
NO: 17-6666

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

VANSTON VENNER WILLIAMS,
MARIO ALIN BENT BARKER,
EDINCE GARCIA CARDOZA,
HENDRICK G. LINERO DUFFIS,
CARLOS C. HENRY TAYLOR,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF THE PETITIONERS

SHERRI A. ROMANO
Counsel for Petitioner Cardoza
2103 Coral Way, Suite 304
Miami, FL 33145
Telephone No. (305) 441-9858

HECTOR L. FLORES
Counsel for Petitioner Taylor
40 N.W. Third Street, PH 1
Miami, FL 33128
Telephone No. (305) 374-3998

DENNIS NICHOLAS URBANO
Counsel for Petitioner Duffis
11440 N. Kendall Drive #400
Miami, FL 33176
Telephone No. (305) 595-0866

HERMAN FRANK RUBIO, JR.
Counsel for Petitioner Barker
1107 N.E. 104th Street
Miami Shores, FL 33138
Telephone No. (305) 892-5297

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner Williams
One East Broward Blvd., Ste. 1100
Ft. Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
**Counsel of Record*

QUESTION PRESENTED

Where a law enforcement officer testifying as a government fact witness offers opinion testimony – based upon his training and experience in prior unrelated interdictions – that conduct or physical evidence he personally observed in the current investigation is “consistent with” trafficking in narcotics generally or with trafficking quantities of a certain narcotic specifically, is that properly deemed “lay opinion testimony” within the purview of Fed. R. Evid. 701 as the First and Eleventh Circuits have held, or rather, expert testimony within the purview of Fed. R. Evid. 702, subject to a heightened reliability showing, and inadmissible without pretrial disclosure under Fed. R. Crim. P. 16(a)(1)(G), as the Seventh Circuit and Ninth Circuits have held?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES.....	ii
REPLY BRIEF OF THE PETITIONERS.....	1
I. The Circuits Are Divided on an Important and Recurring Question of Federal Law	1
II. This Case is an Ideal Vehicle to Resolve the Circuit Conflict	6
III. Review Should be Granted in This Case Because the Decision Below was Wrong and Should be Overturned.....	11
CONCLUSION.....	15
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:

<i>Boumediene v. Bush</i> ,	
549 U.S. 1328 (2007)	6-7
<i>Darr v. Burford</i> ,	
339 U.S. 200 (1950)	7
<i>Evans v. Stephens</i> ,	
544 U.S. 942 (2004)	6
<i>Iacoboni v. United States</i>	
(No. 12-1009).....	8
<i>Martin v. Blessing</i> ,	
134 S.Ct. 402 (2013)	6
<i>Redd v. Chappell</i> ,	
135 S.Ct. 1712 (2014)	6
<i>Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.</i> ,	
320 F.3d 1213 (11th Cir. 2003)	11
<i>Tribble v. Evangelides</i> ,	
670 F.3d 753 (7th Cir. 2012)	6
<i>United States v. Christian</i> ,	
673 F.3d 702 (7th Cir. 2012)	4-6
<i>United States v. Durham</i> ,	
464 F.3d 976 (9th Cir. 2006)	3-4

United States v. Figueroa-Lopez,

125 F.3d 1241 (9th Cir. 1997) 1-4, 6, 11-13

United States v. Jayyousi,

657 F.3d 1085 (11th Cir. 2011),

cert. denied, 567 U.S. 946 (2012).....8

United States v. Oriedo,

498 F.3d 593 (7th Cir. 2007) 1, 4, 6, 11

United States v. Tinoco,

304 F.3d 1088 (11th Cir. 2002) 12

United States v. Toll,

804 F.3d 1344 (11th Cir. 2015) 12

United States v. VonWillie,

59 F.3d 922 (9th Cir. 1995) 2-3

United States v. Westbrook,

896 F.2d 330 (8th Cir. 1990) 3-4, 12

Wilson v. United States

(No. 14-8492).....8

STATUTES AND OTHER AUTHORITY:

