NO. _____

In the

Supreme Court of the United States

Samuel Wilson III,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Fifth Circuit

Fifth Circuit Case No. 22-60286

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Some, but not all, circuits permit a law enforcement agent who is not designated as an expert to testify as a lay witness about drug slang, jargon or code in conversations to which the agent was not a party. Other circuits have ruled that this is improper because it is not, in fact, lay testimony but rather testimony based on experience and training that should be presented by a designated expert. Was it error for the district court in this case to permit a law enforcement agent to testify as a lay expert to otherwise unintelligible conversations which he believed contained drug slang, jargon or code?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Samuel Wilson III was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff in the district court, the appellee in the court below, and is the Respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Wilson III asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On May 5, 2023, the Fifth Circuit entered a *per curiam* opinion affirming Wilson's conviction for federal crimes. *United States v. Samuel Wilson III*, 2023 WL 3270912 (5th Cir. May 5, 2019). (Pet. App. 1).

JURISDICTION

This Court has jurisdiction to review the Fifth Circuit's judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 701 states:

> 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.

Federal Rule of Evidence 702 states:

> 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.

Fed. R. Evid. 702.

STATEMENT OF THE CASE

I. Jurisdiction of the courts below

This case arose from the prosecution of an offense against the laws of the United States of America. The United States District Court for the Northern District of Mississippi had jurisdiction over this case under 18 U.S.C. §3231.

Wilson directly appealed his conviction in the district court to the United States Court of Appeals for the Fifth Circuit, which had appellate jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742.

II. Proceedings below

On July 24, 2019, a Federal Grand Jury returned an indictment in the Northern District of Mississippi charging various individuals in connection with what the government called "the Jeremy Mairidith drug trafficking organization ('DTO')." Wilson was charged with conspiracy to distribute methamphetamine (Count 1), possession with intent to distribute marijuana and heroin (Counts 7 & 8), possession of several firearms in furtherance of a drug trafficking offense in violation of 18 U.S.C. §924(c) (Counts 9 & 10), and possession of firearms by a convicted felon (Counts 11 & 12). The government later filed a superseding indictment charging Wilson with an additional count of a felon in possession of firearms (Count 19).

Two documents transmitted during the course of discovery are relevant to this petition. On September 12, 2019, the government sent defense counsel a "General Discovery Letter" pursuant to Fed. R. Crim. P. 16 in which Frank Elliott ("Elliott") of the Bureau of Alcohol, Tobacco and Firearms ("ATF") was identified as an expert witness to be called at trial. Attached to the letter was a "Memorandum of Testimony" from Elliott

describing his areas of expertise, all of which related to firearms tracing, narcotics investigations, and wiretap logistics. Elliott was not designated as an expert in drug jargon, slang or code[1] pursuant to Fed. R. Crim. P. 16(a)(1)(G), which states that the disclosure "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." (Pet. App. 3).

The government tried Wilson (who was the only remaining defendant) on all counts in the superseding indictment. The trial lasted three days with the bulk of the government's conspiracy case (that Wilson was a member of the Mairidith DTO) being Elliott's interpretation of what was said in wiretapped phone calls, which he himself admitted were barely intelligible.

The jury returned a mixed verdict. They found Wilson guilty of Counts 1 (participating in a controlled substance conspiracy (the Mairidith DTO)), 7 (possession with intent to distribute marijuana), and 11 (felon in possession of two handguns). However, the jury found Wilson not guilty of all other counts.

Wilson was sentenced to 262 months confinement for the convictions. (Judgment, Pet. App. 2).

III. Trial

Elliott testified as a lay witness pursuant to Fed. R. Evid. 701 as to his interpretation of various calls between Mairidith and Wilson (and others).[2] Defense counsel objected to having Elliott interpret the subject matter of the calls: "MR. LEWIS:

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[1] Hereinafter, Wilson will refer to the subject matter of this kind of testimony as "drug code."

[2] There was some confusion as to whether the government called Elliott as an expert in any subject (including drug code), but on appeal, the government confirmed that it only called Elliott as a lay witness.

