasonably foreseeable to Mr. Wadley.

Although there was scant evidence of any crack distribution in relation to Mr. Wadley, the quantity of crack drove his sentencing guideline and ultimate sentence. Rejecting Mr. Wadley's argument that he was only liable for 28 grams of crack, the District Court determined Mr. Wadley was liable for 279 grams of crack, which reflected the jury's response to the special interrogatory, citing its belief that "there is very substantial evidence to support" that amount. Even attributing 279 and not 929 grams of crack to Mr. Wadley, the converted drug weights assigned higher culpability for crack than for heroin. *Compare* U.S.S.G. § 2D1.1(c)(6) (base offense level of 28 for 196 to 279 grams of crack), *with* § 2D1.1(c)(8) (base offense level of 24 for 100 to 400 grams of heroin). Over objection, the District Court also applied a two-point enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance, U.S.S.G. § 2D1.1(b)(12). From an advisory range of 168 to 210 months imprisonment, based on a total offense level of 32 and a criminal history category of IV, the Court imposed a sentence of 186 months' imprisonment.

C. Third Circuit Opinion

On appeal, Mr. Wadley argued, *inter alia*, that the government's opinion and conclusion that a specific amount of heroin and crack was attributable to him violated Federal Rules of Evidence 701, 702, and 704(b). A panel of the Third Circuit (Chagares, Shwartz, and Pratter, JJ.), in a not-precedential opinion, affirmed the convictions and sentence. The panel held that law enforcement's methodology was simply a combination of personal observation of the wiretap recordings "followed by basic math" to estimate the quantity of drugs sold per day. (Pet. App. 4). Rule 701 permitted this "lay opinion" testimony because it did not fall under the exclusive province of an expert, and, instead of usurping the jury's role, it helped jurors keep track of complicated calculations. (Pet. App. 4). Additionally, it was permissible to use the summary charts, under Federal Rule of Evidence 1006, because they were helpful to the jury, and also admissible under Federal Rule of Evidence 611, which gives District Courts broad discretion. (Pet. App. 5). The panel said that even if Rule 702 applied, the District Court's extensive hearing outlining the officers' planned testimony eliminated any prejudice to the defendants, rendering any violation of Federal Rule of Criminal Procedure 16 harmless. (Pet. App. 4).

Mr. Wadley now asks this Court to review the Third Circuit's erroneous admission of the case agents' opinion about his culpability and responsibility as beyond the scope of Rule 701.

REASONS FOR GRANTING THE PETITION

I. This Court's guidance on the bounds of lay witness opinion, particularly from law enforcement officers, is necessary to create uniform standards for criminal trials.

Rule 701 permits opinion testimony by lay witnesses only under certain circumstances. The Rule 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.

Fed.R.Evid. 701. Subsections (a), (b), and (c) are fundamental requirements: if a witness's testimony fails to meet any one of them, it is not admissible. *United States v. Freeman*, 730 F.3d 590, 596 (6th Cir. 2013); *Hirst v. Inverness Hotel Corp.,* 544 F.3d 221, 225 (3d Cir. 2008).

Every witness except for an expert can only testify if they have personal knowledge. Fed.R.Evid. 602. But the drafters of the Rules built some flexibility into how witnesses could present their personal observations because "[w]itnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion." *See* Fed.R.Evid. 701 advisory committee's note (1972 Proposed Rules) (explaining a witness's lay opinion should put "the trier of fact in possession of an accurate reproduction of [an] event" and not "amount to little more than choosing up sides"). Similarly, the Second Circuit has explained that:

> eyewitnesses sometimes find it difficult to describe the appearance or relationship of persons, the atmosphere of a place, or the value of an object by reference only to objective facts, [so] the law permits such witnesses to testify to their personal perceptions in the form of inferences or conclusory opinions. … In short, Rule 701 represents no departure from Rule 602: 'A witness may not testify to a matter until evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter.' Rather, Rule 701 simply recognizes lay opinion as an acceptable 'shorthand' for the 'rendition of facts that the witness personally perceived.'

United States v. Garcia, 413 F.3d 201, 211 (2d Cir. 2005), *cert. denied*, 552 U.S. 1154 (2008) (citation omitted). In sum, Rule 701 was not drafted as an end-run around other rules but merely a recognition of how people think and speak.

