No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RODRIGO ALVAREZ-QUINONEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a law enforcement agent give lay opinion testimony under Federal Rule of Evidence 701 based on the agent's overall knowledge of an investigation, as maintained by several circuit courts of appeals, or does such testimony run afoul of the Rule's foundation requirement that such testimony be rationally based on the perception of the witness, as maintained by several other circuit courts of appeals?

STATEMENT OF RELATED CASES

* *United States of America v. Rodrigo Alvarez-Quinonez*, No. 2:20-cr-00093-RSM-002, U.S. District Court for Western Washington. Judgment entered September 16, 2022.

* *United States of America v. Rodrigo Alvarez-Quinonez*, No. 22-30161, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 4, 2023.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF RELATED CASES ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

A. Procedural History 3

B. Statement of Facts 4

REASONS FOR GRANTING THE PETITION 9

I. THE SPLIT BETWEEN U.S. CIRCUIT COURTS OF APPEALS CONCERNING THE APPLICATION OF FEDERAL RULE OF EVIDENCE 701 TO LAW ENFORCEMENT WITNESSES SHOULD BE RESOLVED, BECAUSE CIRCUITS ON ONE SIDE OF THE SPLIT ARE EFFECTIVELY AND UNNECESSARILY ALLOWING SUCH WITNESSES TO TELL JURORS HOW TO DECIDE THE CASE 9

A. The Circuit Courts of Appeals That Permit Agents of Law Enforcement to Give Opinion Testimony Under Federal Rule of Evidence 701 Based on Knowledge They Have Obtained Through an Investigation Contravenes the Rule's Requirement that Such Testimony Be Based on Percipient Knowledge, and That It Not Undermine the Jury's Factfinding Role 9

TABLE OF CONTENTS

Page

B. The Centrality to the Prosecution's Case of Provenzale's Imputation of the Intercepted Communications to Petitioner Precludes "Fair Assurance" He Would Have Been Convicted Absent That Erroneously Admitted Lay Opinion Testimony 12

CONCLUSION 14

TABLE OF APPENDICES

Page

APPENDIX A Opinion of the Court of Appeals of the United States for the Ninth Circuit (December 4, 2023) 1a

APPENDIX B Order of the Court of Appeals of the United States for the Ninth Circuit (January 5, 2024) 6a

TABLE OF CITED AUTHORITIES

CASES:

U.S. v. Collicott, 92 F.3d 973 (9th Cir. 1996) 14

United States v. Freeman, 498 F.3d 893 (9th Cir. 2007) 9, 10

United States v. Freeman, 730 F.3d 590 (6th Cir. 2013) 10, 11

United States v. Garcia, 413 F.3d 201 (2nd Cir. 2005) 10

United States v. Hill, 63 F.4th 335 (5th Cir. 2023) 10

United States v. Hilliard, 851 F.3d 768 (7th Cir. 2017) 10

United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011) 10

United States v. Johnson, 617 F.3d 286 (4th Cir. 2010) 10, 11

United States v. Peoples, 250 F.3d 630 (8th Cir. 2001) 10, 11

United States v. Vazquez-Rivera, 665 F.3d 351 (1st Cir. 2011) 10, 11

STATUTE:

Federal Rule of Evidence 701 ..... 3, 9, 10, 11

INTRODUCTION

There currently is a split among the circuit courts of appeals on the question of whether a law enforcement officer lacking percipient knowledge of the matter in issue nonetheless may give lay opinion testimony under Federal Rule of Evidence 701 based on information the officer obtained through an investigation. The Fifth, Seventh, Ninth and Eleventh circuits have determined such testimony is consistent with Rule 701, while the First, Second, Fourth, Sixth and Eighth Circuits have determined it is not. Since Rule 701 permits lay opinion testimony only for the purpose of assisting the jury in understanding the witness's testimony or in determining a fact in issue, allowing a law enforcement officer to provide lay opinion testimony based on investigative material that equally could be made available to the jury cannot be reconciled with the rule. Rather than helping the jury determine a fact question, such testimony effectively supplants the jury's factfinding.