Fed. R. Crim. P. 16(a)(1)(E) 2, 12-13

Fed. R. Crim. P. 16(a)(1)(G) i, 9-10, 14

Fed. R. Evid. 701 i, 1-3, 7-13

Fed. R. Evid. 701(c) 1, 12-13

Fed. R. Evid. 701, Advisory Committee Notes (2000 Amendment) 1-3, 11-12

Fed. R. Evid. 702	i, 1-5, 7-10, 12-14
Brief of the United States in <i>Iacoboni v. United States</i> (No. 12-1009)	8
Brief of the United States in <i>Jayyoussi v. United States</i> (No. 11-1194)	8
Brief of the United States in <i>Wilson v. United States</i> (No. 14-8492)	8

REPLY BRIEF FOR THE PETITIONERS

The government claims that the decision below does not implicate any “conflict among the courts of appeals warranting this Court’s review,” Brief in Opposition (“BIO”) at 9, and even if there were a conflict, the instant case is a poor vehicle to resolve it. *Id.* at 21-22. Both positions are meritless.

I. The Circuits Are Divided on an Important and Recurring Question of Federal Law

The government correctly acknowledges that the Eleventh Circuit’s broad interpretation of Rule 701 to permit a law enforcement officer’s experienced-based testimony as a “lay opinion,” is in accord with the view of the First Circuit. BIO at 18-19. While it disputes that there is a conflict between the Eleventh Circuit’s approach and that of the Ninth Circuit in *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244-1247 (9th Cir. 1997), and the Seventh in *United States v. Oriedo*, 498 F.3d 593, 602-604 (7th Cir. 2007), its grounds for dispute are misguided. It has not carefully read the Ninth and Seventh Circuit caselaw.

As a threshold matter, the government cannot and does not dispute that in amending Rule 701 in 2000 to include new subsection (c) clarifying that lay opinion testimony does not include an opinion based upon “scientific, technical, *or other specialized knowledge within the scope of 702*,” the Advisory Committee cited the Ninth Circuit’s decision in *Figueroa-Lopez* with approval. Nor can it dispute that what the Advisory Committee specifically approved in *Figueroa-Lopez* was the Ninth Circuit’s holding that “law enforcement agents testifying that the defendant’s conduct was *consistent with* that of a drug trafficker could not testify as lay witnesses,” since

“to permit such testimony under Rule 701 “subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E).” (Emphasis added).

The government claims that there is no conflict between the decision below and *Figueroa-Lopez*, for a single reason: namely, *Figueroa-Lopez* identified *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995) as still “good law,” and *VonWillie* upheld as properly-admitted “lay opinion” an investigating agent’s testimony about the size and shape of a gun based upon others he had seen, as well as the “nexus” between guns and drug trafficking. BIO at 12, 15. But what the government improperly ignores is that *Figueroa-Lopez* found *VonWillie* “distinguishable.” The agent’s observations in *VonWillie* were “common enough,” the *Figueroa-Lopez* court explained, to “require such a limited amount of expertise” that they did not rise to the level of expert testimony within the purview of Rules 16(a)(1)(E) and 702. *Figueroa-Lopez*, 125 F.3d at 1245-46 (noting that, by contrast, “the agents’ observations in the instant case” that the defendants were engaged in behaviors like countersurveillance, use of a lookout, speaking in code to refer to drug quantities, and use of a rental van to make deliveries, which were “consistent with drug trafficking,” and were opinions offered in response to prosecutorial questions “based upon your training and experience,” were not observations “common enough” to be analogous to those in *VonWillie*; only the single observation that the defendants’ movements were “suspicious” was comparable to the non-expert opinion in *VonWillie*, admissible under Rule 701).

