

IN THE SUPREME COURT OF THE UNITED STATES

VANSTON VENNER WILLIAMS, MARIO ALIN BENT BARKER,
EDINCE GARCIA CARDOZA, HENDRICK GUILLERMO LINERO DUFFIS,
AND CARLOS CLEMENTE HENRY TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in admitting as lay-opinion testimony, under Federal Rule of Evidence 701, testimony by Coast Guard officers that objects jettisoned from petitioners' boat resembled, in size and shape, bales of cocaine that the officers had seen during prior interdictions.

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No. 17-6666

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-18)
is reported at 865 F.3d 1328.

JURISDICTION

The judgment of the court of appeals was entered on August 1,
2017. The petition for a writ of certiorari was filed on October
30, 2017. The jurisdiction of this Court is invoked under
28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to distribute at least five kilograms of a substance containing cocaine while on board a U.S. vessel, in violation of 46 U.S.C. 70503(a)(1) and 70506(b) (2012) and 21 U.S.C. 960(b)(1)(B), and possession with intent to distribute at least five kilograms of a substance containing cocaine while on board a U.S. vessel, in violation of 46 U.S.C. 70503(a)(1) and 70506(a) (2012) and 21 U.S.C. 960(b)(1)(B). Pet. App. A1, at 6. Petitioner Williams was also convicted of failure to heave to, in violation of 18 U.S.C. 2237(a)(1), and the other petitioners were convicted of aiding and abetting that offense, in violation of 18 U.S.C. 2237(a)(1) and 2. Pet. App. A1, at 6; Pet. App. A2, at 3. Petitioners were each sentenced to ten years of imprisonment, to be followed by five years of supervised release. Pet. App. A9, at 2-3; Pet. App. A10, at 2-3; Pet. App. A11, at 2-3; Pet. App. A12, at 2-3; Pet. App. A13, at 2-3. The court of appeals affirmed the drug and failure-to-heave-to convictions, but reversed the aiding-and-abetting convictions. Pet. App. A1, at 1-18.

1. a. In May 2015, while on a night patrol of a known drug-trafficking area off the coast of Panama, officers aboard a U.S. Coast Guard cutter, the Bear, spotted another vessel, the Rasputin, several nautical miles away. Pet. App. A1, at 6-7. Using a forward-looking infrared system (FLIR) that captures body-

heat images, one of the Coast Guard officers saw that the Rasputin was a fishing boat occupied by the five petitioners. Id. at 7. The Coast Guard tried to hail the vessel over the radio in both English and Spanish, but the Rasputin did not respond. 9/9/15 Tr. 196, 201-202. Instead, the Rasputin increased in speed and began zig-zagging away in a dangerous manner, while four men began moving about the vessel and placing bale-like objects (measuring roughly one foot high by three feet long) into a fishing net. Pet. App. A1, at 7. Once the four men had loaded at least ten bale-like objects into the net, they tied it up and threw it overboard -- a process that required all four men because of the apparent weight. Ibid. As the Rasputin continued its erratic flight, the four men twice repeated this sequence and tossed two more laden nets overboard. Ibid.

Several Coast Guard officers boarded an inflatable boat to pursue the Rasputin. Pet. App. A1, at 7. Once near the Rasputin, the officers activated flashing blue law enforcement lights and gave several "stop" orders in English and Spanish via both radio and a loudhailer. Ibid. Despite those orders, the Rasputin "failed to stop or slow down," but instead "continued to change direction erratically at full speed." Ibid. The Rasputin finally stopped only when the Coast Guard's inflatable boat got within a few feet of the vessel. Ibid.