Indeed, in this case, the only material question of fact presented to the jury was whether petitioner was a participant in the recorded telephone conversations in which the other speaker was a drug trafficker. Although the testifying law enforcement officer possessed no experience that rendered him more competent to identify the voice of that speaker than the jury, he was allowed under Rule 701 to identify petitioner as the speaker -- based on listening to recordings that were not even submitted to the jury, except in the form of written transcripts. This case thereby exemplifies the serious encroachment upon the function of the jury that results from allowing law enforcement agents to provide lay opinion testimony based on review of investigation materials. Accordingly, it provides an outstanding opportunity for this Court to

correct the circuit courts of appeals, whose construction of Rule 701 opens the door to such encroachment.

OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Rodrigo Alvarez-Quinonez*, docket number 22-30161, affirming the district court's judgment and filed on December 4, 2023 is attached in the Appendix at 1a; it is unreported and available at 2023 U.S. App. LEXIS 31887.

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Rodrigo Alvarez-Quinonez*, docket number 22-30161, denying petitioner's petition for rehearing and for rehearing en banc and filed January 5, 2024 is attached in the Appendix at 6a; it is unreported and available at 2024 U.S. App. LEXIS 370.

JURISDICTION

The court of appeals entered judgment on December 4, 2023. App. 1a. Petitioner filed a timely petition for rehearing on December 11, 2023 (Docket # 48), which the court of appeals denied on January 5, 2024. App. 6a. In its order of April 1, 2024 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until June 3, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE 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.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Rodrigo Alvarez-Quinonez was tried on two counts of a nine count indictment filed on July 29, 2020.[1] Excerpts of Record of Appellant Rodrigo Alvarez-Quinonez, Ninth Circuit Court of Appeals (hereinafter "Docket # 12") at 259-264. In count 1 of the indictment he was charged with conspiracy to distribute controlled substances, heroin and fentanyl. Docket # 12 at 259-260. In count 9 of the indictment he was charged with with possession of fentanyl with intent to distribute. Docket # 12 at 264.

The indictment further alleged that the reasonably foreseeable conduct of other members of the conspiracy involved one kilogram or more of a mixture or substance containing a detectable amount of heroin, and that the reasonably foreseeable conduct of other members of the conspiracy involved 400 grams or more of a mixture or substance containing a detectable amount of fentanyl. Docket # 12 at 260; 21 U.S.C. § 841 (a)(1), § 841 (b)(1)(A), § 846. As to

1. While Alvarez-Quinonez was tried separately, the indictment named seven co-defendants. Docket # 12 at 259-263.

the charge of possession of fentanyl with intent to distribute, the indictment alleged it involved 400 grams or more of a mixture or substance containing a detectable amount of fentanyl. Docket # 12 at 264; 21 U.S.C. § 841 (a)(1), § 841 (b)(1)(A) and 18 U.S.C. § 2.

The jury convicted petitioner of both counts on June 2, 2022. Docket # 12 at 160-161. It also found both the allegation that the conspiracy involved 400 grams or more of a mixture or substance containing a detectable amount of fentanyl and the allegation the possession of fentanyl with intent to distribute involved 400 grams or more of a mixture or substance containing a detectable amount of fentanyl to be true. Docket # 12 at 160-161.

On September 16, 2022 the court imposed a prison sentence of 120 months prison on each count, to run concurrently. Docket # 12 at 4. Timely notice of appeal was filed on September 27, 2022. Docket # 12 at 266.

On December 4, 2023 the court of appeals affirmed the judgment of the district court. App. 1a. Petitioner filed a timely petition for rehearing and for rehearing en banc on December 11, 2023 (Docket # 48), which the court of appeals denied on January 5, 2024. App. 6a. In its order of April 1, 2024 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until June 3, 2024.

B. Statement of Facts

In the course of investigating a drug trafficking organization in December 2019, pursuant to warrants, the Drug Enforcement Agency (DEA) monitored the telephone calls, texts and the

location of two telephones linked to Delmer Velasquez-Licona. Docket # 12 at 163, 165-166.[2] The warrant authorizing the monitoring of Velasquez-Licona's telephones identified them both as TT18 ("TT" meaning target telephone). Docket # 12 at 163, 166-167. Calls on TT18 were intercepted from December 6, 2019 to January 4, 2020. Docket # 12 at 166-167.