The Advisory Committee likely agreed with *Figueroa-Lopez* that an agent’s testimony about the size and shape of a gun in *VonWillie* was permissible “lay opinion testimony,” and would remain so even after the 2000 amendment, since not only gun

shapes and sizes, but the fact that there is a “nexus” between guns and drugs, are matters within the “common knowledge” of most law-abiding citizens in our society. Such testimony, however, is *not* comparable to the Coast Guard officers’ testimony about the size and shape of *bales of cocaine* here. The size and shape of bales of cocaine is *not* a matter within the “common knowledge” of anyone except drug traffickers and the law enforcement officers who interdict them.

To the extent the government claims the Coast Guard officer’s opinions here were “analogous” to the lay opinions admitted in *VonWillie*, it is wrong. And to the extent the government suggests that – notwithstanding *Figueroa-Lopez* – the Ninth Circuit would today permit a *law enforcement officer* to testify as a “lay witness” that based upon his prior experience a substance is a narcotic, BIO at 16-17 (citing *United States v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006)), the government quotes language out of context in *Durham* and is wrong again. In the cited portion of *Durham*, the Ninth Circuit quoted a comment by the Advisory Committee in connection with the 2000 amendment to Rule 701, which confirmed that an experienced *drug user* (like the witness at issue in *Durham*) could offer lay opinion testimony that a substance was a narcotic. Specifically, the Advisory Committee said:

[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. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson’s personal knowledge.

464 F.3d at 982.

In the discussion following that quotation, which the government conveniently omits from the BIO, the Ninth Circuit explained:

In the instant case, there was no question as to Ms. Nichols's familiarity with marijuana-in both its fresh and burnt forms. Ms. Nichols's testimony was thus based upon her personal knowledge, and her first-hand, multi-sensory interaction with the substance in question: Ms. Nichols viewed the contents of the water pipe used by Michala, and Ms. Nichols then smoke from the pipe, which afforded her the opportunity to smell, taste, and experience the effects of its contents. *Cf. Westbrook*, 896 F.2d at 335-36 (allowing drug identification testimony by lay witnesses based on their having used the substance in question and experienced its effects).

464 F.3d at 982-83.

Durham in no way supports the government's contention that the Ninth Circuit would allow a *law enforcement officer* to testify as a lay witness, to the probable narcotic contents of objects tossed from a vessel miles away at sea, based simply upon the size and shape of those objects as seen from a FLIR video, and the officer's prior experience in unrelated interdictions. The latter is classic "specialized knowledge" possessed by law enforcement officers, not the general public, which the Ninth Circuit in *Figueroa-Lopez* held was subject to the pretrial disclosure requirements of Rule 16 and the heightened reliability requirements of Rule 702. The Advisory Committee confirmed that these requirements could not be evaded by proffering an expert witness in "lay witness guise," as the Ninth Circuit held the government did in *Figueroa-Lopez*. The decision below directly conflicts with the Ninth Circuit's decision in that case.

It also conflicts with the Seventh Circuit's decision in *Oriedo*. And notably, in the BIO, the government does *not* even dispute the direct conflict with *Oriedo*. It merely cites a post-*Oriedo* decision of the Seventh Circuit, *United States v. Christian*,

673 F.3d 702, 709 (7th Cir. 2012), as confirming that the Seventh Circuit “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.’” BIO at 18. But notably, the Seventh Circuit had no problem in *Christian*, distinguishing between the permissible lay opinion testimony by Trooper Renner who testified that the defendant’s concealment of his hands raised a “red flag,” while pointing out that another officer, Agent Manns, went beyond merely opining that the defendant’s hand concealment was “suspicious.” Indeed, Agent Manns “was asked questions that suggest he was testifying in an expert capacity.” *Id.* at 709. And that is the case here as well.