Officers then boarded the Rasputin. Although the vessel was registered in Florida as a fishing boat, the Coast Guard officers

found no fishing gear, bait, ice, or fish on board. Pet. App. A1, at 7. Petitioner Williams, who identified himself as the Rasputin's master, claimed that the boat had come from Colombia and was en route to Colon, Panama, even though the boat had been sailing away from Colon when first spotted. Ibid. One of the officers also found that the Rasputin's radio was tuned to Channel 16 -- the channel through which the Coast Guard had repeatedly sought to communicate -- and that the radio's volume was turned all the way up. Ibid. Officers also discovered several empty gasoline containers and an inch of gasoline on the floor, even though the Rasputin ran on diesel fuel. Ibid. "The presence of gasoline suggested to the officers that [the gasoline] was being used as a masking agent to alter the chemical composition of contraband residue." Ibid.

After failing to locate any bales of narcotics aboard the vessel, the Coast Guard officers used an "IonScan" machine designed to detect trace amounts of illicit materials. Pet. App. A1, at 8. Officers took 34 "swipe" samples from locations and persons aboard the boat, 13 of which tested positive for cocaine. Ibid. These scans detected "cocaine on the person of each occupant of the Rasputin except [petitioner] Taylor." Ibid. The scans also detected cocaine "in the Rasputin's fish hold, marine toilet, and sink, as well as on seat cushions and on a knife." Ibid. The bale-like objects jettisoned from the Rasputin were not recovered. Ibid.

b. In 2015, a federal grand jury in the Southern District of Florida charged petitioners with conspiring to distribute five or more kilograms of a substance containing cocaine while on board a U.S. vessel, in violation of 46 U.S.C. 70503(a)(1) and 70506(b)(2012) and 21 U.S.C. 960(b)(1)(A), and with possessing with intent to distribute five kilograms or more of a substance containing cocaine while on board a U.S. vessel, in violation of 46 U.S.C. 70503(a)(1) and 70506(a)(2012), 18 U.S.C. 2, and 21 U.S.C. 960(b)(1)(A). Pet. App. A2, at 1-2.¹ The grand jury also charged petitioner Williams with failing to heave to, in violation of 18 U.S.C. 2237(a)(1), and the other four petitioners with aiding and abetting Williams's failure to heave to, in violation of 18 U.S.C. 2237(a)(1) and 2. Pet. App. A2, at 3.

At petitioners' trial, several Coast Guard officers testified about the interdiction of the Rasputin. Officer Turner Adair testified that, while operating the FLIR aboard the Coast Guard cutter, he had witnessed the crew of the Rasputin collecting and then jettisoning numerous items that "looked to be bales." 9/8/15 Tr. 190; see id. at 201-204. Officer Adair explained that he considered a "bale" to be "a 1-foot tall by 3-foot long by 1-foot wide package that's either wrapped in saran wrap and also a burlap sack that usually contains cocaine." Id. at 190. Officer Adair testified without objection that he had seen and handled

¹ The indictment's citations to 21 U.S.C. 960(b)(1)(A) were typographical errors; the correct citation is 21 U.S.C. 960(b)(1)(B).

"substantially similar" objects on a prior occasion while serving aboard the Coast Guard cutter and that those objects had turned out to be bales of cocaine. Id. at 232-233; see id. at 204-205.

Officer Stephen Fleming, the leader of the Coast Guard party that boarded the Rasputin, testified that he reviewed the video playback from the FLIR and also saw "bales" being jettisoned from the boat. 9/9/15 Tr. 110; see id. at 15, 20-21, 25. Officer Fleming testified that he had "weighed" and "inventoried" "similarly shaped objects" during three prior interdictions and that those objects turned out to be 40-to-70-pound bales of cocaine. Id. at 111-112. Over a defense objection, see id. at 103-107, Officer Fleming specifically opined that the objects jettisoned by the Rasputin crew were "consistent in shape and size" with what he had "encountered before as bales of cocaine," id. at 111.