Opinion testimony under Rule 701 does not allow witnesses to testify on matters about which they have no personal knowledge or that are based on hearsay. *United States v. Flores–de–Jesus*, 569 F.3d 8, 16-20 (1st Cir.), *cert. denied* 558 U.S. 974 (2009). Nor does opinion testimony under Rule 701 permit witnesses to stray into matters reserved for the jury, such as opinions about a defendant's guilt or a witness's credibility. *See United States v. Casas*, 356 F.3d 104, 119-20 (1st Cir.), *cert. denied* 541 U.S. 1060 (2004).

Case agents, the principal law enforcement witnesses, present a challenge to consistent application of Rule 701. The case agent leads and coordinates the investigation, corresponds with all other law enforcement, coordinates arrests, participates in proffers, testifies before the grand jury, helps prepare for trial, testifies at trial, often sits at counsel table, and is always excluded from the rule prohibiting witnesses to remain in the courtroom. A case agent may testify multiple times throughout a trial to help tie a case together, move a trial along, and

sometimes help a jury decipher extensive testimony or records. On the witness stand, a case agent need not be qualified as an expert to report his extensive law enforcement training and experience. These multiple roles of case agents, and thus multiple avenues for personal observation, are all permissible areas for testimony.

What is not permissible, but too often occurring at trial and sentencing, is when the case agent goes further, and presents the government's theory of the case *as evidence* under the guise of personal observation under Rule 701.[2] Ultimately, because case agents' testimony is an inevitable and featured component of any criminal trial, courts must be vigilant to ensure that this testimony, particularly the most consequential aspects, fits within the Rules of Evidence. Various circuit courts give district court instructions: Take precautionary measures to ensure the jury understands how to properly evaluate a witness's dual roles. *See United States v. Freeman*, 498 F.3d 893, 902-04 (9th Cir. 2007) (holding case agent not categorically barred from testifying as both an expert and percipient witness, "provided that the district court engages in vigilant gatekeeping" and that "jurors are aware of the

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[2] And Rule 702 does not cure the inherent danger of the case agent's dominance in a case either. Despite its utility, a thin line also separates proper expert testimony from "the illegitimate and impermissible substitution of expert opinion for factual evidence [where 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." *United States v. Mejia*, 545 F.3d 179, 190-91 (2d Cir. 2008); *see also United States v. Valdivia*, 680 F.3d 33, 56 (1st Cir.), *cert. denied*, 568 U.S. 994 (2012) (Lipez, J., concurring) (discussing problems with the First Circuit's "approach to the lay/expert opinion dichotomy and the unfairness that results for criminal defendants").

witness's dual roles" and the bounds of each type of testimony); *United States v. Brooks*, 736 F.3d 921, 934 (10th Cir. 2013), *cert. denied* 572 U.S. 1109 (2014) (explaining ways to minimize dangers of agents' overview testimony). Require "properly structured direct examination" to distinguish fact versus opinion. *See, e.g.*, *United States v. York*, 572 F.3d 415, 425 (7th Cir. 2009). Give cautionary instructions. *See, e.g.*, *United States v. Nixon*, 694 F.3d 623, 629 (6th Cir. 2012).

Despite the fact that most Courts have articulated the problems and provided solutions for law enforcement opinion that goes beyond the scope of Rule 701, inter- and intra-circuit conflicts abound. In this case, the Third Circuit explicitly permitted the government's theory to come in as evidence pursuant to Rule 701. But the Eighth Circuit, in a similar case, found that an agent's lay opinion testimony was improperly admitted pursuant to Rule 701:

> Agent Neal lacked first-hand knowledge of the matters about which she testified. Her opinions were based on her investigation after the fact, not her perception of the facts. The court's instructions to the jury that Agent Neals' opinions constituted argument rather than evidence finds no warrant in the Federal Rules of Evidence and could not serve to render admissible that which was inadmissible testimony.

