No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE SOTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Third Circuit err in affirming the District Court allowing law enforcement to testify as an expert in areas not pertaining to general law enforcement expertise?
2. Did the Third Circuit err in affirming the District Court's failure to address a jury note?

PARTIES TO PROCEEDING AND RELATED CASES

All parties appear in the caption of the case on the cover page.

The proceedings related to this matter are as follows:

- *United States v. Jose Soto*, No. 2-20-cr-00903, U.S. District Court for the District of New Jersey. Judgment Entered April 27, 2023
- *Jose Soto v. United States*, No. 23-1827, U.S. Court of Appeals for the Third Circuit. Judgment entered November 20, 2024

Table of Contents

Index to Appendices

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Jose Soto petitions the Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's published opinion is attached as Appendix A. The district court's Opinion on Soto's Rule 33 Motion addressing the issues herein is attached as Appendix B.

JURISDICTION

The judgment and opinion of the Third Circuit was entered on November 20, 2024. See Appendix 1. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the admissibility of expert testimony by law enforcement not proffered as experts in accordance with Federal Rule of Evidence 701 and the affirmative obligation of a district court judge to address all jury notes. The text of Federal Rule of Evidence 701 is contained in Appendix C.

STATEMENT OF THE CASE

This petition arises from the judgment entered by the District Court on April 17, 2023 imposing a 276-month term of imprisonment on Mr. Soto. On October 13, 2020, Mr. Soto was indicted on five charges relating to two (2) robberies at PNC Bank and Valley National Bank:

- Count 1 – Conspiracy to Commit bank Robbery in violation of 18 U.S.C. 2113 (a) and (2) and 18 U.S.C. 371.
- Count 2 – Bank Robbery in violation of 18 USC 2113(a) and (2)
- Count 3 – Bank Robbery in Violation of 18 USC 2113 (a) and (2)
- Count 4 – Use of a Firearm in furtherance of a crime of violence in violation of 18 U.S.C. 924 (c)(1)(A)(ii) and (2).
- Count 5 – Use of a Firearm in furtherance of a crime of violence in violation of 18 U.S.C. 924 (c)(1)(A)(ii) and (2)

Trial commenced on October 7, 2022 and continued until October 14, 2022. During the Government's case-in-chief, FBI Special Agent Matthew Barille ("Barille") testified. Barille was one of the assigned investigators of the bank robberies. Barille testified that he had reviewed video surveillance footage as part of his investigation. Specifically, he testified that he identified a black Ford Focus as the suspect vehicle used in the PNC Bank Robbery and a dark-colored Lexus as the suspect vehicle in the Valley National Bank robbery. Barille's testimony included identification of trim packages, models, and other vehicle specifics. Soto objected to Barille's testimony on the grounds that his testimony beyond the general identification of the vehicle was impermissible expert testimony under the Federal Rules of Evidence 701. The district court overruled the objection and permitted Barille's testimony.

During the second day of deliberations, the jury sent out a note indicating they could not agree on a verdict and asked the question: "What happens if we all do not agree?". The District Court did not respond to this jury communication. Rather, the district court reconvened attorneys and allowed deliberations to continue. In the interim, the jury - without hearing from the district court about an answer to their first question – delivered a second note stating: "Please disregard our previous question.". The jury - again without hearing from the judge regarding their apparent "deadlock" note – returned a verdict of Guilty on all five counts. Counsel was not given an opportunity to address this issue at the time of trial, but did raise the issue in a timely fashion pursuant to Rule 33 of Federal Criminal Procedure.

Upon appeal, the Third Circuit issued an Opinion on November 20, 2024, where it affirmed the district court's determination on both the above issues.

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve the policy disagreements among the circuit courts regarding the permissibility of specialized testimony by law enforcement under Federal Rule of Evidence 701 and to promulgate that district judges have an affirmative obligation to address notes from the jury during deliberations.

A. LAW ENFORCEMENT OFFICERS SHOULD NOT BE PERMITTED TO TESTIFY AS AN EXPERT ON MATTERS NOT PERTAINING TO GENERAL LAW ENFORCEMENT EXPERTISE

This Court should grant Mr. Soto's petition for writ of certiorari in order to clearly distinguish between lay testimony and expert testimony from law enforcement officers in trials. Federal Rule of Evidence 701 limits lay witness testimony to testimony 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. Under Federal Rule of Evidence 701, "lay opinion must be the product of reasoning processes familiar to the average person in everyday life." United States v. Garcia, 413 F.3d 201, 215 (2d Cir.2005). This rule "prevent[s] a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 and the pre-trial disclosure requirements set forth in Fed.R.Crim.P. 16...." Id.