Excuse me, Your Honor. The calls have been admitted into evidence. They speak for themselves. I object to the witness interpreting them." The Court overruled the objection based on the government's proffer that they were only asking Elliott to recite the words he heard and "not asking him to explain or extrapolate the meaning of those words." However, that is precisely what Elliott proceeded to do multiple times during his testimony, with the government asking Elliott to define terms such as "gas," "cream," "dog food," "4-way," and "zip." The government also asked Elliott to interpret motives behind certain statements in the calls such as asking Elliott to interpret the reason why the speaker wanted certain other third parties to come to his home.

IV. Appeal

Wilson timely appealed to the Fifth Circuit. On May 5, 2023, the Fifth Circuit rendered a *per curiam* opinion affirming Wilson's convictions below. The court followed its precedent which permits law enforcement agents to testify as to drug code as a lay witness as long as the testimony is based upon the agent's perceptions from his involvement in the case. *See United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001). The court held that if Elliott and the government crossed the line into straight expert testimony based upon his experience and training, that was harmless error.

ARGUMENT

I. Allowing law enforcement agents to testify as lay witnesses as to matters such as drug code is highly prejudicial to defendants

There is plenty of controversy as to law enforcement agents being designated as *experts* in such general topics as criminality, and then being allowed to testify as court-accepted experts in cases where the agent is also the investigative officer. *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1995 (2017). However, the issue before this Court has to do with non-expert-designated law enforcement testimony that by definition blurs the line between lay and expert testimony. *See United States v. Paiva*, 892 F.2d 148, 156 (1st Cir. 1989) (stating that "rigid distinctions" between lay and expert testimony are blurred because lay opinion of law enforcement officers is not limited to areas within common knowledge.).

Wilson readily agrees that every court permits a witness, including a law enforcement agent, to offer lay opinions pursuant to Rule 701 if the opinion:

> 1) is rationally based upon the perception of the witness;
>
> 2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and
>
> 3) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. It is the last factor where courts have blurred or outright erased the line between lay opinions and properly designated expert opinions in the case of drug code. And this is highly prejudicial to defendants, especially when the Court considers that these law enforcement agents are testifying as undesignated experts, without notice to the defendant pursuant to Fed. R. Crim. P. 16.

The gross advantage that this gives the government is that it may skirt the obligation to give pretrial notice and establish important qualifying facts as part of the foundation normally required for expert testimony. *See* 3 Christopher B. Mueller & Laird Kirkpatrick, *Federal Evidence* § 7:6, (2022). Also, permitting an agent to testify as to lay opinions at the same time as providing factual testimony as to the case at issue creates confusion in the jury where the agent has the "aura of reliability," leading to undue credit to the testimony.

Some circuits have recognized this problem and have prohibited law enforcement agents who are not designated experts from testifying to drug code. Other circuits have implemented complex systems in an attempt to mitigate prejudice to defendants – none of which are workable in a practical sense – and all of which lead to an inconsistent and multivarious quilt of procedures throughout the country.

II. The circuits disagree as to what extent a government agent may be permitted to provide lay testimony regarding interpretations of conversations in which a defendant participates

A. The D.C. Circuit, Second Circuit, and Ninth Circuit do not permit a law enforcement agents to provide lay opinions about the meaning of statements (including drug code) made in a conversation to which they were not a party

The D.C. Circuit held in *United States v. Hampton*, 718 F.3d 978 (D.C. Cir. 2016) that an agent testifying as a lay witness as to the meaning of statements in a conversation failed to meet the requirements of Fed. R. Evid. 701 "first because there is no way for the court to assess whether [the lay opinion] is rationally based on the witness's perceptions, and second because the opinion does not help the jury but only tells it in a conclusory fashion what it should find." *Hampton*, 718 F.3d at 981-82. The court went on to hold that the officer was unqualified to offer the lay opinion because it was based on hearsay and

other information which the jury had not heard, and left the jury with "no way of verifying his inferences or of independently reaching its own interpretations" as required by Fed. R. Evid. 701. *Id.* at 982-83; s*ee also United States v. Smith*, 640 F.3d 358, 365 (D.C. Cir. 2011) (holding that an agent cannot testify as a lay witness about drug code; would have to be qualified pursuant to Fed. R. Evid. 702).