On December 10, 2019, after obtaining a warrant, DEA agents began to track the location of a telephone designated as TT19 with which the phones linked to Velasquez-Licona had communicated. Docket # 12 at 190-193. Pursuant to a subsequent warrant the DEA intercepted the telephone calls and texts from that phone between January 9, 2020 and February 7, 2020. Docket # 12 at 167.[3]

The intercepted telephone conversations were often in Spanish. Docket # 12 at 167. As the calls came in, they were transcribed and English translations were attached. Docket # 12 at 167. As prepared by the Spanish translators, the transcriptions would denote the respective parties to each of the calls as unidentified male voice 1 and unidentified male voice 2. Docket # 12 at 170-171.

2. DEA Special Agent Cheng explained that sometimes persons switch a SIM card in a phone and create a new telephone number, using the same phone and in such cases that substitute phone number continues to be designated by the same TT (Target Telephone) number. Docket # 12 at 162-163. Special Agent Cheng also explained that drug traffickers use phones as part of their business and frequently change their phone numbers, sometimes after having had the number for less than 30 days. Docket # 12 at 180-181.

3. Large portions of the English language translations of those telephone calls and texts from both TT18 and TT19 were read to the jury. *See, e.g.,* Docket # 12 at 188-189. In addition, a document containing the entirety of those English language translations was admitted in evidence. Docket # 12 at 10, 82.

Based on his familiarity with Velasquez-Licona's voice, and information he obtained through the investigation, DEA Agent Provenzale identified Velasquez-Licona as the speaker in some of these conversations. Docket # 12 at 176-177.

Agent Provenzale identified Alvarez-Quinonez as the speaker in some of these conversations and determined TT19 was used by Mr. Alvarez-Quinonez by reviewing the written translations, listening to the voice tone in the recordings and considering other available information, such as the location of the phone disclosed by tracking. Docket # 12 at 168-176, 178-179. In several instances, Provenzale, who does not know Spanish, concluded the translators had attributed a statement to the wrong speaker. Docket # 12 at 171-173.

Special Agent Cheng testified that drug traffickers sometimes use coded language on the phone to avoid law enforcement interception. Docket # 12 at 181. Heroin may be referred to as "night" or "dark," fentanyl as "blueberries" or "buttons," drugs may be referred to as "groceries" and money as "paper." Docket # 12 at 182-184.

In telephone conversations on December 7, 2019 Velasquez-Licona asked Alvarez-Quinonez for 300 tablets of heroin and 500 fentanyl pills, using the coded words "dark ones" for heroin, "buttons" for fentanyl and "paper" for money.[4] Docket # 12 at 82-85, 87-88. Velasquez-Licona said he would pay Alvarez-Quinonez for the heroin and for heroin he previously had received from Alvarez-Quinonez. Docket # 12 at 83.

4. Since the intercepted statements were presented to jurors as having been authored, *inter alia*, by Alvarez-Quinonez, that authorship is included in the statement of facts. The appeal challenged the admissibility of Officer Provenzale's opinion on which that imputation of authorship turned.

Tracking of TT19 showed that on December 17, 2019 the phone was located at Taqueria El Sabor in Shoreline, WA. Docket # 12 at 194-195. A person subsequently identified as Alvarez-Quinonez was photographed that day using a cell phone at that restaurant. Docket # 12 at 194-196.

Prior to December 27, 2019 additional calls concerning drug transactions were intercepted from TT19. Docket # 12 at 90-98. On December 31, 2019 an intercepted call showed Alvarez-Quinonez directed Velasquez-Licona to deliver 1,000 pills of fentanyl ("buttons") to a third party in a brown Mitsubishi at a Chevron station. Docket # 12 at 110, 112. Velasquez-Licona then telephoned a person Provenzale identified as Cruz-Hernandez and directed him to make the delivery and told him the person to whom he delivered the drugs would give him $5,000. Docket # 12 at 114-115, 120.

DEA agents, who knew where Velasquez-Licona lived and the location of the nearby Chevron station, surveilled the Chevron station. Docket # 12 at 197-198. They observed Cruz Hernandez get into a brown Mitsubishi that had pulled up, drive around the block and then leave. Docket # 12 at 200-203. Intercepted telephone communications showed that Velasquez-Licona repeatedly reported on the progress of the transaction to Alvarez-Quinonez. Docket # 12 at 122, 126-128, 131, 136.

After Cruz-Hernandez left the Mitsubishi, agents seized it and found two bags in the back seat containing what was determined to be 1008 fentanyls weighing a total of 109.4 grams. Docket # 12 at 203-208, 237-239. Immediately after the seizure Alvarez-Quinonez telephoned Velasquez-Licona to ask whether Cruz-Hernandez had returned to the house. Docket # 12 at

138. Later that night Velasquez-Licona telephoned Alvarez-Quinonez and informed him agents had seized the truck and all the drugs ("groceries") it contained. Docket # 12 at 140-141.