The Seventh Circuit explained in *Christian* that Agent Manns “blended expert and fact testimony” when he testified on redirect that “90 percent of people who illegally carry weapons conceal them in their waistband or coat pocket.” *Id.* at 709. Notably,

The government then asked Agent Manns to stand in front of the jury to demonstrate Christian’s arm movements. Although Agent Manns was testifying as a fact witness – he was simply describing what he had observed – the next question crossed the line into eliciting testimony wrapped in the aura of special reliability that surrounds expert testimony: “Based on your experience encountering armed subjects in your approximate 20-year career, the significance of those arms going up and not being able to see the hands, was what? Agent Manns answered, “That is a movement I have seen before in my career on occasions wherein the defendant had a gun in his waistband. It was the same movement ...” Agent Manns had earlier testified on direct [as an expert] that in light of his 20 years of law enforcement experience, he had never found a firearm laying in a field unattended, supporting his belief that the gun belonged to Christian.

Id. at 709-10. That was significant, and different from the type of information provided by Trooper Renner, the Seventh Circuit explained, because

When eliciting this testimony [from Manns], the government wasn't merely seeking lay opinion testimony; the government was asking Agent Manns to bring his experience to bear on his personal observations and "ma[k]e connections for the jury based on that specialized knowledge." *Oriedo*, 498 F.3d at 603 (holding that different agent in *Oriedo*, who had found plastic baggies with the corners cut in the defendant's hotel room, testified in expert capacity when informing the jury that this is how crack cocaine is packaged for distribution); *see also Tribble v. Evangelides*, 670 F.3d 753, 758-59 (7th Cir. 2012) (explaining that witness, who summarized her experiences and used her specialized knowledge to guide the jury to a conclusion, testified in an expert capacity).

Id. at 710. The Coast Guard officers' testimony in Petitioners' case, elicited by a prosecutor asking the officers to specifically bring their experience to bear on their personal observations and "make connections for the jury based on that specialized knowledge," is precisely like Agent Manns' testimony in *Oriedo*, and Agent Gourley's in *Oriedo*.

The decision below conflicts with *both* of these Seventh Circuit decisions, as well as with the Ninth Circuit's decision in *Figueroa-Lopez*.

II. This Case is an Ideal Vehicle to Resolve the Circuit Conflict

In claiming that certiorari has "repeatedly and recently" been denied in cases raising "similar issues," BIO at 9 n. 3 (citing seven denials of certiorari from 2012-2017), the government erroneously attempts to read significance into a denial of certiorari, when there is none. The Court has repeatedly reminded that a denial of certiorari is not an expression of any opinion on the merits of the arguments raised. *See, e.g., Redd v. Chappell*, 135 S.Ct. 1712, 713 (2014) (statement of Sotomayor and Breyer, JJ., respecting the denial of certiorari); *Martin v. Blessing*, 134 S.Ct. 402 (2013) (statement of Alito, J., respecting the denial of certiorari); *Evans v. Stephens*, et al, 544 U.S. 942 (2004) (opinion of Stevens, J., respecting the denial of certiorari);

Boumediene v. Bush, 549 U.S. 1328, 1329 (2007); *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) (“Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons, which precludes the implication that were the case here the merits would go against the petitioner”). And in any event, the government errs in characterizing the issues in the seven “cert denials” as “similar” to the issue raised by Petitioners here, when in fact the issues were different.

In each of the cited cases, the Court was asked to resolve the longstanding circuit split on whether an agent’s testimony as to the meaning of cryptic conversations or “code words” used in recorded conversations in which he was not a participant and as to which he had no first-hand knowledge, is “lay opinion” testimony within Rule 701 or expert testimony within Rule 702, if he bases his testimony on his subsequent investigation of the case (including listening to the recorded conversations). The Rule 701 issue here is different. The Coast Guard officers whose testimony Petitioners challenged as unnoticed “expert testimony” within Rule 702, were participant/fact witnesses in the case. They personally observed the jettisoning of objects on the FLIR, but admitted that their opinions as to the presence and packaging of cocaine in jettisoned objects, were based upon their prior experience with bales of cocaine in unrelated cases.