If the opinion of a witness "rests in any way upon scientific, technical, or other specialized knowledge, its admissibility must be determined by reference to Rule 702, not Rule 701" because "lay opinion must be the product of reasoning processes familiar to the average person in everyday life." Garcia, 413 F.3d at 215 (internal quotation marks and citation omitted). "[T]he foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion so based and formed if the agent's reasoning process depended, in whole or in part, on [the agent's] specialized training and experience." Id. at 216.

I. LAY OPINION TESTIMONY OF LAW ENFORCEMENT OFFICERS

Circuit courts are generally split regarding the admissibility of lay opinion testimony from law enforcement officers.

a. BROADEST READING – Tenth and Eleventh Circuits

The Tenth and Eleventh Circuits have held that law enforcement officers may provide lay opinion testimony even if they do not possess personal knowledge of the evidence.

In United States v. Zepeda-Lopez, the Tenth Circuit affirmed the trial court's admission of testimony from an FBI Agent identifying a defendant's voice on audiotapes, which was based entirely on his review of the tapes in preparation for trial. 478 F.3d 1213, 1215 (10th Cir. 2007). The Tenth Circuit held that the agent's testimony was admissible under Federal Rule of Evidence 701 because it would help the jury better understand the

alleged conspiracy. Id. at 1222. The Tenth Circuit also stated that the agent's testimony was supported by the fact that he reviewed the tapes many times prior to trial. Id.

In United States v. Jayyousi, the Eleventh Circuit affirmed the trial court's admission of testimony from an FBI Agent regarding the meaning of coded words used between defendants. 657 F.3d 1085, 1104 (11th Cir. 2011). Although the FBI Agent's testimony was based entirely on his after-the-fact review of investigative materials and documents admitted in evidence at trial, the Eleventh Circuit held that the agent did not need to have personal knowledge or involvement in the activity he was testifying about. Id. at 1095, 1102. The Eleventh Circuit stated that the agent's testimony would better help the jury understand the case due to his review of countless investigative materials (including those not admitted into evidence) and his knowledge of the investigation. Id. at 1103.

b. MIDDLE GROUND – Seventh and Ninth Circuits

The Seventh and Ninth Circuits have held that law enforcement officers may provide lay opinion testimony when the testimony is based on both first-hand knowledge and after-the-fact knowledge.

In United States v. Freeman, the Ninth Circuit affirmed the trial court's admission of a detective's interpretations of drug jargon used between defendants on recorded phone calls. 498 F.3d 893, 898, 904-05 (9th Cir. 2007). The detective's lay opinion testimony was based upon his after-the-fact review of the recorded calls and his direct observations and knowledge of the suspects during his investigation. Id. at 904-05. The Ninth Circuit stated that the detective's testimony was permissible because he directly reviewed the calls. Id. at 904. The Ninth Circuit further stated that the detective's lay opinion testimony was admissible because he explained the basis for his opinion and provided context throughout. Id. at 900.

In United States v. Rollins, the Seventh Circuit affirmed the trial court's admission of a DEA agent's testimony about several recorded phone calls evidencing a drug conspiracy. 544 F.3d 820, 828, 831 (7th Cir. 2008). The DEA agent testified that his lay opinion evidence was based upon his after-the-fact review of the recorded calls, his surveillance of the defendants, and his interviews with witnesses and defendants. Id. at 831-32. The Seventh Circuit stated that the agent's lay opinion testimony was admissible because he had firsthand knowledge through his review of the calls and his direct involvement in the investigation. Id. The Seventh Circuit noted that the agent's testimony regarding the calls teetered the line between lay opinion and expert opinion testimony due to the knowledge he gained through that particular investigation versus general investigative knowledge. Id. at 832-33.

c. NARROW INTERPRETATION – Second, Fourth, and Eighth Circuits

The Second, Fourth, and Eighth Circuits have held that lay opinion testimony of law enforcement must be based upon personal knowledge of the events they testify about.

In United States v. Peoples, the Eighth Circuit held that the testimony of an FBI special agent was inadmissible because she interpreted the meaning of certain words and

phrases in two defendants' conversations regarding a conspiracy to commit murder that she reviewed after-the-fact. 250 F.3d 630, 634-640 (8th Cir. 2001). The Eight Circuit stated that the agent's lay opinion testimony was narrative and based entirely on her own opinion of the conversations. Id. at 640. The Eighth Circuit noted that Federal Rule of Evidence 602 requires lay witnesses to possess personal knowledge of the subject matter. Id. at 641. The Eighth Circuit distinguished between lay opinion and expert testimony by stating that lay opinion testimony is only admissible to aid the jury or court in understanding the facts of the witness's testimony and "not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.". Id.