Subsequently intercepted calls showed that on January 17, 2020 Alvarez-Quinonez telephoned Jorge Ramos and directed him to go to Los Angeles ("L") to pick up drugs, and to then pick up another load of drugs in Phoenix ("the Sun"). Docket # 12 at 28-32, 35-38, 41. The following day Ramos telephoned Alvarez-Quinonez to confirm the amount. Docket # 12 at 47.

Additional intercepted calls show Alvarez-Quinonez and Ramos then decided to return to Washington and that they left for Washington on January 20, 2020. Docket # 12 at 50-58. Tracking data showed their vehicle in Oregon, and agents surveilling them photographed Alvarez-Quinonez at a stop near Salem Oregon. Docket # 12 at 211-214. Minutes after the photographs were taken, a text from Alvarez-Quinonez's phone stated that he was passing Portland and was two hours out. Docket # 12 at 59.

Pursuant to a request from Agent Provenzale, local police stopped the car in Centralia, Washington Docket # 12 at 215-216. Ramos was driving the car, his wife was in the front passenger seat and Alvarez-Quinonez, who presented identification in response to request from police, was seated in the back. Docket # 12 at 217-218, 224-229.

A K-9 unit examined the car, which then was seized and a search warrant was obtained. Docket # 12 at 219-220. The individuals in the car were permitted to leave. Docket # 12 at 229. Search of the car disclosed that under the front driver seat, there were 16,000 pills of fentanyl, with a total weight of 1,700 grams and 400 grams of a mixture containing fentanyl. Docket # 12

at 221-223, 230-231, 240-244. DEA Special Agent Cheng testified that 1,000 pills of fentanyl constitutes a distribution amount. Docket # 12 at 180.

That day Alvarez-Quinonez made a telephone call reporting that he was in Centralia and that agents had seized the truck. Docket # 12 at 60. Two days later he telephoned a number in Mexico and reported that he had been in the back seat of the truck at the time, that the drugs ("groceries") had been hidden, but that a police dog might have smelled the drugs. Docket # 12 at 68-70, 76. In the call Alvarez-Quinonez explained that someone had picked up drugs ("stuff") in Los Angeles, stored them in Fresno and returned to Phoenix for additional drugs ("things"). Docket # 12 at 78-79. Alvarez-Quinonez said he would take responsibility. Docket # 12 at 70.

REASONS FOR GRANTING THE PETITION

I. THE SPLIT BETWEEN U.S. CIRCUIT COURTS OF APPEALS CONCERNING THE APPLICATION OF FEDERAL RULE OF EVIDENCE 701 TO LAW ENFORCEMENT WITNESSES SHOULD BE RESOLVED, BECAUSE CIRCUITS ON ONE SIDE OF THE SPLIT ARE EFFECTIVELY AND UNNECESSARILY ALLOWING SUCH WITNESSES TO TELL JURORS HOW TO DECIDE THE CASE

A. The Circuit Courts of Appeals That Permit Agents of Law Enforcement to Give Opinion Testimony Under Federal Rule of Evidence 701 Based on Knowledge They Have Obtained Through an Investigation Contravenes the Rule's Requirement that Such Testimony Be Based on Percipient Knowledge, and That It Not Undermine the Jury's Factfinding Role

In affirming the decision of the district court to admit lay opinion testimony by a law enforcement agent based on his review of recorded telephone conversations of which he had no percipient knowledge, the court of appeals in this case applied the Ninth Circuit's holding in *United States v. Freeman*, 498 F.3d 893, 904-905 (9th Cir. 2007) that such testimony was admissible under Federal Rule of Evidence 701 based on the agent's "direct knowledge of the

investigation." App. 4a. Several other circuit courts of appeals also have determined Rule 701 permits the admission of opinion testimony by law enforcement concerning matters about which they lacked percipient knowledge, based on knowledge secured through their participation in an investigation. *See United States v. Hill*, 63 F.4th 335, 355-357 (5th Cir. 2023); *United States v. Hilliard*, 851 F.3d 768, 779-781 (7th Cir. 2017); *United States v. Jayyousi,* 657 F.3d 1085, 1101-1104 (11th Cir. 2011). Five circuit courts of appeals have determined that Rule 701 bars such testimony. *See United States v. Vazquez-Rivera*, 665 F.3d 351, 358 (1st Cir. 2011); *United States v. Garcia*, 413 F.3d 201, 212-213 (2nd Cir. 2005); *United States v. Johnson*, 617 F.3d 286, 292-293 (4th Cir. 2010); *United States v. Freeman*, 730 F.3d 590, 595-597 (6th Cir. 2013); *United States v. Peoples,* 250 F.3d 630, 641 (8th Cir. 2001).