There is a separate and distinct circuit split as to whether a law enforcement officer’s opinion that personally-observed conduct is “consistent” with drug trafficking constitutes expert testimony within Rule 702, or lay opinion testimony within Rule 701, if it is based upon the officer’s experience in prior investigations. That particular

question arises only in “dual capacity” cases, where as here, officers who were eyewitnesses to the underlying events are asked by prosecutors to draw conclusions about the defendants’ conduct based upon their “training and experience.” That question does *not* arise where the officer whose testimony is challenged is a case agent or summary witness with no involvement in the original investigation. *See Williams*, 865 F.3d at 1342 (noting that *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011), *cert. denied*, 567 U.S. 946 (2012) “never addressed the central question here”).

But beyond the different “type” of Rule 701 issue raised in the cited cases, there are other dissimilarities with these cases that the government also fails to mention. In most of them, the government argued that the case was an “unsuitable vehicle” to resolve the proper interpretation of Rule 701, because substantial other evidence of guilt rendered any possible error under Rule 701 harmless, *see* BIO in *Jayyousi v. United States* (No. 11-1194) at 19-21; BIO in *Iacoboni v. United States* (No. 12-1009) at 12-20; BIO in *Wilson v. United States* (No. 14-8492) at 24-25, and/or the Rule 701/702 issue was not preserved by the petitioner, and was therefore reviewable for plain error only. *See* BIO in *Wilson* at 22-23

Neither of these obstacles to certiorari exists here. The government has not even attempted to make a “harmless error” argument as it did in *Jayyousi*, *Iacoboni*, and *Wilson*, because the record here would not support such a finding. Indeed, the Coast Guard officers’ testimony based upon unrelated interdictions that what they saw on the FLIR was “consistent with” bales of cocaine, was so demonstrably harmful given the prosecutors’ emphasis of that testimony throughout closing and rebuttal arguments, that the government cannot even bring itself to mention those final

arguments in the BIO. And notably, the government does not even attempt to suggest that the other evidence it presented was sufficient to sustain the convictions; it cannot since the Eleventh Circuit found just the opposite. By failing to make any semblance of the usual harmless error argument in its BIO here, the government obviously concedes that *if* this Court were to find that the district court erred in admitting the disputed testimony under Rule 701, that error was demonstrably harmful and Petitioners' convictions should be vacated.

While the government does weakly argue at the conclusion of the BIO that Petitioner's case is an "unsuitable vehicle for considering broader questions concerning the scope of Rule 701" because the admission of *one* officer's testimony – Adair's – would be "reviewable only for plain error," BIO at 21, on that point the government is wrong. Notably, it made a similar "plain error" argument to the court below, *see* Appellee's Brief at 37-39, 42, and the Eleventh Circuit found that argument meritless. It did not even address it in the opinion.

As Petitioners argued below, *see* Williams' Reply Brief at 21-24, and the Eleventh Circuit implicitly agreed, there was no need for Petitioners to specifically object on Rule 702 grounds to any of the officers' testimony because the Petitioners had filed a pre-trial Rule 16(a)(1)(G) motion seeking disclosure of "any and all" expert testimony the government intended to introduce in its case-in-chief at trial, including "testimony addressing the estimation/extrapolation of the amount of narcotics/cocaine at issue in this case." That motion, granted by the district court, preserved their objection to *any* unnoticed expert testimony, offered through a government lay witness at trial, including Adair's.

