No. _____

IN THE

Supreme Court of the United States

TERENCE WILSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 701 creates a narrow exception to the general rule excluding opinion testimony, allowing lay witnesses to offer an opinion to the jury only when it is based on first-hand knowledge or observation and when it would be helpful to the jury. The Circuits long have been divided over the application of that rule to law enforcement testimony—in particular, where to draw the line when officers are asked to provide lay opinion testimony about opinions derived from their own investigation. Thus, the question presented is:

1. Whether Rule 701 permits a law enforcement officer's lay opinion testimony that is not based on firsthand knowledge of the material or event at issue but is instead based on conclusions drawn from the investigation as a whole.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner herein, who was the defendant-appellant below, is Terence Wilson. The respondent herein, which was the appellee below, is the United States. Neither party is a corporation.

Related Proceedings

The following proceedings are directly related to this case:

- *United States v. Wilson*, No. 22-cr-238-2, U.S. District Court for the Eastern District of Louisiana. Judgment entered April 15, 2025.
- *United States v. Wilson*, No. 24-30684, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 18, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terence Wilson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On August 18, 2026, a panel of the Fifth Circuit Court of Appeals affirmed Mr. Wilsons's convictions and sentences. A copy of the judgment and decision are attached to this petition as the Appendix.

JURISDICTION

The Fifth Circuit entered its decision on August 18, 2026, and no petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is timely filed pursuant to Supreme Court Rules 13 and 30 because it is being filed within 90 days of the Fifth Circuit's final judgment.

LEGAL PROVISION INVOLVED

Federal Rule of Evidence 701 provides:

> 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.

INTRODUCTION

The admission of lay opinion testimony is governed by Federal Rule of Evidence 701, which provides that a lay witness is permitted to testify to an opinion 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. This petition presents a recurring and important question that has long divided the courts of appeals: where to draw the line between proper and improper lay opinion testimony by law enforcement witnesses under Rule 701.

On one side of the split are circuits which—like the Fifth Circuit in this case—have all but dispensed with Rule 701's central requirements and have generally allowed the government's widespread use of a non-percipient, non-expert law enforcement testimony to interpret central evidence on behalf of the jury. Those circuits permit witnesses—shrouded in their authority as law enforcement—to feed juries the conclusions they should draw about what the evidence before them shows and, ultimately, testify to the evidence's indication of a defendant's guilt. Those circuits are in conflict with other circuits that reject this practice and more rigidly enforce Rule 701's strict limitations on lay opinion testimony. The Fifth Circuit's decision below perpetuates that entrenched circuit split.

This Court's resolution of this entrenched conflict is long overdue, and Mr. Wilson's petition presents an excellent opportunity for the Court to weight in on this important issue.

STATEMENT OF THE CASE

I. Investigation and Trial.

The appeal in this case followed a jury's conviction of Petitioner Terence Wilson and co-defendant Travis Enclade for conspiring to distribute methamphetamine, fentanyl, and heroin. Mr. Wilson was additionally convicted of a substantive count of possessing those drugs with intent to distribute them and unlawfully possessing two firearms as a convicted felon. He was acquitted of an additional count charging him with possessing a firearm in furtherance of drug trafficking.

The initial law enforcement investigation into those crimes was led by Jefferson Parish Sheriff's Officer Steven Brens, who also served on a local Drug Enforcement Administration (DEA) taskforce. Much of that investigation consisted of footage pulled from pole surveillance cameras that law enforcement installed outside of three New Orleans residences that they suspected were associated with the drug-trafficking activity of Mr. Enclade and Mr. Wilson. On this surveillance, Officer Brens observed two individuals, who he believed to be Mr. Wilson and Mr. Enclade, in and around the surveilled residences. The footage captured various individuals mingling, coming, and going outside and around the homes. The view of many of these interactions was obstructed and, although Officer Brens did not observe the actual presence of any narcotics on the surveillance, he later testified repeatedly to his conclusion that these interactions were all drug transactions and assured the juries they were witnessing drug deals in action. Throughout that testimony, Officer Brens's relied on his law enforcement experience generally and his knowledge of the investigation as a whole to support these proffered opinions.