Officer William Coffey also testified that he saw "bales" being jettisoned from the Rasputin on the FLIR playback. 9/9/15 Tr. 196-197, 203-204. Officer Coffey testified that he had been involved in seven prior cocaine interdictions during which he had seen, handled, and weighed cocaine bales, which "are consistent[ly] between 45 to 70 pounds per bale" and slightly larger than a "litigator's briefcase." Id. at 191-192, 194. On five of those seven occasions, the bales of cocaine had been jettisoned, but were ultimately recovered. Id. at 191-192. The prosecutor asked Officer Coffey if the objects thrown overboard by the Rasputin crew were "consistent" with what he had "recovered"

in those past "cocaine seizures," and Officer Coffey responded in the affirmative; the district court then sustained the defense counsel's objection to that question. Id. at 204.

Finally, Officer Richard Caruso also testified that he saw "bales" being jettisoned from the Rasputin. 9/10/15 Tr. 59, 62-63. Officer Caruso also stated that, in two prior interdictions, he had seen "tightly packaged," one-by-three-by-one-foot "squares" that weighed about "55, 60 pounds apiece," and which turned out to contain cocaine. Id. at 60-61. The district court precluded Officer Caruso from expressing a view about whether the bales he saw being jettisoned from the Rasputin were "similar to what [he] had seen" in the two prior interdictions. Id. at 62.

c. After four days of trial, the jury found petitioners guilty on all counts. 9/15/15 Tr. 7-11. The district court sentenced each petitioner to a total of 120 months of imprisonment, to be followed by five years of supervised release. See Pet. App. A9, at 2-3; Pet. App. A10, at 2-3; Pet. App. A11, at 2-3; Pet. App. A12, at 2-3; Pet. App. A13, at 2-3.

2. The court of appeals affirmed in relevant part. Pet. App. A1, at 1-18.²

² The court of appeals reversed the convictions of petitioners Barker, Cardoza, Duffis, and Taylor for aiding and abetting the violation of 18 U.S.C. 2237(a)(1), finding insufficient evidence that those petitioners "intended to aid [petitioner Williams] in failing to heave to" when ordered by the Coast Guard. Pet. App. A1, at 17. On remand, Barker, Cardoza, Duffis, and Taylor were again sentenced to 120 months of

As relevant here, the court of appeals concluded that the district court had “acted within its discretion in admitting * * * as lay opinion” the Coast Guard officers’ testimony about the size, shape, and weight of the bales jettisoned from the Rasputin. Pet. App. A1, at 13. The court of appeals explained that “lay witnesses are permitted to give opinions so long as they are ‘rationally based on the witness’s perception,’ ‘helpful to clearly understanding the witness’s testimony or to determining a fact in issue,’ and ‘not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.’” Ibid. (quoting Fed. R. Evid. 701). The court observed that the testifying Coast Guard officers had “simply compared the size and shape of the objects they saw on the FLIR to bales they had seen previously in cocaine arrests” and reasoned that this “assessment of ‘the appearance’ and ‘size’ of objects” was one that “required no scientific or technical knowledge.” Ibid. (quoting Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213, 1222 (11th Cir. 2003)).

The court of appeals rejected petitioners’ suggestion that “the lay opinion of a law enforcement official automatically becomes an expert opinion simply because it involves knowledge that preexisted the investigation in the present case.” Pet. App. A1, at 13. The court explained that, although some law enforcement

imprisonment, to be followed by five years of supervised release. See D. Ct. Docs. 241, 242, 243, 244 (Dec. 8, 2017).

matters may “require technical expertise,” in this case, “the Coast Guard witnesses’ opinions were not based on any scientific or technical knowledge, but instead on their rationally based perceptions of the size and shape of objects.” Ibid.