Since Adair had only one prior interdiction, the defense could not immediately perceive that he was offering “expert testimony” in “lay witness’ guise.” The government’s strategy in that regard only became apparent after Adair testified, and the government had Officer Fleming (who had 6 prior interdictions under his belt) testify similarly that what he saw on the FLIR was “consistent” in size and shape with the bales of cocaine he had seen jettisoned and recovered in prior interdictions. The defense vigorously objected to Fleming’s testimony as violative of Rule 702, and not proper “lay opinion testimony” within Rule 701. And once the court overruled that objection, that ruling preserved a standing objection to the similar testimony the government thereafter sought to elicit from Officers Coffey and Caruso. But indeed, notwithstanding the specific objections voiced under Rule 702 during trial, the Petitioner’s pretrial Rule 16(a)(1)(G) motion adequately preserved their objection to unnoticed expert testimony by all of the Coast Guard fact witnesses. There is simply no basis on this record, or under the law, for the Court to review the admission of any of the Coast Guard officers’ unnoticed expert testimony predicated upon their “training and experience” – including Adair’s testimony in that regard – for plain error only here.¹

¹ While the government is correct that the district court ultimately sustained defense objections to Coffey’s and Caruso’s unnoticed expert opinions about “bales of cocaine,” BIO at 13 n. 4, in closing and rebuttal argument the prosecutors drew no distinctions between the officers whose testimony had been admitted, and the similar testimony of others the court had excluded. Notably, the prosecutor directed the jury in closing to specifically consider Coffey’s testimony that he was able to see “rectangular bales” on that video, and described them as something he’d “experienced before,” that they were “consistent with” those he had seen carrying kilograms of cocaine in that known drug area of the South Caribbean. And twice thereafter in closing, and once again in rebuttal, the prosecutor asked the jury to consider the testimony of the “officers” collectively (without differentiation), as they had testified based on their experience

Because the government's "plain error" contention here is baseless, the disputed evidence was harmful, resolution of the circuit conflict would be case-dispositive for Petitioners, and because the Eleventh Circuit's interpretation and application of Rule 701 in a far-reaching published decision is demonstrably wrong, this is an ideal vehicle for certiorari.

III. Review Should be Granted in This Case Because the Decision Below was Wrong and Should be Overturned

In claiming that the Eleventh Circuit correctly held that the Coast Guard witnesses' testimony was properly admitted as lay opinion testimony within Rule 701, BIO at 9-10, the government glosses over crucial distinctions drawn by the Advisory Committee in its Notes accompanying the 2000 amendment, rightly emphasized by the Seventh Circuit in *Oriedo*. The government's decision to acknowledge only certain portions of the Advisory Committee Notes in its BIO, while disregarding others, confirms that it knows the Eleventh Circuit misapplied Rule 701 and the Petitioners were wrongly convicted.

The government, for instance, points out that the Advisory Committee recognized that "[l]ay-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." BIO at 11. But, at the same time, the government ignores that the Advisory Committee expressly distinguished the "personal knowledge" of business owners, from the "specialized knowledge" of law enforcement officers about drug trafficking as occurred in *Figueroa-Lopez*. For that reason, two of the three precedents cited by the

that what they saw on the FLIR was consistent in size, shape, and weight with bales of cocaine they had previously recovered.

court below in support of its Rule 701 ruling – *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213 (11th Cir. 2003) and *United States v. Toll*, 804 F.3d 1344 (11th Cir. 2015) – were inapposite. The government impliedly concedes as much, by failing to marshal those decisions in support of its own position, and ignoring the argument in the Petition at 37.²

In another significant “gloss-over,” the government cites the Advisory Committee Notes as confirming that “a witness” may testify from “personal knowledge” within the scope of Rule 701 “that a substance appeared to be a narcotic.” BIO at 11. But what the government omits to mention is that the Advisory Committee made clear in 2000 that going forward, the prototypical “witness” who could testify from “personal knowledge” under Rule 701 “that a substance appeared to be a narcotic” would be a *drug user*. See Advisory Committee Notes (citing with approval the Eighth Circuit’s decision in *Westbrook*, discussed *supra*). By citing *Figueroa-Lopez* with approval in conjunction with the 2000 amendment, the Advisory Committee clarified that testimony by a law enforcement officer, based upon his training and experience, that “the defendant’s conduct was *consistent with that of a drug trafficker*” – the precise type of testimony offered here – is an opinion based on “specialized,” not “personal” knowledge. And going forward, the Advisory Committee confirmed, such testimony would fall squarely within Rule 702, since to permit it “under Rule 701 ‘subverts the requirements of Federal rule of Criminal Procedure 16(a)(1)(E).’”

