No. 19-855

In the Supreme Court of the United States

LENIN LUGO, PETITIONER

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
DANIEL J. KANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 petitioner's boat resembled bales of cocaine that the officers had seen during prior interdictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the Federal Reporter but is reprinted at 789 Fed. Appx. 766. The order of the district court (Pet. App. 10-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 2019. The petition for a writ of certiorari was filed on January 6, 2020. 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 Middle District of Florida, petitioner was convicted of conspiring to distribute at least five kilograms of a substance containing cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 21 U.S.C. 960(b)(1)(B)(ii) (2012), 46 U.S.C.

70503(a), 70506(a) (Supp. IV 2016), and 46 U.S.C. 70506(b). Pet. App. 1-2. The district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-9.

1. a. In May 2017, U.S. Coast Guard personnel in a marine-patrol aircraft observed petitioner and two confederates aboard a "go-fast" vessel idling approximately 109 nautical miles north of Colombia. Pet. App. 3, 11-12; Presentence Investigation Report (PSR) ¶ 7. Using the aircraft's on-board video cameras, Coast Guard officers recorded petitioner as he pointed out the aircraft circling overhead. Pet. App. 3, 11; 1/4/18 Tr. 67, 209. The go-fast vessel's crew then began to combine fuel tanks, poured leftover fuel throughout the boat, and sped off. Pet. App. 3, 11; 1/4/18 Tr. 75. As they fled, the crew members jettisoned empty fuel barrels, a tarp, a long-range whip antenna, and as many as 15 large, rectangular, bale-like objects. Pet. App. 3, 11-12; 1/4/18 Tr. 72, 75, 183-184, 212-213. Due to the apparent weight of the bale-like objects, two of the crew members worked together to cast them overboard. 1/4/18 Tr. 77, 216.

After receiving a report from the Coast Guard aircraft, a nearby Coast Guard cutter deployed two small boats: one to search the debris field, and another to interdict the go-fast vessel. PSR ¶ 7; 1/5/18 Tr. 106-107, 169-170. The search boat did not locate any of the jettisoned items. 1/5/18 Tr. 109, 143. The second Coast Guard boat, however, sped past a floating whip antenna as it pursued the go-fast. Pet. App. 12; 1/5/18 Tr. 49, 193.

Following a 30- to 40-minute chase, the second Coast Guard boat successfully intercepted the go-fast vessel. Pet. App. 12; 1/5/18 Tr. 19, 41. Painted blue to "match[]

with the seas," 1/5/18 Tr. 29, the go-fast vessel had three 75-horsepower outboard engines and no navigational lights, *id.* at 20, 28, 52. It also had four mostly full 50-gallon barrels of fuel connected by hoses to the engines. *Id.* at 32-34, 44-45. The Coast Guard officers found the deck of the boat and the crew members covered in fuel, which suggested to the officers that gasoline was being used to conceal trace amounts of contraband. Pet. App. 12; 1/5/18 Tr. 36-37, 120, 196-197; 1/9/18 Tr. 24-25.

The Coast Guard officers did not find any contraband aboard the go-fast vessel. 1/5/18 Tr. 71. The officers also swabbed the hands of the three crew members and four areas of the go-fast vessel for ION scan testing, which is designed to detect trace amounts of illicit materials, but the samples tested negative for cocaine. *Id.* at 38-39, 82, 115-116. The officers did, however, find in one crew member's fanny pack a business card with geo-coordinates for a common drug-trafficking destination point on the island of Hispaniola. Pet. App. 12; 1/8/18 Tr. 31-33.

b. A federal grand jury in the Middle District of Florida charged petitioner and his crewmates with conspiring to distribute five or more kilograms of a substance containing cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 21 U.S.C. 960(b)(1)(B)(ii) (2012), 46 U.S.C. 70503(a), 70506(a) (Supp. IV 2016), and 46 U.S.C. 70506(b), and with possessing with intent to distribute five kilograms or more of a substance containing cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 21 U.S.C. 960(b)(1)(B)(ii) (2012), 46 U.S.C. 70503(a) and 70506(a) (Supp. IV 2016), and

18 U.S.C. 2. Indictment 1-2. The government later dismissed all charges against petitioner's codefendants. See D. Ct. Doc. 179 (Jan. 3, 2018).