In its opening statement at the start of trial, the prosecution promised the jury that they would learn about how Mr. Enclade and Mr. Wilson conspired to use one of the surveilled residences as a "drug factory" and urged the jury that the two co-defendants "were working together in their drug trafficking activities." That conspiracy would be evidenced, the prosecutor promised, by "video footage of them together conducting hand-to-hand transactions with drug customers" and "a jail call where they talk about the location of their narcotics." The prosecutor further promised that the evidence would show that Mr. Wilson and Mr. Enclade "jointly possessed" both the drugs and the guns in "their stash house."

Central to this presentation, the prosecutor promised, would be Officer Brens, "a DEA task force officer with 30 years in law enforcement." The prosecutor assured jurors that Officer Brens would explain to them how his investigation "let him to identify Mr. Wilson and Mr. Enclade as drug dealers" and that "he observed several behaviors consistent with drug dealing" during his surveillance. The prosecutor promised that Officer Brens would walk the jury through that surveillance:

> You'll see video footage of Mr. Wilson and Mr. Enclade conspiring together at a house on Hollygrove Drive. They would hang out on the front porch, a customer would arrive, make a quick hand-to-hand exchange, and the customer would leave quickly. Officer Brens will tell you that a quick exchange like this and the frequency of these types of exchanges is indicative that it was a drug deal.

As the prosecution promised, Officer Brens was its star witness—providing almost all the prosecution's evidence. In fact, in the prosecution's brief day-and-a-half presentation of testimony, Officer Brens's testimony took almost the entirety of the first day, dwarfing the testimony of the other, relatively minor fact witnesses. Though

he was presented as a lay witness under Rule 701—and not an expert under Rule 702—Officer Brens began his testimony by describing his 30 years of law enforcement experience in detail, explaining that he had conducted "over 100, close to 200 or more narcotics investigations." Officer Brens and the prosecutor would later call upon that "experience" repeatedly to explain and interpret evidence for the jury.

Central to his testimony was Officer Brens extensive narration of a small collection of surveillance videos presented to the jury. From three months of surveillance, the prosecution selected a small handful of video clips to show, with Officer Brens claiming that three in particular depicted drug transactions. Those videos—narrated extensively by Officer Brens—proved central at trial and were disputed by the defense.

First, the prosecution played a pole camera video taken from outside of Mr. Enclade's residence. The video showed an individual—who Officer Brens claims was Mr. Enclade—retrieving multiple objects from a parked car, including a hat, which he placed on his head. Though it was not possible to know what was in the individual's hand based on the video itself, the prosecution asked Officer Brens nonetheless: "Can you describe what Mr. Enclade is holding?" Officer Brens (who was not present and could see the video just as easily as the jury could) responded, "He looks like he's holding a package of narcotics."

When asked to explain his opinion on the matter, Officer Brens testified:

> It's based on the activity that I observed, and also the appearance of the item in his left hand. It appears to be packaged in a clear plastic bag. Also, the nature of the meeting of him leaning into the vehicle so he's not to be seen from the exterior. The windows on this vehicle are – I'm

> not an expert on it, but it's like limo type tint, so you couldn't see it through the back window or anything to zoom in on that.

When defense counsel pressed Officer Brens about this claim, Officer Brens doubled down, explaining that his "investigation" and his law enforcement experience made him confident that the bag contained narcotics:

> No, I think my observations, and the circumstances in the investigation of this case, and my familiarity with them, and how a drug trafficking organization operates, and as well as the location, I believed those items were in that location for the purposes as I stated.

Officer Brens admitted, though, that "you can't actually see the actual hand-to-hand." Officer Brens insisted nonetheless: "[T]his is textbook."