In relevant part Federal Rule of Evidence 701 permits lay opinion testimony where the testimony is: "(a) rationally based on the witness's perception [and] (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue." The notion that law enforcement officers may give lay opinion testimony based on their knowledge of the police investigation turns on the presumption that the officer's "indirect knowledge and perceptions" constitute perception within the meaning of Rule 701. *See United States v. Hilliard*, 851 F.3d at 779-781; *see also United States v. Hill*, *supra,* 63 F.4th at 355-357; *United States v. Freeman*, *supra*, 498 F.3d at 904-905; *United States v. Jayyousi, supra,* 657 F.3d at 1101-1104.

The opposing construction of Rule 701 maintains that admitting lay opinion testimony based on matter secured through the investigation as a whole is irreconcilable with the requirement that such testimony be "'rationally based on the witness's perception.'" *United*

States v. Vazquez-Rivera, *supra*, 665 F.3d at 358; *see also United States v. Garcia*, *supra*, 413 F.3d at 213 ("[p]recisely because Rule 701 limits the admissibility of lay opinions at trial to those based only on personal perceptions, an opinion such as [the testifying agent's] which appears to have been based on the totality of information gathered by various persons in the course of an investigation, was not admissible before a jury"); *United States v. Johnson*, *supra*, 617 F.3d at 293 ("post-hoc assessments cannot be credited as a substitute for the percipient knowledge and perception required under Rule 701"); *United States v. Freeman*, *supra*, 730 F.3d at 596-597 (admission of law enforcement agent's opinion testimony absent showing it was based on personal observation, rather than investigation as a whole inconsistent with Rule 701); *United States v. Peoples, supra*, 250 F.3d at 641 (admission of law enforcement agent's opinion testimony based on "investigation after the fact, not on her perception of the facts" violated Rule 701). In light of the additional condition on lay opinion testimony imposed by Rule 701, that the testimony be helpful to the factfinder, the conclusion drawn in support of the latter position is unavoidable, to wit: "the nub of Rule 701(b)'s requirement is to exclude testimony where the witness is no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions which would merely tell the jury what result to reach." *United States v. Vazquez-Rivera*, *supra*, 665 F.3d at 363 (internal quotes and citations omitted).

In this case Agent Provenzale's lay opinion testimony did precisely that. Lacking any qualification not possessed by the jury, Agent Provenzale opined that the other voice on dozens of tape recorded telephone conversations with a drug trafficker belonged to petitioner. Docket # 12 at 168-176, 178-179. Since the only material question at issue in the trial was the identity of

that person, Agent Provenzale effectively told the jury to find Mr. Alvarez-Quinonez guilty.[5] This case, therefore, provides this Court an outstanding opportunity to resolve the circuit split on this question, since it quite starkly demonstrates that allowing law enforcement agents to give lay opinion testimony about matters of which they lack percipient knowledge substantially undermines the jury's role as the finder of fact.

B. The Centrality to the Prosecution's Case of Provenzale's Imputation of the Intercepted Communications to Petitioner Precludes "Fair Assurance" He Would Have Been Convicted Absent That Erroneously Admitted Lay Opinion Testimony

Representing petitioner as the author of statements the DEA had intercepted was, as manifest in the prosecutor's closing argument, the foundation of the government's case: "[t]he proof is his own words." Docket # 12 at 245. The prosecutor summarized these words at great length: "[j]ust a few days into the interception of Velasquez's phone, we already see a clear agreement between Velasquez and the defendant to distribute controlled substances…" Docket # 12 at 246. "[B]ased on these early December 2019 calls alone, you have more than enough to find that the defendant conspired to distribute controlled substances." Docket # 12 at 247.