Before trial, petitioner moved to preclude any Coast Guard officers from testifying as lay witnesses, based on their training and experience, that the rectangular objects jettisoned from the go-fast vessel appeared to be bales of cocaine. D. Ct. Doc. 166 (Dec. 29, 2017); see 1/2/18 Tr. 39 (deeming pre-trial motions adopted by codefendants). Although the district court initially granted the motion, see 1/2/18 Tr. 54-56, it later reconsidered and deferred its ruling, in light of *United States* v. *Williams*, 865 F.3d 1328 (11th Cir. 2017), cert. denied, 138 S. Ct. 1282 (2018), in which the court of appeals had approved the admission of Coast Guard officers' lay opinion testimony that objects they saw jettisoned from a fleeing boat resembled bales of cocaine they had encountered in previous drug interdictions, see 1/3/18 Tr. 40-42, 46-47.

At trial, the district court permitted several Coast Guard officers who had participated in the interdiction to testify as lay witnesses that, based on their experience with prior interdictions, the rectangular objects jettisoned from the go-fast vessel appeared to be bales of cocaine. For example, Officer Tison Velez, who had observed the events in real time from aboard the Coast Guard aircraft, 1/4/18 Tr. 68-69, testified "[b]ased on [his] experience" that crew members in the video recording—which was admitted into evidence—appeared to be jettisoning bales of cocaine, *id.* at 101-103; see D. Ct. Docs. 204-1, 204-2 (Jan. 11, 2018). Similarly, Officer Bob Baquero, the aircraft camera operator, 1/4/18 Tr. 177, testified "[b]ased on [his] experience" that the rectangular objects appeared to be bales

of cocaine, *id.* at 179; see *id.* at 197 ("[B]ased on my experience and the bales that have been recovered in the past, it's the exact same thing."). During Officer Baquero's testimony, outside the presence of the jury, the district court overruled petitioner's standing objection to this line of questioning, explaining that, under *Williams*, the witnesses were permitted to offer opinions "actually based on their experiences." *Id.* at 187.

A final Coast Guard witness, Chief Petty Officer Guillermo Velazquez, was not present during the interdiction but testified as an expert. See Pet. App. 8 n.2, 86. He told the jury that, based on his experience and review of the video, given the packaging, shape, and apparent weight, the rectangular objects jettisoned from the go-fast vessel were bales of cocaine. 1/9/18 Tr. 29-30. He also testified that the bales were wrapped in a tarp, a technique used by cocaine traffickers to evade positive ION scans, and that smugglers often use gasoline to mask cocaine. Pet. App. 17.

The government additionally introduced the testimony of Ivan Jose Baron-Palacio, an informant who previously had been convicted of trafficking cocaine between Colombia and Hispaniola. 1/8/18 Tr. 150, 158, 163, 177-178. Baron-Palacio testified that while he and petitioner were imprisoned together, petitioner volunteered that he had been caught transporting cocaine to the Dominican Republic. *Id.* at 188-190. According to Baron-Palacio, petitioner stated that, after spotting an airplane, he had successfully jettisoned the cocaine along with a tarp he had used to avoid leaving surface residue. *Id.* at 190-191. Baron-Palacio further testified, based on his review of the video recording and his experience trafficking cocaine, that the rectangular objects

jettisoned from the go-fast vessel were bales of cocaine. *Id.* at 192.

c. After eight days of trial, the jury found petitioner guilty on the conspiracy count but not guilty on the possession count. 1/11/18 Tr. 115. The district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

2. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-9. As relevant here, the court explained that, under Federal Rule of Evidence 701, lay-witness opinion testimony is admissible if it 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 that would qualify the witness as an expert under Federal Rule of Evidence 702." Pet. App. 6 (citing Fed. R. Evid. 701). The court observed that in *Williams* it had applied that rule to approve the admission of Coast Guard officers' testimony that jettisoned objects they saw through an infrared scope resembled cocaine bales they had found in previous interdictions. *Id.* at 7 (citing *Williams*, 865 F.3d at 1341-1342). In particular, the court explained that it had determined that the witnesses' opinions in *Williams* "were not based on any scientific or technical knowledge," such that they would be governed by Rule 702, but rather on the witnesses' "rationally based perceptions of the size and shape of objects." *Ibid.* (citing *Williams*, 865 F.3d at 1341-1342).