ARGUMENT

Petitioners renew their contention (Pet. 22-40) that the district court abused its discretion by admitting the Coast Guard officers’ statements as lay testimony. The court of appeals correctly rejected that contention, and its decision neither conflicts with any decision from this Court nor implicates any conflict among the courts of appeals warranting this Court’s review. This Court has repeatedly and recently denied review of petitions for writs of certiorari presenting similar questions concerning the admissibility of law enforcement officers’ lay-opinion testimony, and the same result is warranted here.³

1. The court of appeals correctly determined that the district court did not abuse its discretion in admitting, as lay-opinion testimony under Federal Rule of Evidence 701, the officers’ statements about the objects they saw being jettisoned from the

³ See, e.g., Moon v. United States, 137 S. Ct. 830 (2017) (No. 16-6460); Kilpatrick v. United States, 136 S. Ct. 2507 (2016) (No. 15-7790); Wilson v. United States, 135 S. Ct. 2350 (2015) (No. 14-8492); Akins v. United States, 135 S. Ct. 707 (2014) (No. 13-10760); Iacoboni v. United States, 569 U.S. 994 (2013) (No. 12-1009); Albertelli v. United States, 568 U.S. 994 (2012) (No. 12-6542); Jayyousi v. United States, 567 U.S. 946 (2012) (No. 11-1194).

Rasputin. See General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) (“[A]buse of discretion is the proper standard of review of a district court’s evidentiary rulings.”); see also pp. 20-21, infra (explaining that plain-error standard applies to admission of Officer Adair’s testimony).

a. Petitioners do not appear to dispute that the officers’ testimony met the first two requirements of Rule 701: that it be “rationally based on the witness’s perception” and “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701(a) and (b). They instead argue (Pet. 23-25, 37-40) that the testimony did not meet the third requirement: that it “not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702,” the rule governing expert witnesses. Fed. R. Evid. 701(c). That argument lacks merit.

As explained in the relevant advisory committee note to Rule 701, “the distinction between lay and expert witness testimony” reflected in Rule 701 “is that lay testimony ‘results from a process of reasoning familiar in everyday life,’ while expert testimony ‘results from a process of reasoning which can be mastered only by specialists in the field.’” Fed. R. Evid. 701 advisory committee’s note (2000 Amendments). For example, “a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma,” but

"a lay witness with experience could testify that a substance appeared to be blood." Ibid. Even if the jurors do not themselves have the relevant experience to identify a substance as blood, they are able to evaluate lay testimony from someone who does, so long as the witness's "process of reasoning" is one that the jurors would find familiar. Ibid. Among the "prototypical example[s]" of lay-opinion testimony permitted under Rule 701 are statements "relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, [and] distance." Ibid. (citation omitted).

Lay-opinion testimony may permissibly be based on "particularized knowledge" that the average person would not possess, such as when "the owner or officer of a business * * * testif[ies] to the value or projected profits of the business." Fed. R. Evid. 701 advisory committee's note (2000 Amendments). Similarly, and particularly pertinent here, a witness is testifying from "personal knowledge" within the scope of Rule 701 -- and not "specialized knowledge within the scope of Rule 702" -- when he testifies "that a substance appeared to be a narcotic," based on a "foundation of familiarity with the substance." Ibid.

Rule 701 applies in the same way to the testimony of witnesses who are law enforcement officers as it does to the testimony of other witnesses. So long as the witness is employing a familiar

mode of reasoning, his testimony about, for example, the appearance or size of a particular object does not transform into expert testimony simply because it draws on knowledge that he acquired from working in law enforcement. See Fed. R. Evid. 701 advisory committee's note (2000 Amendments). The advisory committee note referred approvingly to the Ninth Circuit's decision in United States v. Figueroa-Lopez, 125 F.3d 1241 (1997), cert. denied, 523 U.S. 1131 (1998), which upheld the admission under Rule 701 of some, but not all, of certain opinion testimony by law enforcement agents who were testifying as lay witnesses. Fed. R. Evid. 701 advisory committee's note (2000 Amendments); see Figueroa-Lopez, 125 F.3d at 1242-1246. Of particular relevance here, Figueroa-Lopez specifically identified as "good law" the Ninth Circuit's prior decision in United States v. VonWillie, 59 F.3d 922, 929 (1995), which had permitted a law enforcement agent to testify "as a lay witness about the nexus between drug trafficking and the possession of weapons," based on "his experience with the Drug Enforcement Bureau." Figueroa-Lopez, 125 F.3d at 1245 (quoting VonWillie, 59 F.3d at 929). The agent in VonWillie had permissibly testified that "one of the guns found in [the defendant's] bedroom[] was a particularly intimidating gun and [the agent] knew of drug dealers who used that specific weapon." Ibid. (citation omitted).