Next, Officer Brens walked the jury through footage taken outside of Mr. Wilson's father's home, in which three individuals could be seen socializing around a black pickup truck, again, their faces largely obscured. During the episode, a white pickup truck pulled up, and a man in a work uniform exited holding a gray or black cell phone to his ear. Although the man appeared to begin to walk in the direction of the three men, the camera suddenly zoomed out, with the view remaining obscured for much of the interaction. When the camera readjusted, the man in the work uniform could be seen briefly standing by the truck, but the camera's operator quickly panned away to zoom in on the white truck's license plate, where it remained until the man returned to his car. Though impossible to make out, it appeared the man again had a gray or black object in his hand upon returning to the car.

After showing the video, the prosecution asked Officer Brens: "Can you describe what's happening here with this car?" Officer Brens opined to the jury that

this too was a hand-to-hand narcotics transaction, though one could not actually be seen by watching the video:

> A. [The man in the work uniform] walked over to the driver's seat of the Ford Ranger very quickly, and then came back and he appeared to be cupping something in his right hand when he gets back into the Nissan Titan.
>
> Q. Based on the timing of this meeting and your investigation, what do you believe just happened?
>
> A. I believe it was indicative of a narcotics transaction given the area and my investigation in this case.

In other words, Officer Brens suggested that he knew this was a narcotics transaction based on the investigation into the defendants for narcotics trafficking.

Finally, the prosecution showed a third video taken outside of the one of the houses, during which an unknown person in a white car dropped something off. Officer Brens yet again claimed to be confident that this too was a drug-related transaction. An induvial—whose face was obscured but who Officer Brens identified as Mr. Wilson—approached the white car and took a large object from the driver. Despite its fundamentally different size, shape, and appearance than the other two objects that Officer Brens previously identified with great certainty as narcotics, Officer Brens opined that this object too was narcotics—or perhaps, in the alternative, "currency," telling the jury: "Mr. Wilson reached into the vehicle that pulled up and grabbed something that I believe was suspected narcotics or U.S. currency and then walked right back to the porch."

On cross examination, Officer Brens continued to insist that the contents of the bag were "definitely" either "currency or narcotics," again claiming that the

"circumstances of this investigation" confirmed that to be true, though admitting his opinion was not based on his first-hand perception of the video itself:

> Q. But it's definitely one or the other, though. You just don't know which one it is?
>
> A. That's my testimony.
>
> Q. Okay. And that's based off of this picture?
>
> A. It's not just based off the photograph. It's based off of my investigation, and the area, and the amount of time that the two individuals met, and then he goes right into the house with it.
>
> Q. So if somebody pulls up in a car, hands somebody a bag, and they swiftly walk into a house with that bag, that's indicative of a narcotics transaction, with nothing else?
>
> A. No. I think given the circumstances of this investigation, and my experience in this investigation and other investigations, in this particular incident, I believe was a transaction.

Throughout this testimony, Officer Brens assured the jury that he had observed "behavior consistent with narcotics transactions" "[p]retty much daily." When asked by the prosecution on redirect why he "believe[d]" that these various other interactions were "drug exchanges," Officer Brens explained that the "investigation" made him confident that they were. He expanded, "we" (i.e., the investigation team) had evidence of various drug transactions, though Officer Brens did not say where that information came from, much less, whether that was his own firsthand knowledge. Officer Brens also claimed that "some of these people" seen stopping by the house were identified as "drug customers"—information Officer Brens claimed was gleaned from "registration checks" and "traffic stops."

Officer Brens testified similarly about footage captured at Mr. Wilson's rental

house—where narcotics were later located. For example, Officer Brens claimed to be able to identify Mr. Enclade, from far away on pole camera video, entering the home on one occasion with a black bag on the other side of his body. After asking Officer Brens to describe the video for the jury, the prosecution asked: "Did you later find that backpack when you searched the residence?" "Yes," Officer Brens responded, referring to photographic exhibits of a black backpack containing narcotics that was located when the house was later searched. The prosecutor then asked Officer Brens to go even further, asking him to opine for the jury, "[b]ased on [the] investigation, what he thought occurred" once Mr. Enclade was inside the Encampment Street home, and Officer Brens answered: "I think that based on the lack of furniture and my belief that it's a stash location and the amount of time and the backpack that was recovered inside the residence, this was a time that they were processing drugs for resale, packaging, weighing, divvying up for customers."