The court of appeals found that the same was true in this case, determining that the district court "did not abuse its discretion in admitting lay opinion testimony from the [Coast Guard] personnel opining that objects

jettisoned from the go-fast vessel were cocaine bales." Pet. App. 7. The court explained that Rule 701 does not prohibit lay opinion testimony "based on particularized knowledge gained from [a witness's] own personal experiences." *Ibid.* (quoting *United States* v. *Hill*, 643 F.3d 807, 841 (11th Cir. 2011), cert. denied, 566 U.S. 970 (2012)). The court explained that the disputed testimony was "rationally based on the [Coast Guard] personnel's professional experiences, rather than scientific or technical knowledge." *Id.* at 7-8 (citing *Williams*, 865 F.3d at 1341). And the court observed that each of the testifying officers (apart from Officer Velazquez, who had testified as an expert) had "participated directly in the interdiction of the go-fast vessel and testified as to their opinions of what they actually observed, and were entitled to draw on their professional experiences to guide their opinions." *Id.* at 8 & n.2 (citing *United States* v. *Jeri*, 869 F.3d 1247, 1265 (11th Cir.), cert. denied, 138 S. Ct. 529 (2017); *United States* v. *Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999)).

ARGUMENT

Petitioner renews his contention (Pet. 11-25) 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 recently and repeatedly 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.[1]

1. The court of appeals correctly determined that the district court did not abuse its discretion in admitting, as lay-opinion testimony under Rule 701, the Coast Guard officers' statements about the objects they saw being jettisoned from the go-fast vessel. 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.").

a. Petitioner does 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). He instead argues (Pet. 18-24) 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 advisory committee notes 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

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[1] See, *e.g.*, *Williams* v. *United States*, 138 S. Ct. 1282 (2018) (No. 17-6666); *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*, 574 U.S. 1026 (2014) (No. 13-10760); *Iacaboni* 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).

reasoning which can be mastered only by specialists in the field.'" Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (citation omitted). 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.* (citation omitted). 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; first and second brackets in original).

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 testifies 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). Indeed, the advisory committee notes refer 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 the opinion statements provided 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 disputed testimony here fell squarely within the scope of Rule 701. Pet. App. 6-8. That testimony—statements by Coast Guard officers that the objects jettisoned by petitioner's vessel were similar in appearance to bales of cocaine that the witnesses had seen on other

occasions—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) (citation omitted). 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, the Coast Guard officers compared the size and shape of the objects they saw being thrown from the boat to bales of cocaine they had recovered in prior interdictions, see Pet. App. 12. Their opinions were thus grounded in their "rationally based perceptions of the size and shape of objects," which did not require "scientific or technical knowledge." *Id.* at 7-8 (citing *United States* v. *Williams*, 865 F.3d 1328, 1341-1342 (11th Cir. 2017), cert. denied, 138 S. Ct. 1282 (2018)); see Fed. R. Evid. 701 advisory committee's note (2000 amendments).

Petitioner fails to identify any error in the court of appeals' decision. Petitioner posits (Pet. 21) that the Coast Guard officers' observations must have required expert knowledge on the theory that "[o]nly the officers' experience in drug interdictions permitted them to form their opinions as to the contents of the containers." But the fact that the officers' testimony drew on their experience does not remove their testimony from the ambit of Rule 701. Just as a witness may testify "that a substance appeared to be a narcotic," based on a "foundation of familiarity with the substance," Fed. R. Evid. 701 advisory committee's note (2000 Amendments), so may

an officer testify that an object appeared to be a package of narcotics based on a foundation of familiarity with that packaging.[2]

2. Petitioner's assertion (Pet. 12-17) of "entrenched" disagreement among six courts of appeals does not identify any conflict that warrants this Court's review. The courts of appeals generally agree that determining whether a law enforcement officer's lay testimony was properly admitted under Rule 701(c) requires a fact-specific inquiry as to whether the particular testimony was "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). And petitioner does not point to any court of appeals that has reached a different result from the court below on facts materially similar to the ones here.

a. Petitioner errs in suggesting (Pet. 12-13) that the First and Eleventh Circuits categorically hold "that law enforcement opinion testimony is properly admitted as lay witness opinion under Rule 701, even where the opinion is based on the officer's specialized training and experience." Neither circuit has adopted such a one-size-fits-all rule.

The First Circuit has explicitly rejected the view that "all experience[]-based police officer testimony is per se admissible under Rule 701," explaining that

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[2] In the petition's statement (Pet. 8-10), petitioner observes that, on cross-examination, two Coast Guard officers testified that their opinions were also based on their "training." But petitioner did not raise any objections based on those particular statements in the district court; the court of appeals did not address the statements; and the petition elsewhere asserts (Pet. 21) that it was "precisely the Coast Guard officers' experience" that allowed them "to discern what drug contraband containers looked like." And any passing references to "training" would not amount to plain error. See Fed. R. Crim. P. 52(b).