b. As the court of appeals correctly recognized, the Coast Guard officers' testimony here fell squarely within the scope of Rule 701. Pet. App. A1, at 12-13. The testimony at issue -- statements by Officers Adair and Fleming that the objects jettisoned by petitioners' vessel were similar in size and appearance to bales of cocaine that the witnesses had seen on other occasions⁴ -- rested on "a process of reasoning familiar in everyday life," as applied to the "particularized knowledge" of the officers. Fed. R. Evid. 701 advisory committee's note (2000 Amendments). Just as the agent in VonWillie permissibly compared the size and shape of the gun found in the defendant's bedroom to other guns that he had seen, see 59 F.3d at 929, Officers Adair and Fleming "simply compared the size and shape of the objects they saw on the FLIR to bales they had seen previously in cocaine arrests," Pet. App. A1, at 13. The Coast Guard officers' opinions were thus grounded in their "rationally based perceptions of the size and shape of objects," and those perceptions "required no scientific or technical knowledge" but were instead "well within the ken of the average layperson." Ibid.

⁴ Although Officers Coffey and Caruso also testified that they saw bale-like objects being jettisoned from the Rasputin (see pp. 6-7, supra), the district court precluded those officers from opining whether the objects resembled bales they had seen in the past.

Petitioners fail to identify any error in the court of appeals' decision. Petitioners posit (Pet. 39) that the Coast Guard officers' observations must have required expert knowledge on the theory that "[a]n average lay person could not see anything of any particular shape and size * * * on the FLIR video" and could not "estimate the size or shape of even one of the objects tossed overboard." At trial, however, petitioners took the opposite view, arguing that the "video speaks for itself." 9/8/15 Tr. 194; see id. at 195. Indeed, the government repeatedly played the FLIR video for the jury, displayed still photographs derived from that video, and invited the jury to form its own impressions about the objects that petitioners had jettisoned. See 9/8/15 Tr. 197-200; Pet. App. A6, at 134-135, 139-140, 194, 197-198. Although petitioner Taylor's counsel argued in closing that "you can't really tell who is doing what" from the FLIR video, he acknowledged that "you do see objects being jettisoned from there." Pet. App. A6, at 171 (emphases added).⁵ The officers' testimony about the appearance and size of the objects jettisoned from the Rasputin accordingly fell well within the scope of Rule 701. See Fed. R. Evid. 701 advisory committee's note (2000 Amendments)

⁵ As the government explained to the district court at trial, the FLIR playback that the Coast Guard officers "actually watche[d]" during the interdiction was "crisper" than the "lower quality video" introduced at trial. 9/8/15 Tr. 194. Thus, the officers "had a clearer picture" of the bales than the videos and photographs depicted. Id. at 195.

(identifying, as "prototypical example[s]" of lay-opinion testimony under Rule 701, evidence "relat[ing] to the appearance of persons or things, identity, * * * size, [and] weight") (citation omitted).

2. Petitioners' assertion (Pet. 26-30) of an "intense conflict among four circuit courts of appeals" (the First and Eleventh Circuits, and the Seventh and Ninth Circuits) is without merit.

a. The decision below does not conflict with decisions of the Ninth Circuit (Pet. 23-25, 28). As noted, in Figueroa-Lopez, the Ninth Circuit specifically reaffirmed its prior holding in VonWillie that an experienced narcotics agent properly testified as a lay -- not expert -- witness when he opined that "a particularly intimidating" gun in the defendant's bedroom was consistent with other guns he had seen in the possession of drug traffickers. Figueroa-Lopez, 125 F.3d at 1245 (quoting VonWillie, 59 F.3d at 929). This case involved analogous testimony; Officers Adair and Fleming testified that "physical evidence [they] personally observed" (Pet. 27) was consistent in size and shape with bales of cocaine that they had seen on other occasions.

