

Number ____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 2021

RAFAEL CORTEZ-OROPEZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Should certiorari be granted where the district court itself called this case a “close” situation when an unqualified Special Agent with the Bureau of Alcohol, Tobacco and Firearms, who had never before been called as an expert on interstate commerce, testified as an expert on whether the firearms and ammunition seized in Petitioner’s home had been shipped or transported in interstate commerce?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW.....	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS.....	4
SUMMARY OF ARGUMENT	7
ARGUMENT	8

POINT 1:

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER FED. R. EVID. 702 PERMITS THE GOVERNMENT TO PROVE THE INTERSTATE COMMERCE ELEMENT OF POSSESSING FIREARMS AND AMMUNITION AS A CONVICTED FELON AND UNLAWFULLY POSSESSING A FIREARM WITH AN OBLITERATED SERIAL NUMBER BASED SOLELY ON THE TESTIMONY OF A SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WHO HAD NEVER TESTIFIED AS AN EXPERT BEFORE, AND KNEW SO LITTLE ABOUT THE ISSUE OF INTERSTATE COMMERCE THAT EVEN THE DISTRICT COURT CALLED PETITIONER’S §702 OBJECTION A “CLOSE” QUESTION	8
CONCLUSION.....	14

CERTIFICATE OF SERVICE.....	15
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TABLE OF AUTHORITIES

FEDERAL CASES

<i>United States v. Cortez-Oropeza</i> , Number 21-1209, 2022 U.S. App. LEXIS 19295 (1 st Cir. July 13, 2022)	1, 6
<i>United States v. Smith</i> , 869 F.2d 348 (7 th Cir. 1989)	12
<i>TK-7 Corp. v. Estate of Barbouti</i> , 993 F.2d 722 (10 th Cir. 1993) . .	11
<i>Whole Woman’s Health v. Hellerstedt</i> , 579 U.S. 582, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016)	12

FEDERAL STATUTES

18 U.S.C. §§ 922(k)	3
18 U.S.C. §§922(g)(I), 924(a)(2)	3
FED. R. EVID. 702.	2, 8

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OPINION BELOW

There was one decision below, which is attached to this petition.
See United States v. Cortez-Oropeza, No. 21-1209, 2022 U.S. App.
LEXIS 19295 (1st Cir. July 13, 2022).

JURISDICTION

The judgment of the Court of Appeals was entered on December July 13, 2022, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 702 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

Petitioner, Rafael Cortez-Oropoza, was convicted, in the District of Puerto Rico (Hon. Juan R. Torruella at trial; Hon. Pedro Delgado Hernandez at sentence), on February 24, 2021, of being a convicted felon in possession of a firearm or ammunition, in violation of 18 U.S.C. §§922(g)(I), 924(a)(2) and 924(e), and possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. §§ 922(k) and 9249(a)(1)(B). He was sentenced on Count One to 235 months' imprisonment and a concurrent sentence on Count Two to 60 months' imprisonment. The First Circuit Court of Appeals affirmed his conviction on July 13, 2022.

STATEMENT OF FACTS

On July 17, 2018, at 5:10 a.m., the Puerto Rico Police Department executed a search warrant for firearms at Villas Del Carmen. Petitioner told the police he owned the home and had firearms hidden in the bedroom. The police found a Charter Arms .38 caliber revolver, a Cobray 12 .380 caliber pistol, with a mutilated serial number, a machine gun that resembled an Uzi, a rifle magazine, two black pistol magazines, two nine-millimeter rounds of ammunition, two .40 caliber rounds of ammunition, and one 7.62 by 39 round of ammunition.

At trial, Israel Valle, a Special Agent with the Bureau of Alcohol, Tobacco, Firearms, testified, during *voir dire*, that this was his first time he was testifying as an expert.