whether particular testimony should be admitted under Rule 701 or Rule 702 "depend[s] on the content and circumstances." *United States* v. *Page*, 521 F.3d 101, 105 (1st Cir. 2008), as amended, 542 F.3d 257, 257 (1st Cir. 2008), cert. denied, 555 U.S. 1124 (2009); see also, *e.g.*, *United States* v. *Vega*, 813 F.3d 386, 394-395 (1st Cir. 2016) (similar). And as the decision below demonstrates, the Eleventh Circuit has similarly eschewed a bright-line rule, instead focusing on the "central question" of whether the specific testimony is "based on scientific, technical, or other specialized knowledge." Pet. App. 6. In this case, that case-specific inquiry revealed no abuse of discretion in the admission of the officers' testimony under Rule 701. *Id.* at 7-8. But, in the past, the court has applied the same fact-specific inquiry to reverse a district court's decision to admit law enforcement testimony under Rule 701 where the testimony rested on "specialized knowledge" about the "modus operandi of people involved in the drug business." *United States* v. *Dulcio*, 441 F.3d 1269, 1274-1275 (11th Cir. 2006) (per curiam).

b. Petitioner is likewise mistaken in his assertion that several circuits apply a rule barring "any" lay testimony from a law-enforcement officer when the testimony is based on the "officer's professional experience or training." Pet. 13. For example, while petitioner contends (*ibid.*) that the Second Circuit adopted a categorical bar on such testimony in *United States* v. *Garcia*, 413 F.3d 201 (2005), the Circuit has more recently explained that it has not yet "addressed whether a law-enforcement officer's opinion testimony associating physical evidence with drug distribution can be admissible as lay opinion testimony under Federal Rule of Evidence 701." *United States* v. *De Jesus Sierra*,

629 Fed. Appx. 99, 102 (2015) (unpublished), cert. denied, 136 S. Ct. 1835 (2016).

Similarly, while petitioner asserts (Pet. 14) that the Eighth Circuit's decision in *United States* v. *Peoples*, 250 F.3d 630 (2001), provides "[p]erhaps the most succinct guiding standard" for courts on its side of the alleged conflict, *Peoples* did not in fact consider the application of Rule 701(c), as that provision was not in effect at the time of the defendants' trial. See *id.* at 641 n.3. And the Eighth Circuit more recently clarified that Rule 701 does not categorically preclude lay-opinion testimony based on a witness's particularized knowledge gained from prior professional experience. See *United States* v. *Smith*, 591 F.3d 974, 983 (2010) (affirming admission of a forensic interviewer's lay-opinion testimony based on "her experience observing other sexually abused children and her personal perception of [the victim] during the forensic interview").

Nor is it clear that the D.C. Circuit would prohibit all experience-based lay testimony from law enforcement officers. Petitioner cites *United States* v. *Smith*, 640 F.3d 358 (2011), which involved testimony by a law enforcement agent who had monitored phone conversations between the defendant and a co-conspirator concerning heroin distribution. See *id.* at 361. The agent testified as a lay witness about the meaning of certain slang words used in the phone conversations. *Id.* at 364-365. The court of appeals concluded that the interpretive testimony was not admissible under Rule 701 because it was "based on previous experiences with other drug conspiracies," *id.* at 365 (quoting *United States* v. *Wilson*, 605 F.3d 985, 1026 (D.C. Cir.) (per curiam), cert. denied, 562 U.S. 1116, and 562 U.S. 1117 (2010)),

and stated that knowledge "derived from previous professional experience falls squarely 'within the scope of Rule 702,'" *ibid.* (quoting Fed. R. Evid. 701(c) (2000)).

Although the reasoning in *Smith*, which has been repeated by the D.C. Circuit in subsequent opinions, *see*, e.g., *United States* v. *Williams*, 827 F.3d 1134, 1156 (2016) (per curiam), cert. denied, 137 S. Ct. 706 (2017), was framed in broad terms, that court has simultaneously articulated a narrower framing, under which "an individual without personalized knowledge of a specific drug conspiracy may not testify about drug topics *that are beyond the understanding of an average juror*." *Ibid.* (quoting *Wilson*, 605 F.3d at 1026) (emphasis added). That formulation is consistent with the court of appeals' analysis in this case, which focused on whether the officers' testimony was predicated on "rationally based perceptions of the size and shape of objects" as opposed to "scientific or technical knowledge" that might be foreign to an average juror. Pet. App. 7. And petitioner does not identify any decision of the D.C. Circuit rejecting lay-opinion testimony concerning the appearance of objects in relation to other objects a witness had previously encountered.