In United States v. Garcia, the Second Circuit held that a DEA agent's lay opinion testimony regarding his opinion on the roles of members in a drug conspiracy based on the review of several phone calls between members of the conspiracy. 413 F.3d 201, 208-215 (2d Cir. 2005). The Second Circuit first found that the agent's lay opinion testimony did not satisfy the requirements of 701(a) because it was based on an amalgamation of all the knowledge collected throughout the investigation instead of his personal knowledge. Id. at 211-12. The Second Circuit further found that the agent's testimony did not meet the helpfulness requirement because it summarized the admitted evidence rather than interpreted it. Id. at 210.

In United States v. Johnson, , the Fourth Circuit found a DEA agent's lay opinion testimony about phone calls regarding a defendant's involvement in a drug conspiracy inadmissible because it was not based on personal knowledge. 617 F.3d 286, 288-93 (4th Cir. 2010). The Fourth Circuit found that the agent's lay opinion testimony was based on a limited review of phone calls after-the-fact. Id. at 293. The Fourth Circuit noted that the Government elicited the agent's credentials but did not proffer him as an expert. Id. The Fourth Circuit agreed with the Second Circuit in Peoples, holding that the agent's lay opinion testimony is inadmissible where their opinion is not based on first-hand knowledge and provided an unhelpful summary of the evidence to the jury. Id.

In the instant matter, the district court allowed Agent Barille, over defendant's objection, to testify as a *de facto* expert in the area of automobiles. The government was clear that Agent Barille was *not* being offered as an expert and did not have any specialized training in the area of automobiles. Further, Agent Barille's lay opinion testimony was based upon his review of the video surveillance footage he reviewed throughout the investigation. Despite this, the Agent testified about trim packages and specific features of vehicles as if he were an expert. His testimony was as follows:

Q: Generally, how could you tell that this was that type of car?

A: Sure. So myself, I'm a little bit of a car enthusiast. I'm not an expert by any means, but I do research on different kind of cars and like looking up cars and stuff like that. Also, I did own personally a black Ford Focus in my -- as a past car for myself.

Q: Now, can you explain what features on this car made you think it was a Ford Focus?

A: Sure. First off, immediately what drew my attention was the front grill area here. You could see there's a chrome accent piece along the grill and then you see a sideways oval, which is typical for Ford, and I recognize that because my Ford Focus had the same Ford emblem on the front it.

Also, the fog lights here are important because they do have – it's hard to see on this picture, but they do have a chrome trim around them as well, as well as there's this chrome accent piece along the base of the windows that makes it stand out.

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Q: Can you describe from this angle if there's any other features of this car you were able to tell?

A: Sure. Overall, we were immediately able to recognize it as being a hatchback. So a hatchback just means there's a fifth door here that opens kind of like a minivan trunk, instead of a normal sedan where the trunk is not attached to the passenger compartment, and a hatchback like this is actually – like, you can access this from the passenger compartment, Also, I want to point out once again is the chrome accent piece underneath the windows here as well as these 20-spoke wheels that are on the vehicle.

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Q: looking at these photographs, how did you know it was a 2012 to 2014 as opposed to 2015?

A: Sure. So after looking at the photos and using my prior knowledge of Ford Focuses, I was able to go online and compare to other Ford Focuses of certain years and models. For 2011 and in general, they didn't make a hatch in the United States that year. I mean, not saying there couldn't be one; there could be, but it didn't match all the other things that I described. In 2015, the car got a facelift itself where the front grill did not look the same as the 2012 to 2014-year range.

Q: How could you tell generally that this was a Titanium or SEL as opposed to a different trim of the Ford Focus?

A: Sure. Just by all of the different pieces that I mentioned to you guys, like it – when comparing to the online photos, you can compare the tires came on this, the chrome came on this, that kinds of things all matched up, as opposed to like an ST which look the sports trim where it had different wheels and different like patterns -- or colors and stuff associated with it,

A___. Tr. 392-94.

What's clear from the above testimony is that Agent Barille was not testifying as a lay witness. He identified specific features and was able to narrow down those features to certain models and years for the suspect Ford Focus. This testimony is the fodder of expert opinion - not permissible lay opinion testimony.