In another contested portion of Officer Brens's testimony, the prosecution asked him to describe and interpret a short portion of a call recorded from the Jefferson Parish Correctional Center in the days after Mr. Wilson's arrest—a call Officer Brens claimed was between Mr. Wilson and Mr. Enclade. In the brief clip, one person could be heard mentioning an individual named "Ray" and later referred to something in a cabinet. Officer Brens opined on the meaning of those references, explaining to the jury: "I believe they're talking about some narcotics that were located in the kitchen cabinet under the sink in 3511 Encampment Street." Though Officer Brens was not familiar with the term "Ray" at all—either in this investigation

or through his experience as a whole—he nonetheless reasoned that the term must be drug-related because Mr. Enclade was later seen at the rental house and because drugs were later found under the sink. Thus, Officer Brens opined, Mr. Wilson must have been providing Mr. Enclade with some sort of drug-related instruction, evidencing that they were in a drug conspiracy together.

Central to Officer Brens's analysis and proffered opinions was a consistent claim throughout his testimony that the "investigation" confirmed that all the various interactions upon which he opined were drug-related, and, at base, his belief—transparently expressed to the jury—that the evidence against the defendants was overwhelming. In other words, Officer Brens repeatedly engaged in circular logic: Because the "investigation" had confirmed that Mr. Enclade and Mr. Wilson were conspiring to distribute narcotics, these interactions must be evidence of that activity.

In closing, the prosecutor hammered Officer Brens's opinion that the defendant's were guilty, urging that any forensic testing was unnecessary because: "This was never really a case of who done it. Law enforcement knew who done it on October 12th, 2022, when they went to execute those search warrants." She then highlighted the probable cause finding for the warrant as evidence that that jury should trust Officer Brens's conclusion of the defendants' guilt, assuring the jury: "The video footage and the other evidence was overwhelming. It supported probable cause to get the search warrants." She insisted that, on the day the warrants were executed, "the only question was how many drugs were they dealing?"

The jury acquitted Mr. Wilson of one of the charged counts against him (a 18

U.S.C. § 924(c) count for possession of a firearm in furtherance of drug trafficking), but found him guilty of the remaining three charges, i.e., a drug conspiracy, a substantive drug charge arising from the drugs discovered at the home he rented, and a felon-in-possession-of-a-firearm charge for the two firearms found there as well. The jury acquitted Mr. Enclade of his own § 924(c) count and of the substantive drug distribution count for which they had found Mr. Wilson guilty. However, the jury found Mr. Enclade guilty of the drug conspiracy and for being a felon in possession of a firearm. The district court sentenced Mr. Wilson to 240 months' imprisonment.

II. Fifth Circuit Affirmance.

On appeal, Mr. Willson challenged the admission of Agent Brens's testimony, arguing that his extensive narration and interpretation of the surveillance videos and jail phone call exceeded the scope of permissible lay opinion testimony under Rule 701. The Fifth Circuit agreed that the district court erred in its admission of Agent Bren's opinion about the meaning of the term "Ray," conceding that Officer Brens "simply connected the term to the narcotics recovered from [Mr. Wilson's rental] and that "[t]he jury had all the evidence necessary to draw or reject that inference itself." *United States v. Enclade*, 187 F.4th 766, 785 (5th Cir. 2026). However, the court deemed that error unimpactful considering the remainder of the evidence presented, which the court found unproblematic. With respect to Officer Brens's interpretation of the surveillance videos—the prosecution's proffered evidence that Mr. Wilson and Mr. Enclade engaged in drug transactions together—the court deemed that evidence

acceptable under prevailing circuit caselaw, as it "reflected Brens's own observations and conclusions." *Id*. at 787.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split On The Admissibility Of Lay Opinion Law Enforcement Testimony Under Rule 701.

Federal Rule of Evidence 701(a) requires that a lay witness's opinion testimony must be "(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[.]" The Advisory Committee's Notes clarify that the "the witness's perception" portion of the rule is derived from "the familiar requirement of first-hand knowledge or observation." *See* Fed. R. Evid. 701 advisory committee's note. The Rule's prohibition on any reliance on technical knowledge—as the Second Circuit has explained—"is to prevent 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 and Fed. R. Civ. P. 26." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005).

