No. 19-855

IN THE
Supreme Court of the United States

LENIN LUGO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL submits this brief in support of certiorari because the issue presented in this case—the evidentiary standard applicable to the testimony of law enforcement officers providing opinions based on their professional experience—is an area of great concern to criminal defendants throughout the country.[1]

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae* or their counsel has made any monetary contributions to fund the preparation or submission of this brief. Notice of intent to file was given to both parties 10 days in advance, as required by Rule 37.2(a), and Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioner Lenin Lugo was convicted primarily because of the Circuit in which he was indicted. In a case with no direct evidence of drugs, drug residue, or drug paraphernalia, Mr. Lugo was convicted of a drug offense. His conviction was based largely on testimony by U.S. Coast Guard officers that they saw, through a scope from a surveillance aircraft, containers jettisoned from a boat, and that they believed, based on their professional experience from prior narcotics investigations, the containers were filled with cocaine. The First Circuit and Eleventh Circuit (the Circuit in which Mr. Lugo was indicted) allow such law enforcement officers to testify as lay witnesses under Federal Rule of Evidence 701.

However, five other Circuits—the Second, Seventh, Eighth, Ninth, and D.C. Circuits—to the contrary require such law enforcement officers to qualify as experts and to comply with the stringent standards in Rule 702 that expert testimony be based on reliable principles and a reliable application of those principles. In these Circuits, consistent with Supreme Court precedent, courts instead serve as the gatekeepers to assess the reliability of proffered expert testimony before it is heard by a jury. By contrast, the First and Eleventh Circuits permit law enforcement officers to testify with the veneer of expertise commonly afforded by juries to officers, but without being required to face traditional expert qualification tests, to the prejudice of criminal defendants.

This Court should grant certiorari to resolve this clear Circuit split. The question of the evidentiary standard applicable to the testimony of law enforcement officers recurs frequently—with federal district and appellate courts having addressed it in more than

two dozen written opinions in the last three years alone—and it recurs in a wide variety of criminal cases, from narcotics to tax fraud to terrorism cases. The minority rule followed in the First and Eleventh Circuits also leads to unfair results, with law enforcement officers permitted to offer opinions no lay witness would have been permitted to present to a jury, including that ordinary words or practices are indicative of criminal activity.

ARGUMENT

A. The Federal Circuit Courts Are Intractably Split on Whether Testimony From Law Enforcement Officers Based on Professional Experience is Lay Opinion or Expert Testimony.

As set forth in the Petition, there is an entrenched, ten-year Circuit split over whether the testimony of a law enforcement officer based on the professional experience of the officer is lay opinion testimony governed by Federal Rule of Evidence 701 or is subject to the rigorous Rule 702 standard for the admission of expert testimony. *See* Pet. at 12-17. In opposing the Petition, the government may characterize the Circuit split as limited or non-existent, as it did in opposing a prior petition.[2] Such a characterization is incorrect. In fact, the federal Circuits are intractably split on the standard applicable to such law enforcement testimony.

The Seventh Circuit recognized the split more than a decade ago when, in *United States v. Oriedo*, it

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[2] Brief of Respondent at *15-20, *Williams v. United States*, 138 S.Ct. 1282 (2018) (No. 17–6666), *cert. denied*. While the *Williams* petition described a split involving four Circuits, Brief of Petitioner at *26-30, seven Circuits have addressed the issue, rendering the split ripe for this Court's review.

rejected the "contrary approach" taken by the First Circuit, and concluded that a narcotics officer had to be qualified as an expert pursuant to Rule 702 in order to testify to opinions that were derived from his specialized experience in prior criminal investigations. 498 F.3d 593, 603 (7th Cir. 2007). The Seventh Circuit did not allow the officer to testify as a lay witness about the significance of plastic bags at the site of an investigation and the role of such bags in the distribution of crack cocaine, because such testimony "brought the wealth of his experience as a narcotics officer to bear on [his] observations" and "made connections for the jury based on that specialized knowledge." *Id.* at 601-03 and n.9 (citing Fed. R. Evid. 701(c), which excludes from the scope of lay opinion any testimony based on "scientific, technical, or other *specialized knowledge* within the scope of Rule 702" (emphasis added)). The Seventh Circuit recognized that the First Circuit had concluded to the contrary that this type of testimony was simply lay testimony. *Oriedo*, 498 F.3d at 603 n.10 (discussing *United States v. Ayala-Pizarro*, 407 F.3d 25 (1st Cir. 2005) (admitting testimony regarding packaging and its alleged connection to narcotics distribution as lay opinion)). The federal Circuits therefore require guidance from this Court to determine which "contrary approach" is proper moving forward.