Petitioner's trial counsel objected that he was not "certified ... as an expert" on whether the firearms or ammunition had traveled in interstate commerce. He said "[h]e's not even able to tell you if there are professional organizations within that field of expertise, which we know that there are * * * He uses a database which he doesn't know how it's maintained. He uses books which he doesn't remember their titles or even if they're the last editions or not. I think, in this particular case, the

government has not fulfilled all the requirements that it needs to affirmatively present in order to establish this individual as an expert. He will have expertise in maybe other areas as a law enforcement officer, but as to gun markings, I propose to the Court that he hasn't been properly qualified."

The District Court conceded this was a "close" question, but still found Agent Valle was qualified as an expert for the limited purposes of determining whether the weapons and bullets traveled in interstate commerce.

Agent Valle then testified no firearms are manufactured in Puerto Rico. The Charter Arms firearm, he believed, was manufactured in Connecticut, while the Cobray 12 was made in Buffalo, New York. The SKS 26 rifle, meanwhile, was made in China by Chinese Armory.

Special Agent Valle also testified no ammunition is made in Puerto Rico either. The seized Remington ammunition was manufactured in Arkansas and Connecticut, while the TulAmmo ammunition was manufactured in Russia. He conceded he did not prepare a report of his inspections or verify his conclusions with a more experienced agent. Nor

did he confirm the serial numbers of the firearms with the manufacturers themselves.

Critically, Agent Valle he did not know whether there are unlicensed armorers and gunsmiths in Puerto Rico that could have assembled the firearms and ammunition in Puerto Rico, rather than abroad, hence negating the interstate commerce element. Rather, he could only testify he could not answer the question because the information was confidential.

Petitioner was found guilty of Count One of the second superseding indictment, of possession of firearms and ammunition by a prohibited person, and Count Two, possession of a firearm with an obliterated serial number.

The First Circuit Court of Appeals affirmed. *United States v. Cortez-Oropeza*, No. 21-1209, 2022 U.S. App. LEXIS 19295 (1st Cir. July 13, 2022). It ruled that the district court did not abuse its discretion when it ruled Special Agent Valle was qualified to testify as an expert on the interstate travel of Petitioner's firearms and ammunition.

SUMMARY OF ARGUMENT

Certiorari should be granted because, contrary to the ruling of the First Circuit Court of Appeals, the district court abused its discretion when it found Israel Valle, a Special Agent with the Bureau of Alcohol, Tobacco and Firearms, was an expert on whether the firearms or ammunition seized in Petitioner's home had been shipped or transported in interstate commerce, even though it conceded he "doesn't have a lot of experience," and noted this issue was a "close situation."

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER FED. R. EVID. 702 PERMITS THE GOVERNMENT TO PROVE THE INTERSTATE COMMERCE ELEMENT OF POSSESSING FIREARMS AND AMMUNITION AS A CONVICTED FELON AND UNLAWFULLY POSSESSING A FIREARM WITH AN OBLITERATED SERIAL NUMBER BASED SOLELY ON THE TESTIMONY OF A SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WHO HAD NEVER TESTIFIED AS AN EXPERT BEFORE, AND KNEW SO LITTLE ABOUT THE ISSUE OF INTERSTATE COMMERCE THAT EVEN THE DISTRICT COURT CALLED PETITIONER'S §702 OBJECTION A "CLOSE" QUESTION.

Before Israel Valle testified, defense counsel objected that he was not "certified ... as an expert" on whether the firearms or ammunition had traveled in interstate commerce. The District Court conceded "I don't think he's the greatest expert" and even acknowledged "this is a close situation," yet it still permitted him to testify. The First Circuit agreed.

Certiorari should now be granted because the district court allowed the Government to call an unqualified expert to testify that the weapons had traveled in interstate commerce.

When the Government initially attempted to lay a foundation on direct-examination that Special Agent Valle was an expert, the district court underscored the deficiency in its case, observing:

Let me tell you what I think this witness has to be an expert on. He has to be an expert not on firearms generally but on how to determine whether this firearm has moved in interstate commerce. And I would like to hear some questions, either from the government or from the defense, establishing that he -- how he knows about determining that, what training he has on that issue, before I rule on whether he's an expert on that or not. *I haven't heard it so far*. I have heard general evidence about a one-week course [in Alabama] being -- all his experience before that, as a D.C. police officer, as a local police officer, even as a member of ATF, does not, in my opinion, at this point, qualify him as an expert on determining the interstate travel of these weapons (emphasis added).