There is a well-documented circuit split over the bounds of what constitutes "first-hand" knowledge and observation in this context, as well as whether proffered opinions about the import and meaning of evidence that already is before jurors is, in

fact, helpful to them or whether it impermissibly usurps their role.[1] This issue arises frequently in the context of testimony from law enforcement officers, who often testify to their lay opinions about the meaning of evidence that are based on their own conclusions derived from their investigation as a whole—testimony that may incorporate interactions they themselves participated in or those that they learned of later through collected surveillance. Often, those opinions go to the ultimate issue of the defendant's guilt, as was the case here, where Agent Brens testified that he knew obstructed interactions in surveillance shown to the jury were drug transactions—an opinion derived from his belief that the defendants were drug dealers, based on the investigation as a whole.

The circuits fall into three main schools of thought on what constitutes helpful, personal knowledge for the purposes of lay opinion testimony from a law enforcement witness.[2] The first group—the Fifth, Tenth, and Eleventh Circuits—generally applies the broadest interpretation of Rule 701's personal knowledge requirement. Under this loose view of Rule 701, the witness's opinions and interpretations of evidence are allowed as long as the testifying agent took part in the investigation, even if he or she had no first-hand knowledge of the particular events that are the subject of the agent's lay opinion testimony. And, relatedly, these courts admit lay opinion

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[1] *See, e.g.*, Joseph Richard Ward III, *The Interpretation of Context: How Some Federal Circuits Are Bypassing the Familiar Requirement of Firsthand Knowledge for Lay Witnesses*, 15 Loy. J. Pub. Int. L 117 (2013); Emily Jennings, *Witness History As Juries Become History: How the Eleventh Circuit Allowed the Opinions of Lay Witnesses to Overtake the Duty of the Jury in* United States v. Jayyousi, 54 B.C.L. Rev. E-Supplement 145 (2013); Kim Channick, *You Must Be This Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify As Laypersons Under Federal Rule of Evidence 701*, 81 Fordham L. Rev. 3439 (2013).

[2] *See, e.g.*, Ward, *supra* note 1 (describing the split and categorizing the circuits into three main groups).

testimony even if it is based solely on information gathered during the investigation itself, rather than first-hand knowledge of or participation in an event in question. This group allows officers to interpret videos and phones calls for the jury and proffer opinions about the meaning of that evidence, even if that opinion is not derived from any first-hand knowledge of that content but is instead based on broader conclusions of the investigation as a whole.[3]

The Fifth Circuit—as illustrated by this case—goes so far as to hold that lay opinion testimony from law enforcement officers is not only permitted when their knowledge is based on their personal perception of documents or other evidence created in the course of the investigation, but also if the witness has employed specialized knowledge in forming their opinion—much like Officer Brens's interpretations of the surveillance videos, which he claimed, in his experience, to be "textbook" drug transactions. These decisions are rooted in the court's decision in *United States v. El-Mezain*, in which several FBI agents were permitted to give lay opinion testimony as to the meaning of terms used in conversations and documents they had investigated, as well as to the relationship between the defendants that they had investigated. 664 F.3d at 467. The court held that the testimony was admissible as lay opinion if the agents' testimony was limited to their *personal perceptions from their investigation of the case*, rather than others' perception—even if some

[3] *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 515 (5th Cir. 2011); *United States v. Jayyousi*, 657 F.3d 1085, 1104 (11th Cir. 2011); *United States v. Diaz*, 637 F.3d 592, 600 (5th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1223 (10th Cir. 2007); *United States v. Griffin*, 324 F.3d 330, 351 (5th Cir. 2003); *United States v. Novaton*, 271 F.3d 968, 1009 (11th Cir. 2001); *United States v. Garcia*, 994 F.2d 1499, 1507 (10th Cir. 1993).

specialized knowledge on the part of the agents was required to come to those conclusions and even if the agents were not firsthand witnesses to the events being interpreted. *Id.* at 514. By virtue of their extensive involvement in the investigation, the court concluded that the testimony was based on the agents' participation in and understanding of the case at hand. *Id.* Notably, that caselaw is what led the Fifth Circuit in this case to deem Officer Brens's interpretations of the surveillance permissible in this case.