In particular, the Circuits disagree as to how to interpret the following Advisory Committee Note to Rule 701: "the distinction between lay and expert witness testimony 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) (internal citation omitted). The

Committee elaborated that lay-opinion testimony may sometimes be based on unique "particularized knowledge," such as when "the owner or officer of a business . . . testif[ies] to the value or projected profits of the business." *Id*. However, the Circuits disagree as to whether law enforcement officer testimony is the "particularized knowledge" of the business owner, or "specialized knowledge" of the type that is subject to Rule 702. *Oriedo*, 498 F.3d at 603 n.10 (drawing distinction, contrary to the First Circuit, based on the fact that "[t]he business owner has knowledge of his own business *in the particular*" whereas "a narcotics officer who draws on his broad experience, acquired from his observations outside of this particular case, relies on his *specialized* knowledge of drug trafficking to draw conclusions about the particular case.") (emphasis in original). The Eleventh Circuit has concluded the opposite here—that the officers' testimony as to whether the jettisoned objects resembled containers used in other drug-trafficking cases is "particularized" rather than "specialized" knowledge, even though it draws broadly from the officers' prior professional experience. *See United States v. Lugo*, 789 F. App'x. 766, 770 (11th Cir. 2019). Thus, the same or similar testimony would face two entirely different standards simply by virtue of the Circuit in which the defendant happened to be tried.

Other Circuits have followed the Seventh Circuit's interpretation, and rejected that of the First and Eleventh Circuits. The Second Circuit, for example, has concluded that, because an officer's "reasoning process was not that of an average person in everyday life" but was "rather . . . that of a law enforcement officer with considerable specialized training and experience in narcotics trafficking," his testimony "was not admissible under Rule 701." *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005). The D.C.

Circuit has reached a similar conclusion, as well. *See United States v. Smith*, 640 F.3d 358, 365-66 (Kavanaugh, J.) (D.C. Cir. 2011) (citing *Oriedo* and *Garcia* and interpreting Rule 701(c) to exclude an officer's testimony derived from "previous professional experience"). For the sake of clarity among the courts in the federal criminal justice system, we therefore respectfully encourage this Court to grant certiorari and resolve the Circuits' dispute, which now includes a majority of the Courts of Appeal and can only be resolved by this Court.

B. The Question Presented Arises Frequently and in a Broad Range of Cases

The issue of whether the opinion of a law enforcement officer based on professional experience is lay opinion or expert testimony is one that courts across the country face frequently and in a wide range of cases. In the past three years alone, district and appellate courts have addressed this question in more than two dozen written opinions.[3] In narcotics cases such as the instant Petition, trial courts have examined law enforcement testimony on every aspect of narcotics prosecutions, including the market value of particular drugs, the meaning of code words used by drug deal participants, and the modus operandi of

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[3] *See*, *e.g.*, *Trice v. Sec'y, Dept. of Corr.*, No. 8:11–cv–1453, 2017 WL 3923088, at *8-9 (M.D. Fla. Sept. 7, 2017) (regarding forensic description of crime scene); *Shkambi v. United States*, No. 4:09–cr–00193, 2018 WL 6495088, at *7 (E.D. Tex. Nov. 12, 2018) (regarding "code words" used in drug trafficking); *United States v. Greenwood*, No. 12–cr–00504, 2018 WL 3586399, at *9-10 (D. Colo. July 26, 2018) (interpreting the words "'zip,' 'hammer,' and 'banger'" in the narcotics context); *United States v. Abdelijawad*, 250 F. Supp. 3d 839, 842-44 (D.N.M. 2017) (discussing the meaning of coded language used by drug traffickers).

particular narcotics dealers.[4] And courts have confronted the same issue in all of the following contexts beyond narcotics:

- Possession of firearms. *United States v. Christian*, 673 F.3d 702, 709-11 (7th Cir. 2012) (upholding admission of agent's testimony regarding certain hand movements being consistent with the pulling and then tossing of a firearm, only after agent was qualified as an expert); *United States v. Habibi*, 783 F.3d 1, 4 (1st Cir. 2015) (upholding district court's admission of lay opinion testimony from an FBI special agent to show that "detectable DNA is not left every time someone touches an object with his bare hands").
- Murder for hire of a cooperating witness. *United States v. Peoples*, 250 F.3d 630, 639-42 (8th Cir. 2001) (testimony from case agent regarding her interpretation of recorded prison conversations, including both "coded, oblique language" and "plain English words and phrases" admissible only if agent had been qualified as an expert).
- Enticing a minor to engage in sexual activity. *United States v. Stahlman*, 934 F.3d 1199,