The district court admitted the lay opinion testimony of Agent Barille regarding the identification of a specific make and model Ford Focus in violation of Federal Rule of Evidence 701 because that testimony was based on a) on secondary/after-the-fact review of the subject matter and b) specialized knowledge. The admission of this testimony prejudiced Soto because he did not have the opportunity to present a rebuttal expert or to prepare to cross-examine Agent Barille on the technical subject of vehicle make, year and model identification. The testimony was important to the government's case because it supported the government's argument that the vehicle seen at the scene of the bank robbery was the same vehicle registered to Soto. The relevant testimony quoted above confirms the expert nature of the testimony of Agent Barille – a witness the government chose not to designate as an expert.

Agent Barille's testimony was improperly admitted over the defendant's objection because his opinion was based on specialized training and experience. Agent Barille did more than simply describe what he perceived, which is narrative of the evidence already admitted into evidence. He described how the specific features he identified enabled him to identify the make, model and year of the suspect Ford Focus. This kind of testimony is not lay opinion testimony and inadmissible under Rule 701. Thus, this Court should grant Soto's petition for writ of certiorari and reconcile the rule for admissibility of lay opinion and expert testimony by law enforcement officers under Federal Rule 701.

B. DISTRICT COURT JUDGES MUST ADDRESS ALL JURY DELIBERATION NOTES

The Court should grant Mr. Soto's petition for writ of certiorari regarding a judge's obligation to address jury notes during deliberations to prevent infringement upon a defendant's right to a fair trial. In a jury trial, the judge is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.". Quercia v. United States, 289 U.S. 466, 469 (1933), see also Starr v. United States, 153 U.S. 614, 626 (1894)(" The influence of the trial judge on the jury is necessarily and properly of great weight[.]".)

A trial judge has some obligation to make reasonable efforts to answer a question from the jury. United States v. Rodriguez, 765 F.2d 1546, 1553-54 (11th Cir. 1985) (citing Bollenbach v. United States, 326 U.S. 607, 612-613 (1946)). "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Id. Moreover, the parties should be "given an opportunity to be heard before the trial judge respond[s]" to a message from the jury. Rogers v. United States, 422 U.S. 35, 39 (1975). Lastly, even if the defendant shows that the trial judge erred in failing to reinstruct or address the jury, he must also "show a reasonable probability that, but for the error" the outcome of the proceeding would have changed. United States v. Dominguez Benitez, 542 U.S. 74, 76 (2004). A reasonable probability is one sufficient to undermine confidence in the outcome by causing the court to have doubts that the result would have been the same. United States v. Hasan, 526 F.3d 653, 665 (10th Cir. 2008).

In the instant matter, during the first day of deliberations, the jury deliberated for

approximately three and a half hours before recessing for the day. Fifteen minutes into the second day of deliberations, at 8:45 a.m., the jury sent out a note indicating they could not agree on a verdict and asked the question: "What happens if we all do not agree?" The Court did not respond to this jury communication. Rather, the Court reconvened attorneys and allowed deliberations to continue. In the interim, the jury - without hearing from the district court about an answer to their first question – delivered a second note stating: "Please disregard our previous question." The jury - again without hearing from the judge regarding their apparent "deadlock" note – returned a verdict of Guilty on all five counts. Counsel was not given an opportunity to address this issue at the time of trial, but did raise the issue in a timely fashion pursuant to Rule 33 of Federal Criminal Procedure.

There is no dispute that the district court did not address the jury's deadlock note, nor did the judge provide counsel the opportunity to be heard regarding this question. The nature of the jury's note indicating a deadlock was of great import in that the jury required clarification from the trial judge regarding unanimity. Additionally, the inquiry by the jury required the judge to explain that a deadlock could result in a mistrial. The judge's failure to address the note and allowing the jury to continue deliberating without explanation or any argument by counsel infringed on Soto's right to a fair trial because that note could have changed the outcome of the verdict. Thus, this Court should grant Mr. Soto's petition for writ of certiorari in order to address whether district judges have an affirmative obligation to address jury notes.

CONCLUSION AND PRAYER FOR RELIEF

The district courts need uniformity regarding what constitutes lay opinion versus expert testimony for law enforcement officers. The district courts also require guidance regarding a judge's obligation to address jury notes. Absent this Court's intervention, the district courts will continue to treat law enforcement testimony differently across jurisdictions. Likewise, district courts should have clear instructions that they are required to address all jury notes.

This Court should grant certiorari to review the Third Circuit's judgment refusing to review the Petitioner's argument pertaining to lay opinion and expert testimony and the duty of district judges to address jury notes. This Court should summarily reverse the decision below and remand this case in accordance with this Court's directive, or grant such other relief as justice requires.

Respectfully submitted,

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