The decision below also does not conflict with United States v. Vera, 770 F.3d 1232 (9th Cir. 2014). That case involved testimony about the meaning of "code words" used by drug traffickers. Id. at 1241. The Ninth Circuit there explained that

"[d]rug jargon is well established as an appropriate subject for expert testimony" and stated that an officer may testify as an expert witness in order to interpret "'commonly used drug jargon' based solely on their training and experience." Ibid. The court further explained, however, that if the proffered drug-jargon expert had also been directly involved in the investigation that yielded the intercepted calls, he would additionally be permitted to testify as a lay witness concerning his "direct perception" of the "intercepted conversations." Id. at 1242-1243 (citation omitted); see id. at 1242 (discussing such "dual capacity testimony").

Contrary to petitioners' suggestion (Pet. 28), nothing in Vera suggests that law enforcement opinions about matters that are ordinarily amenable to lay-opinion testimony -- such as observations about the "appearance," "size," or "weight" of objects, Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (citation omitted) -- automatically become expert opinions simply because they involve a comparison to prior observations made outside the same "investigation." Rather, in the Ninth Circuit as elsewhere, a lay witness may appropriately render an opinion informed by the witness's prior experiences, provided that no specialized or technical knowledge is involved. See, e.g., United States v. Durham, 464 F.3d 976, 982 (2006) ("[C]ourts have permitted lay witnesses to testify that a substance

appeared to be a narcotic, so long as a foundation of familiarity with the substance is established.") (citation omitted; brackets in original); Figueroa-Lopez, 125 F.3d at 1245; VonWillie, 59 F.3d at 929.

b. The alleged conflict with the Seventh Circuit also does not warrant this Court's review (Pet. 26-28). United States v. Oriedo, 498 F.3d 593 (7th Cir. 2007), concerned testimony by a law enforcement agent who participated in a search of the defendant's hotel room, where the agents found, "among other items, plastic baggies left on an ironing board." Id. at 602. At trial, the government "asked [the agent] about 'the significance of the baggies with the corners cut off,'" and the agent responded that that was "'usually the way drug dealers will package the crack cocaine for resale.'" Ibid. (citation omitted). Following a defense objection, the agent restated that, "based on his own observations," drug dealers "'will take a small baggie and cut or tear the corner where it makes a longer end.'" Id. at 603 (citation omitted). The court of appeals viewed that testimony, although "ostensibly couched as a matter of [the agent's] direct observation," to relate to matters "'likely to be outside the knowledge of the average layman'" and therefore to require special knowledge of "'the clandestine nature of narcotics trafficking.'" Ibid. (citation omitted). The court concluded that the agent's

testimony should have been admitted, if at all, as expert testimony under Rule 702. Id. at 603-604.

Although the Seventh Circuit has since suggested that “an officer testifies as an expert when he brings the wealth of his experience as an officer to bear on [his] observations and makes connections for the jury based on that specialized knowledge,” United States v. Christian, 673 F.3d 702, 709 (2012) (brackets, citation, and internal quotation marks omitted), it also recognizes that “the distinction between expert and lay testimony is often far from clear in cases where * * * a witness with specialized knowledge was also personally involved in the factual underpinnings of the case,” ibid. (alteration, citation, and internal quotation marks omitted), and acknowledges that Rule 701 can allow for an officer’s “fact testimony [to] be influenced by [his] specialized knowledge” when his “observations are guided by experience and training,” ibid. Both the First and Eleventh Circuits similarly recognize that the distinction between expert and lay testimony depends on the character of the evidence and the basis for the witness’s opinion. See, e.g., United States v. Page, 521 F.3d 101, 105, as amended, 542 F.3d 257 (1st Cir. 2008) (rejecting the view that “all experience[]-based police officer testimony is per se admissible under Rule 701,” and explaining that whether particular testimony should be admitted under Rule 701 or Rule 702 “depend[s] on the content and circumstances”),