[4] *See*, *e.g.*, *United States v. Garcia*, 413 F.3d 201, 216-17 (2d Cir. 2005) (holding that an agent's testimony regarding whether the defendants were acquiring drugs for distribution or for use and regarding the price of cocaine constituted expert testimony under Rule 702); *United States v. Freeman*, 730 F.3d 590, 596-98 (6th Cir. 2013) (excluding testimony interpreting 23,000 phone conversations as improper lay opinion); *United States v. Hampton*, 718 F.3d 978, 984 (D.C. Cir. 2013) (FBI agent should have been qualified as an expert to testify to code words used by drug traffickers).

1223-24 (11th Cir. 2019) (case agent's testimony regarding the meaning and effect of language used in Craigslist post and of coded language in email communications to the case agent, although informed by "his years of experience investigating child exploitation and child pornography crimes," admissible as lay opinion).

- Tax fraud and aggravated identity theft. *United States v. Morel*, 885 F.3d 17, 26 (1st Cir. 2018), *cert. denied*, 139 S.Ct. 174 (2018) (upholding admission of lay opinion testimony by IRS special agent regarding whether "deposit activity for [the defendant's] bank account was consistent with money laundering and inconsistent with the activity of a normal convenience store," even though testimony was based on his past "experience with tax-fraud investigations of small convenience stores") (internal citations omitted).
- Terrorism. *United States v. Jayyousi*, 657 F.3d 1085, 1095 (11th Cir. 2011) (upholding admission of lay opinion testimony by agent interpreting code words in telephone intercepts, including testimony that "words such as 'football' and 'soccer'" meant "jihad").

The sheer breadth and frequency of the lower courts' grappling with the issue of whether law enforcement officer testimony is lay or expert testimony counsels in favor of this Court providing guidance to resolve the contradictory rulings at the Circuit level.

C. Permitting Law Enforcement Officers to Furnish Lay Opinion Testimony Leads to Unfair Applications.

In those Circuits where law enforcement officers are permitted to offer lay witness testimony derived from their professional experience, courts have granted wide latitude to officers to offer opinions that would never be allowed if provided by an ordinary lay witness. The resulting opinions have sometimes strained credulity, yet are presented to the jury with the imprimatur of the officer's years of experience.

For example, in *United States v. Maher*, a police officer was allowed to testify as a lay witness that a Post-It note found in the defendant's vehicle with the number "4" next to an individual's name signified "four ounces of cocaine." 454 F.3d 13, 17 (1st Cir. 2006). The court held that the testimony was "based on [the officer's] experience," and thus "did not cross the line to become expert testimony." *Id.* at 24 (quoting *Ayala-Pizarro*, 407 F.3d at 28 (1st Cir. 2005)). Moreover, the First and Eleventh Circuits have, respectively, allowed special agents as lay witnesses to testify that a defendant's registration of a telephone number in the name of a third party is indicative of trafficking activity, and that a suspect driving past open parking spaces closer to his destination and continuing to look for parking suggests he is acting as a lookout. *United States v. Valdivia*, 680 F.3d 33, 49 (1st Cir. 2012) (concerning registration of a telephone number); *United States v. Clark*, 710 F. App'x 418, 422 (11th Cir. 2017) (concerning parking activity).

The First Circuit has also allowed an FBI special agent to offer lay opinion testimony in a possession of stolen firearms case that the defendant could have touched the firearm even though his DNA was not

found on it, because in his experience an individual can "touch[ ] or handle[ ] a[n] object with a bare hand, but when tested, no detectable DNA [is] found on that object." *Habibi*, 783 F.3d at 5-6. The court recognized that "of course . . . an expert could have testified on the DNA residue issue," but it nevertheless concluded that the special agent's testimony "was based only on his own investigative experience" and thus "f[e]ll comfortably within the boundaries of permissible lay opinion testimony." *Id*. (internal quotation and citation omitted).

None of this testimony was examined for reliability under Rule 702—no gatekeeping function was performed by the court—which is troubling in light of the enhanced credibility law enforcement officers enjoy in the eyes of a typical jury. *See* Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 248, 256 (2017) (describing "potential juror bias in favor of police officer testimony" and the "popular view that police officers are more credible than civilian witnesses"). In light of the intractable Circuit split and the unfair results defendants face in the Eleventh and First Circuits, the question presented is thus ripe for this Court's review.

CONCLUSION

For the foregoing reasons, NACDL respectfully urges this Court to grant Mr. Lugo's petition for a writ of certiorari.

Respectfully submitted,

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