The Court was correct. The Government attempted to show Agent Valle was an expert on firearms, but not on how they traveled in interstate commerce. After the Court found an insufficient foundation, the Government again attempted to establish that Agent Valle was an interstate nexus expert.

Agent Valle then testified claimed he looked at a database, but that did not make him an interstate nexus expert. On the contrary, any non-

expert ATF agent can do that. That action merely reflects what the Agent did, not what he knows, which is the hallmark of an expert.

While Agent Valle looked at the database, he admitted he did not know how it was maintained or even if the information contained therein was reliable. Instead, he conceded that he took all the “information [in] the database upon faith.” He thus relied on internal, non-published government files to establish the jurisdictional element of Petitioner’s felon-in-possession offense, even though he is an agent of the Government, and is relying on self-serving, internal documents as the basis for his opinion.

Agent Valle’s reliance on about ten books about firearms also does not make him an expert. He could not even remember the names of eight of the ten books. Nor did he know the publishing houses, the authors or even when they were written or published. While he remembered one book, the Blue Book of Gun Values, he did not know if he had the latest version, thus undermining its reliability. While any ATF agent can read a book, not every one is an interstate nexus expert.

Valle's testimony about unknown books was not based on facts or data of a type reasonably relied upon by experts in the field in forming an opinion as to the interstate nexus of firearms.

He did not do anything else to qualify as an interstate nexus expert. Even though there are organizations of gun marking examiners, he does not belong to any. Nor did he ever publish anything on interstate nexus or anything on the field of gun markings identification. Although Agent Valle was not peer reviewed by other experts, he testified that “ ... every time I finish one determination, I sometimes go and ask [another expert in my office] if they believe I am writing the right information. And they double check” Seeking peer review from either another interstate nexus expert or another non-expert agent is insufficient. The information provided by other experts or ATF agents is not published, documented, or subject to peer review. As a result, the information Agent Valle obtained from other agents, after criminal proceedings had begun, are not reasonably reliable. At best, they are the summary of the hearsay opinion of other un-cross-examined experts or agents. *Cf. TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993)(expert testimony was inadmissible under Rule 703 “where the expert failed to demonstrate

any basis for concluding that another individual's opinion ... was reliable, other than the fact that it was the opinion of someone he believed to be an expert"); *United States v. Smith*, 869 F.2d 348, 355 (7th Cir. 1989)("An expert witness may not simply summarize the out-of-court statements of others as his testimony."). *See, generally, Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 620, 136 S. Ct. 2292, 2316, 195 L. Ed. 2d 665 (2016)("The Federal Rules of Evidence state that an expert may testify in the 'form of an opinion' as long as that opinion rests upon 'sufficient facts or data'").

Here, the Government failed to prove the jurisdictional element of its case through the testimony of Agent Valle. Nor did it introduce records subpoenaed from the manufacturer, direct testimony from the manufacturer, or any ATF trace reports.

Absent admissible proof that any of the weapons or ammunition seized in Petitioner's home had traveled in interstate commerce, his convictions for both being a felon in possession of a firearm or ammunition, and possessing a firearm with an obliterated serial number violate due process.

Certiorari should thus be granted to find that Agent Valle was not an interstate nexus expert, and his testimony was insufficient to prove the firearms found in Petitioner's home traveled in interstate commerce.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE
GRANTED.

Dated: July 18, 2022
Manhasset, New York

Respectfully Submitted,

Steven A. Feldman
Steven A. Feldman

UNITED STATES
SUPREME COURT

RAFAEL CORTEZ-OROPEZA,

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I affirm, under penalties of perjury, that on July 18, 2022, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney for the District of Puerto Rico, Torre Chardon, Suite 12-1, 350 Carlos Chardon Street, San Juan, Puerto Rico 00918, and on Rafael Cortez-Oropeza, 52063-069, FCI Yazoo City, 2225 Haley Barbour Parkway, Yazoo City, MS 39194.

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