See United States v. Peoples, 250 F.3d 630, 641-42 (8th Cir. 2001), *cert. denied*, 543 U.S. 104 (2005); *accord United States v. Ganier,* 468 F.3d 920, 927 (6th Cir. 2006); *United States v. Johnson,* 617 F.3d 286, 293 (4th Cir. 2010) ("Agent Smith admitted that he did not participate in the surveillance during the investigation, but rather gleaned information from interviews with suspects and charged members of the conspiracy *after* listening to the phone calls. His post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under

Rule 701."). Here, the case agents had some first-hand perception of the facts, but the majority of their conclusions stemmed from post-hoc investigation that did not meet the personal perception requirement of Rule 701.

District Courts and practitioners must have clear direction to ensure that case agents do not undermine the constitutional and procedural protections guaranteed to criminal defendants. *Cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (holding that trial courts have an obligation to ensure that expert testimony "is not only relevant, but reliable"). A clear standard should be established by this Court to avoid the numerous ad hoc rationales that have engendered significant intra- and inter-circuit conflicts in determining the admissibility of lay opinion testimony pursuant to Rule 701.

For example, a helpful standard would be that a witness has "firsthand knowledge or observation," only when he personally participated in or observed the events about which such opinion is being offered. This opinion may not be based upon information gathered by the witness through after-the-fact investigation, including witness interviews, examinations of paper and electronic documents and records, and listening to and viewing audio or video recordings of past events in which the witness did not personally participate. Such a standard would prevent the broad, sweeping conclusions that are too often admitted at trials and unfairly permit the government to explicitly argue its case through the presentation of its witnesses. *Cf. Garcia*, 413 F.3d at 214 ("If such broadly based opinion testimony as to culpability were admissible under Rule 701, 'there would be no need for the trial

jury to review personally any evidence at all.'" (quoting *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004))).

II. The legal question presented is exceptionally important.

This case presents a question of exceptional importance because it affects virtually every federal criminal trial in which an agent testifies about their opinion as a lay witness pursuant to Rule 701. Such testimony, which substitutes argument into the factual record, undermines due process at its core. A decision from this Court setting a clear standard for the permissible bounds of lay opinion testimony is especially necessary because there is both intra- and inter-circuit conflict and general inconsistency on this issue. *See* S.Ct.R. 10(a).[3]

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[3] Law enforcement opinion to establish drug quantity at sentencing poses a similar challenge to fair and uniform practices and much depends on how a Circuit evaluates such testimony. The First, Fourth, Fifth, Ninth, and Eleventh Circuits review it *de novo*., *United States v. Giggey,* 867 F.3d 240 (1st Cir. 2017); *United States v. Wright,* 42 F.3d 1387, *3 (4th Cir. 1994) (unpublished); *United States v. Hardin,* 437 F.3d 463, 471 (5th Cir. 2006); *United States v. Flores,* 725 F.3d 1028, 1035 (9th Cir. 2013); *United States v. McCrimmon,* 362 F.3d 725, 728 (11th Cir. 2004). The Second and Tenth Circuits apply enhanced review. *United States v. Vasquez,* 389 F.3d 65, 68 (2d Cir. 2004); *United States v. Smith,* 705 F.3d 1268, 1274 (10th Cir. 2013). The Third, Seventh, Eighth, and D.C. Circuits review for clear error. *United States v. Freeman*, 763 F.3d 322, 337 (3rd Cir. 2014), *cert. denied* 574 U.S. 1181 (2015; *United States v. Young*, 863 F.3d 685, 688 (7th Cir. 2017); *United States v. Madison*, 863 F.3d 1001, 1005 (8th Cir. 2017), *cert. denied* 138 S.Ct. 699 (2018); *United States v. Tucker,* 12 F.4th 804 (D.C. Cir. 2021), *cert. denied,* 596 U.S. ___ (2022) (No. 21-7769). Law enforcement opinion at sentencing and how the Circuits review such determination is another area that would benefit from this Court's guidance.

III. This case is an ideal vehicle to resolve this question.

This case is an ideal vehicle to address the issue because the District Court believed and the Third Circuit affirmed that the entirety of the "methodology" for calculating culpability and offering the government's theory into evidence was permissible lay opinion testimony under Federal Rule of Evidence 701. The trial court record is well-developed, and the drug calculation methodology was a central issue before and during trial and at sentencing. The Third Circuit also focused on this issue in its opinion, aiding this Court's review.

CONCLUSION

Because the legal question presented is exceptionally important, the Court should grant this petition for writ of certiorari, set forth appropriate limitations under Federal Rule of Evidence 701, and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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