The prosecutor also discussed the seizure of fentanyl on New Years eve in which he reports Alvarez-Quinonez allegedly telling Velasquez-Licona "that his guy was in a brown Mitsubishi near that Chevron" and the "updates" petitioner allegedly received from him as the transaction progressed. Docket # 12 at 248. The prosecutor then recounted another intercepted call in which petitioner putatively told Velasquez-Licona that the truck and its contents had been

5. The egregiousness of that error was heightened by the fact that the recordings on which Provenzale based his opinion were not admitted in evidence.

seized by police "just so there's no doubt that the defendant knew exactly what was happening" Docket # 12 at 249. The prosecutor subsequently recounted numerous other statements putatively authored by Alvarez-Quinonez. Docket # 12 at 249-252.

Conversely, the defense consisted almost entirely of challenging the prosecution's attribution of intercepted communications to Alvarez-Quinonez. Docket # 12 at 252-258. Yet, the admission of Agent Provenzale's imputation of those communications to Alvarez-Quinonez effectively removed that ultimate question in this case from the jury's consideration.[6]

Absent Provenzale's attribution, the prosecution would have had to demonstrate that Alvarez-Quinonez, who effectively identified himself on January 22, 2020 as the holder of target telephone 19, to have been the same person who had used that phone when the nearly 40 other communications imputed to him, including several more than one month earlier, had occurred. Nothing in the record authorizes confidence jurors would have reached that conclusion, had that factual question fairly been presented to them.[7]

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6. Since the tapes of the calls were not even played for the jury, they had no realistic opportunity to independently assess Provenzale's imputation of their authorship to Alvarez-Quinonez.

7. In the respondent's brief, the government argued that the jury would have imputed the statements to Alvarez-Quinonez even if the transcripts admitted in evidence only identified the speaker and "UMV-1." Docket # 41 at 53. Yet, other than petitioner's self identification as the holder of that phone on January 22, 2020, the only occasion on which the phone was shown to have been possessed by petitioner was on December 17, 2022, when he was observed using a cell phone near a restaurant; there was no evidence that discussion concerned drugs. Thus, absent Agent Provenzale's identification, there was no evidence showing petitioner to have possessed the phone for any of the nearly 40 other communications imputed to him by the prosecution.

For this reason it is impossible to avoid "grave doubt" the jury would not have reached a different conclusion, absent the erroneous imputation of the intercepted communications to defendant. *See U.S. v. Collicott*, 92 F.3d 973, 977-978, 984 (9th Cir. 1996) (reversing convictions for possession of controlled substance with intent to distribute based on erroneous admission of evidence bolstering questionable case). The error, therefore, was prejudicial.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Dated: May 24, 2024

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A Opinion of the Court of Appeals of the United States for the Ninth Circuit (December 4, 2023) 1a

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RODRIGO ALVAREZ-QUINONEZ, Defendant-Appellant.	No. 22-30161 D.C. No. 2:20-cr-00093-RAJ-2 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted November 14, 2023
Seattle, Washington

Before: McKEOWN and GOULD, Circuit Judges, and BAKER,** International Trade Judge.

Rodrigo Alvarez-Quinonez appeals his conviction for conspiracy to distribute controlled substances and for possession of fentanyl with intent to distribute. He argues that the district court erred under Federal Rule of Evidence 901 by concluding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

For this reason it is impossible to avoid "grave doubt" the jury would not have reached a different conclusion, absent the erroneous imputation of the intercepted communications to defendant. *See U.S. v. Collicott*, 92 F.3d 973, 977-978, 984 (9th Cir. 1996) (reversing convictions for possession of controlled substance with intent to distribute based on erroneous admission of evidence bolstering questionable case). The error, therefore, was prejudicial.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

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APPENDIX

TABLE OF APPENDICES

Page

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UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RODRIGO ALVAREZ-QUINONEZ, Defendant-Appellant.	No. 22-30161 D.C. No. 2:20-cr-00093-RAJ-2 MEMORANDUM*

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that the lead DEA case agent established a proper foundation to identify and admit statements in transcripts of intercepted phone calls and text messages. He further argues that the district court erred under Federal Rule of Evidence 701 by allowing the agent to give lay opinion testimony identifying Alvarez-Quinonez as the user of one of the intercepted phones. We have appellate jurisdiction under 28 U.S.C. § 1291 and we affirm.