The Tenth Circuit has similarly allowed law enforcement officers to testify based on knowledge gleaned entirely from an investigation, including testimony to the ultimate issue of identification of the defendant. For example, the Tenth Circuit held that an FBI Special Agent could testify, based solely on his review of the same tapes offered into evidence, that the voice on audiotapes and the image in a videotape belonged to the defendant. *Zepeda-Lopez*, 478 F.3d at 1215. The Circuit rejected the defendant's argument that this testimony was unhelpful (as the jury could just as easily conduct that analysis), reflecting the circuit's low bar for Rule 701's "helpfulness" requirement.

The Seventh and Ninth Circuits appear to take a middle-ground approach to the meaning of personal knowledge, restricting testimony that in some circumstances might be permitted by one of the circuits in the first group. For instance, Ninth Circuit has held that there was no error when the district court admitted a detective's lay interpretations of recorded phone calls when the detective based his testimony on his direct perception of several hours of intercepted conversations—in some instances

coupled with direct observation of the suspects—and other facts he learned during the course of the investigation. *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007). The court held that the detective's perception of the conversations amounted to direct knowledge but noted that it was crucial that throughout his testimony, the witness attempted to provide context to explain his reasoning and the basis for his opinions. *Id.* The court applies a stricter limitation, however, on lay testimony from law enforcement officers who have knowledge of a defendant from a picture in a surveillance photograph, warning that such testimony presents a "risk of invading the province of the jury and unfairly prejudicing [the defendant]." *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

The Seventh Circuit has held, in a drug conspiracy case, that the testimony of a DEA agent of his impressions of intercepted telephone conversations was admissible. *United States v. Rollins*, 544 F.3d 820, 831–33 (7th Cir. 2008). The agent, who listened to the intercepted wiretap call daily from the start of the investigation, was permitted to testify based on his knowledge of code words that were unique to the conversations in the alleged conspiracy. *Id.* The court held that it was helpful to the jury to have explanations from the investigator "who became intimately familiar with the unusual manner of communicating" used by the conspirators. *Id.* at 831.

The last group—which includes the First, Second, Third, Fourth, and Eighth Circuits—applies the narrowest reading of the personal knowledge required for law enforcement officers to give lay opinion testimony. These circuits follow a strict interpretation of Rule 701 and will generally not admit lay witness opinion testimony

unless the witness personally participated in, or contemporaneously observed, the events that are the subject of their testimony.

In the Second Circuit, *United States v. Garcia* sets out the Circuit's position that law enforcement's lay opinion testimony must be based on a witness's personal perception of the matter he or she is testifying to and not from records of information the witness learned from the investigation as a whole. *Garcia*, 413 F.3d at 201. The court held that basing an opinion on the entirety of an investigation could not meet the 701(a) requirement of personal knowledge. *Id.* at 212. Not only that, the court held that the testimony was not helpful to the jury under Rule 701(b) because it did little more than summarize the evidence in a way that told the jury how to decide the case. *Id.* at 210. The First Circuit takes a similar approach. The court has explained that investigation-based opinions often rely upon a disallowed combination of perceptions—both of the officer and of the officer's colleagues. *United States v. Vazquez-Rivera*, 665 F.3d 351, 358 (1st Cir. 2011). Under that court's caselaw, basing an opinion on the totality of unidentified information gathered over the course of the investigation does not meet the requirement of personal knowledge, since such an opinion is not "rationally based on the witness's perception" per Rule 701(a). *Id.*

The Third Circuit holds a similarly narrow view of the appropriate definition of personal knowledge under Rule 701. *See, e.g.*, *Virgin Islands v. Knight*, 989 F.2d 619, 629 (3rd Cir. 1993). That court has also noted that lay opinions on the ultimate issue—i.e., the question of identification or the defendant's guilt of the crime alleged—"seldom . . . meet the test of being helpful to the trier of fact since the jury's

opinion is as good as the witness' and the witness turns into little more than an oath helper." *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 226 (3rd Cir. 2008) (citation omitted).