cert. denied, 555 U.S. 1124 (2009); United States v. Vega, 813 F.3d 386, 394-395 (1st Cir. 2016) (similar); United States v. Hill, 643 F.3d 807, 841-842 (11th Cir. 2011) (explaining that "Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences," provided that "it does not take any specialized or technical knowledge" to understand), cert. denied, 566 U.S. 970 (2012); United States v. Dulcio, 441 F.3d 1269, 1274-1275 (11th Cir. 2006) (per curiam) (holding that it was error to admit law enforcement officer's testimony under Rule 701 where it rested on "specialized knowledge" about the "modus operandi of people involved in the drug business").⁶

In Oriedo, the Seventh Circuit stated in a footnote that the First Circuit in United States v. Ayala-Pizarro, 407 F.3d 25, cert. denied, 546 U.S. 902 (2005), a case also involving testimony about the packaging of narcotics, had taken a "contrary approach" to the application of Rule 701. Oriedo, 498 F.3d at 603 n.10. But the two decisions are not inconsistent. While the agent in Oriedo opined about packaging practices based on "the wealth of his

⁶ That circumstance-specific approach is also consistent with the advisory committee notes to Rule 701, which distinguish between testimony that a substance "appeared to be a narcotic," which can be lay opinion under Rule 701, and testimony about "how a narcotic was manufactured" or about "the intricate workings of a narcotic distribution network," which would fall within Rule 702. Fed. R. Evid. 701 advisory committee's note (2000 Amendments).

experience as a narcotics officer" and "made connections for the jury based on that specialized knowledge," id. at 603, the agent in Ayala-Pizarro had testified only about "what he saw," and "[t]he jury was left to draw its own conclusions as to the contents and purpose of the decks," 407 F.3d at 29. Indeed, the First Circuit subsequently clarified that Oriedo "apparently misread Ayala-Pizarro" as establishing a rigid rule that all experience-based police testimony must be lay testimony. Page, 521 F.3d at 105 n.2. And although the First Circuit itself has stated that "[t]o the extent [that] Oriedo may be read as suggesting that all experience-based police testimony must be expert testimony, that is contrary to our view of the law," ibid., any disagreement between those two circuits is not clearly presented on the facts of the Eleventh Circuit's decision here, which simply involves comparisons of the size of objects that Officers Adair and Fleming observed. See Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (identifying, as "prototypical example[s]" of lay-opinion testimony under Rule 701, evidence "relat[ing] to the appearance of persons or things, identity, * * * size, [and] weight") (citation omitted).

3. This case is a poor vehicle for further review for the additional reason that petitioners did not timely object at trial to all of the testimony that they now seek to challenge. Although petitioners objected on Rule 701 grounds to the opinion offered by

Officer Fleming, see 9/9/15 Tr. 103-107, petitioners had not objected on that basis to testimony by Officer Adair, who also opined that the bale-like objects jettisoned from the Rasputin were "substantially similar" to bales of cocaine that he had previously seen while serving aboard the Coast Guard cutter, 9/8/15 Tr. 204-205, 232-233. The admission of Officer Adair's testimony thus is reviewable only for plain error. See Fed. R. Crim. P. 52(b).

For the reasons stated above, the district court committed no error, and certainly no plain error, in admitting the challenged testimony. But the absence of an objection to the testimony the first time it was offered, and the resulting standard of review, complicates the analysis of petitioners' entitlement to relief and renders this case an unsuitable vehicle for considering broader questions concerning the scope of Rule 701.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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