We apply *de novo* review to a district court's construction of the Federal Rules of Evidence. *United States v. Seminole*, 865 F.3d 1150, 1152 (9th Cir. 2017). We review a district court's finding that evidence had a proper foundation for abuse of discretion. *United States v. Pang*, 362 F.3d 1187, 1192–93 (9th Cir. 2004). We similarly review a district court's decision to admit lay opinion testimony for abuse of discretion. *United States v. Gadson*, 763 F.3d 1189, 1209 (9th Cir. 2014).

1. Alvarez-Quinonez contends that the lead DEA case agent could not authenticate the transcripts because the agent was not familiar with his voice. The government responds that Federal Rule of Evidence 901 permits authentication of transcripts of audio recordings not only through familiarity with a speaker's voice, *see* Fed. R. Evid. 901(b)(5), but also through other "evidence sufficient to support a finding that the item is what the proponent claims it is," Fed. R. Evid. 901(a). *Cf. Gadson*, 763 F.3d at 1204 ("Where the government offers a tape recording of the defendant's voice, it must also make a prima facie case that the voice on the tape is

in fact the defendant's, whether by means of a witness who recognizes the voice *or by other extrinsic evidence*." (emphasis added)).

Rule 901(a) "allows the district court to admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *Vatyan v. Mukasey*, 508 F.3d 1179, 1184 (9th Cir. 2007). "Once the offering party meets this burden, 'the probative value of the evidence is a matter for the jury.' " *United States v. Ortiz*, 776 F.3d 1042, 1045 (9th Cir. 2015) (quoting *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996)).

Alvarez-Quinonez admits that he "identified himself on January 22, 2020, as the holder of [the] target telephone" during a phone call to associates in Mexico in which he stated that he was a passenger in a vehicle that was stopped and searched. His self-identification, combined with the totality of the circumstances including the matching of phone call transcripts with physical surveillance evidence, was sufficient to clear the "low" threshold imposed by Rule 901, *id.* at 1044, so the district court did not abuse its discretion in allowing the agent to authenticate the transcripts.

2. Alvarez-Quinonez asserts that the lead DEA case agent could not properly give lay opinion testimony identifying him as the speaker on the transcribed phone calls because the agent was not familiar with his voice. But as the government points out, this ignores that information gleaned from the investigation—information with

which the agent was personally familiar—indicated that Alvarez-Quinonez was the user of the phone in question.

Alvarez-Quinonez further contends that the lead DEA case agent could not rely on the totality of the investigation to form his opinion because the agent did not personally observe all aspects of that investigation. A law enforcement lay opinion witness, however, may use his direct knowledge of the investigation, including facts he learned as part of the investigation, in interpreting the evidence. *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007). By its very nature, lay opinion testimony is based "on the witness's own understanding, including a wealth of personal information, experience, and education, that cannot be placed before the jury. If witnesses cannot draw on their experience and knowledge, they are effectively limited to presenting factual information. . . . Rule 701 does not impose such a limitation." *Gadson*, 763 F.3d at 1208. "[A]n investigator who has accumulated months or even years of experience with the events, places, and individuals involved in an investigation necessarily draws on that knowledge when testifying; indeed, it is those out-of-court experiences that make the witness's testimony helpful to the jury." *Id.* at 1209.

We therefore find no error in the district court's decision to allow the lead DEA case agent to give lay opinion testimony identifying Alvarez-Quinonez as the speaker on the transcribed phone calls based on the agent's overall knowledge of the

investigation and the facts gleaned therefrom. Finally, as the government points out, the significant testimony about code words used in drug transactions came not from the lead DEA case agent, but rather from another agent who was admitted as an *expert* witness to discuss drug terminology and code words, drug distribution quantities, drug trafficking operations, and the use of cell phones in such operations. Thus, Alvarez-Quinonez's argument that the agent impermissibly relied upon specialized knowledge is unavailing.

AFFIRMED.

FILED

JAN 5 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RODRIGO ALVAREZ-QUINONEZ, Defendant-Appellant.	No. 22-30161 D.C. No. 2:20-cr-00093-RAJ-2 Western District of Washington, Seattle ORDER

Before: McKEOWN and GOULD, Circuit Judges, and BAKER,* International Trade Judge.

The panel judges have voted to deny the petition for panel rehearing. Judge Gould has voted to deny the petition for rehearing en banc, and Judges McKeown and Baker have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for panel rehearing and rehearing en banc, Docket No. 48, is DENIED.

* The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.