NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
JULY TERM 2022

BASIL BEY,

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

2. The caption identifies all parties in this case.

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Petitioner Basil Bey respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Third Circuit affirming the District Court's judgment is unpublished but available at No. 19-2931, 2022 WL 1011693, (3d Cir. Apr. 5, 2022) (unpub.) and is attached at Pet. App. 1-14.

JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That

court entered judgment on April 5, 2022. This petition is timely filed within ninety days after the judgment issued. *See* Sup.Ct.R. 13.1 The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 701 ("Rule 701"), Opinion Testimony by Lay Witnesses, provides as follows:

> 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 as follows:

> 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, Mr. Bey and nine co-defendants were indicted by a grand jury in a 22-count indictment that resulted from an investigation into Mr. Bey and his alleged associates that started in 2014. Mr. Bey was charged with conspiracy to distribute 280 grams or more of cocaine base ("crack") and one kilogram or more of heroin in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A) and (B) ("Count 1"); distribution of crack and heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) ("Count 10"); and distribution of controlled substances within 1,000 feet of a playground/school, in violation of 21 U.S.C. §§ 860(a) and 841(a)(1) and (b)(1)(C) ("Count 11"). The government alleged Bey and his co-defendants engaged in a conspiracy to distribute heroin and crack in South Philadelphia.

B. Trial and Sentencing

The central issue at trial with respect to Mr. Bey was not whether he sold crack or heroin, but the quantity of crack and heroin he and his co-conspirators sold. Bey and his co-defendants were street-level dealers that sold small quantities of crack and heroin multiple times per day (the largest individual sale of crack or heroin from Mr. Bey was a mere seven grams). The government developed evidence that Bey and his alleged co-conspirators shared a cellular phone from which all the street-level transactions were arranged. The government presented toll records of hundreds of thousands of calls on the phones.

Seeking to aggregate weights of the narcotics sold against Bey and his co-defendants, the FBI prolonged the investigation for approximately three years. The FBI's obtained a wiretap which was active from September 12, 2016 to December 8, 2016. The FBI agents listened to calls and, often without any stopped buyers and no drugs recovered, made assumptions that the calls they listened to resulted in completed sales. Additionally, the FBI agents assumed calls in which no specific drug, or quantity of drugs were requested, also resulted in completed sales. For toher sales in which buyers were stopped and drugs were recovered, the FBI calculated the average weight of a single bag of crack and a single bag of heroin. Then, based upon the average weight of a bag, calculated the weights of drugs attributed to Mr. Bey for transactions dating back to 2014 in which no buyers were stopped nor drugs recovered.

The total amount of crack and heroin actually seized in the entire investigation was 38.7 grams of crack and 90 grams of heroin. Nonetheless, the trial court permitted the FBI agents to testify that Bey was responsible for selling 2,668 grams of heroin and 7,480 grams of crack. The court permitted this testimony as "opinion" testimony under Federal Rule of Evidence 701. Before allowing the government to present the FBI's calculated weights, the trial court conducted an extensive hearing, outside the presence of the jury, when the FBI agents explained their so-called methodology for calculating the precise drug weights attributable to each co-defendant. The alleged methodology was as follows.

Two case agents analyzed 19 days of calls from the wiretaps, familiarizing themselves with the drugs purchased by particular customers and code language which distinguished between heroin and crack, for example, that "hard" meant crack. The agents assigned what it 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 drug seizures they associated with the conspiracy, and averaged the weight for a bag of heroin (.04 grams) and crack (.3 grams). Then, they estimated how many bags were sold each day (110 bags of heroin and 42 bags of crack) to come up with a precise weight that the conspiracy distributed each day: 4.418 grams of heroin and 12.55 grams of crack. The government then determined when a co-defendant joined the conspiracy. Mr. Bey was allegedly involved in the conspiracy for 604 days. The agents then multiplied the daily average weight of crack and heroing sold by 604 days to calculated drug weights attributable to Mr. Bey. The District Court deemed this "a coherent and intellectually sound methodology."

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. The District Court determined it was not expert under Rule 702, and that charts setting forth this precise theory were permissible under Federal Rule of Evidence 1006. 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. Bey 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 280 grams of crack was attributable and reasonably foreseeable to Mr. Bey, and that more than 100 grams of heroin were attributable and reasonably foreseeable to Mr. Bey.