The Second Circuit held in *United States v. Grinage*, 390 F.3d 746 (2d Cir. 2004) that it was reversible error to permit an agent who participated in the investigation to testify as a lay witness as to the meaning of conversations involving the defendant because the agent was basing his interpretations on knowledge of the investigation which included information the jury had not heard. *Grinage*, 390 F.3d at 750-51. Similarly, in *United States v. Garcia*, 413 F.3d 215 (2d Cir. 2005), the Second Circuit held that lay testimony is not permissible "to explain both the operations of drug dealers and the meaning of coded conversations about drugs;" however, such testimony is permissible expert testimony. *Garcia*, 413 F.3d at 215-17.

Finally, the Ninth Circuit in *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) held that a government agent testifying as to various activities of the defendant, including "code words for a drug deal," required "demonstrable expertise" blurred the distinction between Fed. R. Evid. 701 and 702. *Figueroa-Lopez*, 125 F.3d at 1244-45. The court noted, "Surely a civilian bystander, or for that matter a raw DEA recruit would not be allowed to interpret for the jury Lopez's behavior in the parking lot on May 25, 1995 as that of an 'experienced' trafficker merely because that person was an eyewitness to the same." *Id.* at 1246. The court further found that the government's actions subverted the notice requirements of Fed. R. Crim. Pro. 16(a)(1)(E) and failed to

give the defendant a fair opportunity to test the merit of expert testimony through cross-examination. *Id.* at 1246.[3]

B. The Fifth Circuit, First Circuit, Eleventh Circuit, and Sixth Circuit have much more permissive standards for admission of lay witness government agent testimony

The leading Fifth Circuit case (and that which the court followed in this case) is *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015). *Haines* is primarily directed at situations not present here where the law enforcement agent is testifying as *both* an expert and a lay witness (which Agent Elliott clearly did in this case although he was not designated as an expert in drug code). However, *Haines* permits a law enforcement officer to testify as a lay witness about "the meaning of specific words and terms used by the particular defendant in th[e] case." *Haines*, 803 F.3d at 728. This is in conflict with other circuits.

The First Circuit permits a law enforcement witness to provide lay opinions which "explain the drug trade and translate coded language." *United States v. Belanger*, 890 F.3d 13, 25 (1st Cir. 2018). The First Circuit explicitly blurs the line between expert and lay opinions in this case by stating "Rule 701 lets in 'testimony based on the lay expertise a witness personally acquires through experience, often on the job.'" *United States v. George*, 761 F. 3d 42, 59 (1st Cir. 2014) (quoting *United States v. Santiago*, 560 F.3d 62, 66 (1st Cir. 1009)). By definition, if expertise is acquired through *experience*, it is based on

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[3] The Eighth Circuit is often identified as another circuit that prohibits law enforcement agents from testifying as to drug code, citing *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). *See* Anne Toomey McKenna and Clifford S. Fishman, *Wiretapping and Eavesdropping*, § 41:24.40, n. 2 (2022). However, though it would be fair to state that the Eighth Circuit disfavors drug code testimony by lay witnesses – and prohibits it when it is based upon investigation after the fact and not first-hand knowledge, it does not appear that the Eight Circuit has an across-the-board prohibition of drug code testimony by lay witnesses. *Peoples*, 250 F.3d at 641.

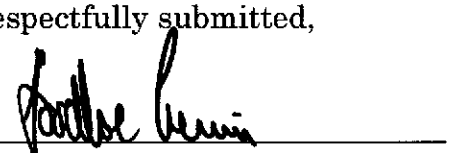
"specialized knowledge within the scope of Rule 702." *See* Fed. R. Evid. 701. This is an improper expansion of the scope of Rule 701.

The Eleventh Circuit allows law enforcement witnesses to provide lay opinions about the content of conversations based on his or her investigation, *including documents and evidence not admitted into evidence. United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011). Again, this is explicitly expert testimony pursuant to Fed. R. Evid. 702 because only designated experts may rely upon information not admitted into evidence, and then only when the information is the type normally relied upon by experts in that field. *See* Fed. R. Evid. 703. The Sixth Circuit takes a similar approach. *See United States v. Kirkpatrick*, 798 F. 3d 365, 380-83 (6th Cir. 2015) (allowing law enforcement agents to provide lay opinions based upon hearsay interviews of witnesses that did not testify at trial).

III. Conclusion

Petitioner respectfully asks that this Court grant certiorari and set the case for a decision on the merits.

Respectfully submitted,



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