The Eighth Circuit similarly restricts the definition of "personal knowledge" under Rule 701(a). For example, the court has held that an agent who listened to recorded telephone conversations and prison visitations lacked first-hand knowledge and therefore could not give lay opinion testimony about them. *Untied States v. Peoples*, 250 F.3d 630 (8th Cir. 2001). The Court held that her testimony, which both interpreted allegedly coded language and statements made in plain English and sometimes imputed reasons behind those statements, was improperly admitted because the agent neither personally observed the activities the conversations were about nor heard or observed the conversation itself. *Id.* The Eighth Circuit considers this type of knowledge "after-the-fact" rather than personal, noting in that case that the agent provided a "narrative gloss" on the facts, comprised entirely of her opinion about the conversations' meanings. *Id.* at 640. As Mr. Wilson's case illustrates, such a "narrative gloss," under Fifth Circuit caselaw, is permissible. The Eighth Circuit, by contrast, holds that "[l]ay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide *specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events*." *Id.* at 641 (emphasis added).

Finally, the Fourth Circuit has likewise declared that relying on "secondhand information" and conclusions formed from this information are "post-hoc"

assessments that fall outside of permissible lay opinions permitted by Rule 701. *United States v. Johnson*, 617 F.3d 298 (4th Cir. 2010). The court also condemned the government eliciting testimony on the agent's "credentials and training, *not his observations* from the surveillance employed in [the] case." *Id.* at 293 (emphasis in original). That caselaw incorporates the Eighth Circuit's warning about testimony given without first-hand knowledge as its foundation—noting that such testimony provides merely "a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant." *Id.* (quoting *Peoples*, 250 F.3d at 640) (internal quotation marks omitted).

II. This Is An Important, Reoccurring Issue, And This Case Is A Good Vehicle To Resolve This Circuit Conflict.

Law enforcement testimony is ubiquitous in criminal trials, and the application of Rule 701's limits on its admissibility represents a critical, reoccurring issue that courts must be prepared to address using clear and consistent guidance from appellate courts and this Court. Moreover, failure to properly limit such testimony threatens to seriously undermine the fairness of criminal proceedings. Indeed, unchecked lay law enforcement testimony of the type in this case usurps the jury's duty to come to its own conclusions regarding how to interpret and weigh the evidence before it. As the above illustrates, however, the same testimony is currently admissible in some circuits but not others, subjecting criminal defendants to radically different trials based on the same evidence and, inevitably, radically different outcomes as well.

This case illustrates that point. Unquestionably, Officer Brens's testimony constituted a "narrative gloss" on the facts put before the jury, consistently delivering what the prosecution presented as "specialized explanations or interpretations" of surveillance evidence before the jury. *Peoples*, 250 F.3d 641. Moreover, those interpretations were not based on any first-hand knowledge or actual observations of the events presented. Instead, the government elicited testimony about Agent Brens's "credentials and training"—substituting that expertise for first-hand observations of what could actually be seen on the surveillance. *Johnson*, 617 F.3d at 293 Indeed, the jury could see exactly what Officer Brens could see. Nonetheless, Officer Brens told the jury how to fill in the gaps of what neither he nor they could see, offering interpretations of those events based (1) on his conclusion that the investigation as a whole showed that the defendants were drug dealers; and (2) nondescript "experience" that permitted him to see something the jury could not. That evidence would not have been permissible in some circuits—for example, the Eighth and the Fourth—but was deemed above-board in the Fifth. And that evidence was central to the government's presentation of evidence. In particular, these claimed drug transactions were the central evidence of concerted narcotics-related action between the two defendants to support the conspiracy charge.

Thus, this case presents a prime opportunity for this Court to address the longstanding circuit conflict over this issue.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Wilson's petition for a writ of certiorari.

Respectfully submitted,

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