C. Third Circuit Opinion

On appeal, Mr. Bey 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 and basic math to estimate the quantity of drugs sold per day. (Pet. App. 9). Rule 701 permitted this lay opinion testimony because it was not the exclusive province of an expert, and, instead of usurping the jury's role, helped jurors keep track of complicated calculations. (Pet. App. 10). 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. 10). 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. 12).

Mr. Bey 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.[1]

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.

To ensure that a witness's lay opinion puts "the trier of fact in possession of an accurate reproduction of [an] event" and does not "amount to little more than choosing up sides," Rule 701 permits opinion testimony by lay witnesses only under certain circumstances. *See* Fed.R.Evid. 701 advisory committee's note (1972 Proposed Rules). 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.

[1] Counsel for Basil Bey and his co-defendants, Amin Wadley, Reginald White and Tyrik Upchurch coordinated efforts in formulating and drafting the arguments contained within the section 'Reasons for Granting the Petition."

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

Case agents, the principal law enforcement witness, present a challenge to consistent application of this Rule. 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 sequestered during the testimony of other witnesses. 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 a case agent are all permissible.

What is not permissible, but too often occurring at trial and sentencing,[2] is when the case agent goes further, and presents the government's theory of the case

[2] Law enforcement extrapolation to determine drug quantity is similarly a challenge for fair and uniform sentences and much depends on how a Circuit evaluates such evidence. The First, Fourth, Fifth, Ninth, and Eleventh Circuits review it *de novo,* because the validity of a drug quantity calculation is fundamentally a legal question or a mixed question of law and fact. *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,

as evidence under the guise of personal observation under Rule 701. But the traditional purpose of Rule 701(a) testimony recognizes:

> 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, 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 to "Weinstein's Evidence" omitted).

Rule 701 does not allow witnesses 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. 2009). Nor should Rule 701 permit law enforcement 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. 2004). 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

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Seventh, Eighth, and D.C. Circuits review for clear error. *United States v. Freeman*, 763 F.3d 322, 337 (3rd Cir. 2014); *United States v. Young*, 863 F.3d 685, 688 (7th Cir. 2017); *United States v. Madison*, 863 F.3d 1001, 1005 (8th Cir. 2017); *United States v. Tucker*, 12 F.4th 804 (D.C. Cir. 2021), *cert. denied*, 596 U.S. ___ (U.S. June 13, 2022) (No. 21-7769). How law enforcement calculates and a District Court then determines drug calculation at sentencing is another area that would benefit from this Court's guidance.

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").

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

And yet, despite cases over several decades laying out the problems with this testimony and possible fixes, inter-circuit and intra-circuit conflicts abound. In this case, the Third Circuit explicitly permitted the government's theory to come in as evidence, but the Eighth Circuit, in a similar case, prohibited this type of testimony under Rule 701. *See United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001), *cert. denied*, 543 U.S. 104 (2005). In holding an agent's lay opinion testimony was improperly admitted pursuant to Rule 701, the Court explained:

> 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.

Id. at 641-42; *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 do not meet the personal perception requirement of Rule 701.

District Courts and practitioners must have clear direction to ensure that case agents who present overview and dual capacity testimony 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 "bright-line test" should be established by this Court to avoid the numerous ad hoc rationales that have engendered significant intra-circuit and inter-circuit conflicts in determining the admissibility of lay opinion testimony pursuant to Rule 701. To have "firsthand knowledge or observation" under Rule 701(a), a witness must have "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 (but not limited to) interviews of witnesses, 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.

II. THE LEGAL QUESTION PRESENTED IS IMPORTANT.

This case presents a question of importance in that it affects virtually every federal criminal trial in which an agent testifies about their opinion as a lay witness pursuant to Rule 701. Given the frequency of such testimony, the conflict in the federal courts as to whether and to what extent Rule 701 governing lay opinion testimony permits a law enforcement officer to testify based on information derived from the investigation as a whole, as opposed to real first-hand knowledge needs to be settled. A decision from this Court setting a bright line rule is especially necessary

because there is both intra- and inter-circuit conflict and general inconsistency on this issue.

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 calculation and conclusion fell 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,
/s/ Patrick A. Egan

Dated: July 5, 2022