Contrary to the government, the Advisory Committee’s Notes in 2000 do *not* confirm that Rule 701 applies “in the same way to the testimony of witnesses who are

² The government likewise does not dispute that the Eleventh Circuit misplaced its reliance upon its third precedent, *United States v. Tinoco*, 304 F.3d 1088, 1119 (11th Cir. 2002) for the reasons stated in the Petition at 38.

law enforcement officers as it does to the testimony of other witnesses.” BIO at 11. The 2000 amendments specifically sought to “eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing,” as was common practice with law enforcement testimony prior to the amendment. By adding new subdivision (c) to Rule 701, clarifying that lay witness testimony may not be “based on scientific, technical, or other specialized knowledge within the scope of Rule 702,” and confirming that testimony by the law enforcement officers in *Figueroa-Lopez* that the conduct they personally observed was “consistent with drug trafficking” was indeed an opinion based upon “specialized knowledge” within the purview of Rules 16(a)(1)(E) and 702, the Advisory Committee drew a bright line between the testimony of law enforcement officers based upon their “specialized” law enforcement training and experience, and the testimony of other witnesses. The Ninth Circuit clearly stated in *Figueroa-Lopez*, and the Advisory Committee obviously agreed by approving the reasoning in that decision, that even where a law enforcement officer is an “eyewitness” to the defendant’s conduct, that “does not trump Rule 702.” 125 F.3d at 1246.

The government, notably, does not dispute that ordinary lay persons know nothing about the size and shape of “bales of cocaine,” nor could the ordinary lay persons on the jury see any distinct objects tossed overboard from the FLIR. Rather, and cognizant of the fact that it expressly argued in its Reply Brief below that Officer Fleming, “by virtue of his drug interdiction duties as a member of the Coast Guard,” was “*more adept at identifying bales of cocaine than the average person*,” the government simply ignores the argument in the Petition at 39 that average lay

persons have no idea what a “bale of cocaine” looks like, or whether it differs in size or shape from a bale of any other controlled substance, or other types of contraband (such as weapons). Since the jury were asked repeatedly by the prosecutors to trust the Coast Guard officers’ expertise on that point, the testimony in question was subject to the pretrial disclosure requirements of Rule 16(a)(1)(G), and the enhanced reliability showing of Rule 702.

It was error to admit expert testimony in “lay witness guise” here. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

SHERRI A. ROMANO
Counsel for Petitioner Cardoza
2103 Coral Way, Suite 304
Miami, FL 33145
Telephone No. (305) 441-9858

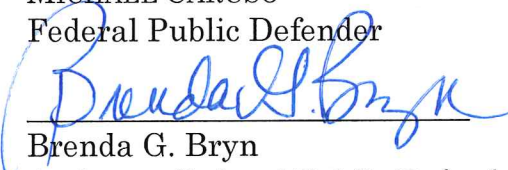
HECTOR L. FLORES
Counsel for Petitioner Taylor
40 N.W. Third Street, PH 1
Miami, FL 33128
Telephone No. (305) 374-3998

DENNIS NICHOLAS URBANO
Counsel for Petitioner Duffis
11440 N. Kendall Drive #400
Miami, FL 33176
Telephone No. (305) 595-0866

HERMAN FRANK RUBIO, JR.
Counsel for Petitioner Barker
1107 N.E. 104th Street
Miami Shores, FL 33138
Telephone No. (305) 892-5297

MICHAEL CARUSO
Federal Public Defender

By:


Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner Williams
One E. Broward Boulevard, Ste. 1100
Fort Lauderdale, Florida 33301-1842
Telephone No. (954) 356-7436
**Counsel of Record*

Fort Lauderdale, Florida
February 20, 2018