The Seventh Circuit's decision in *United States* v. *Oriedo*, 498 F.3d 593 (2007), likewise does not demonstrate a conflict warranting this Court's review. *Oriedo* 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.* (citation, ellipsis, and internal quotation marks omitted), and that "[t]he inferences officers draw when observing and responding to situations cannot always be separated from the expertise they bring to evaluate those situations," *ibid.* Accordingly, the Seventh Circuit 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*, 542 F.3d 257, 257 (1st Cir. 2008), cert. denied, 555 U.S. 1124 (2009) (recognizing that the propriety of admitting law officer's lay testimony under Rule 701 "depend[s] on the content and circumstances"); *United States* v. *Hill*, 643 F.3d 807, 841-842 (11th Cir. 2011), cert. denied, 566 U.S. 970 (2012) (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).[3]

c. Petitioner's assertion of a conflict warranting this Court's review (Pet. 15-16) relies heavily on a concurrence and an en banc statement authored by Judge Lipez in the First Circuit. Judge Lipez's primary evidence of a divide, however, is the alleged conflict between the Seventh Circuit's decision in *Oriedo* and the First Circuit's decision in *United States* v. *Ayala-Pizarro*, 407 F.3d 25, cert denied, 546 U.S. 902 (2005), a case that likewise involved the packaging of narcotics. See *United States* v. *Valdivia*, 680 F.3d 33, 56 (1st Cir.) (Lipez, J., concurring) (describing alleged conflict), cert. denied, 568 U.S. 994 (2012); *United States* v. *Moon*, 823 F.3d 102 (1st Cir. 2016) (Lipez, J., Statement Re Denial

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[3] The circumstance-specific approach adopted by the circuits 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).

of En Banc Review) (reiterating views expressed in *Valdivia*). But while *Oriedo* suggested—in a footnote—that the Seventh Circuit disapproves of the First Circuit's approach to Rule 701, 498 F.3d at 603 n.10, the First Circuit's subsequent opinion in *Page* clarified that *Oriedo* "apparently misread" First Circuit precedent as establishing a rigid rule that "experience-based police testimony is per se admissible under Rule 701," a reading that was contrary to the First Circuit's fact-specific approach. *Page*, 542 F.3d at 257.[4] And four years later, the Seventh Circuit likewise expressly recognized that an officer's lay testimony may sometimes be "guided by experience and training." *Christian*, 673 F.3d at 709.

In any event, to the extent that some circuits disagree as to whether particular forms of law-enforcement testimony are admissible under Rule 701, that conflict is not implicated here. Petitioner does not identify any court of appeals decision holding that a law-enforcement officer may not offer lay-opinion testimony regarding whether a particular object appeared to contain narcotics. Indeed, the advisory committee's note for Rule 701 specifically contemplates that witnesses may provide lay opinion testimony "'relat[ing] to the appearance of persons or things, identity, * * * size, [and] weight,'" as well as testimony "that a substance appeared to be a narcotic" based on a "foundation of familiarity with the

[4] Nor are the two decisions inconsistent. While the agent in *Oriedo* opined about packaging practices based on "the wealth of his experience as a narcotics officer" and "made connections for the jury based on that specialized knowledge," 498 F.3d 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.

substance." Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (citation omitted).

Moreover, no court of appeals views experience-based testimony by law enforcement agents to be generally inadmissible; the only potential question is whether it may be admitted as lay testimony under Rule 701 or expert testimony under Rule 702. Any division in the circuits on that issue does not warrant this Court's review because it is rarely outcome determinative. Courts often conclude that an error in admitting testimony under Rule 701 did not prejudice the defendant because the witness in question would have qualified as an expert under Rule 702. See *Smith*, 640 F.3d at 366 (collecting cases); *United States* v. *Jones*, 739 F.3d 364, 370 (7th Cir. 2014). Indeed, in articulating his favored view of Rule 701, petitioner primarily relies on cases in which the court of appeals deemed an error in admitting testimony under that Rule harmless. See Pet. 13-16 (citing *Garcia*, 413 F.3d at 217; *Oriedo*, 498 F.3d at 603; *Smith*, 640 F.3d at 366). And petitioner expressly acknowledges that, in the "mine-run of cases," the "challenged evidentiary rulings amount to harmless errors, at best." Pet. 24.

3. Although the court of appeals did not need to reach the issue below, see Gov't C.A. Br. 37-38, the circumstances of this case would lead to such a harmless-error determination. And because the question presented here would not be outcome determinative, it would be an unsuitable vehicle for review of that question.

Petitioner does not contend that the Coast Guard witnesses' testimony would have been inadmissible had they testified as experts. See Pet. 21-24. Nor does he dispute their qualifications as experts. See Pet. 23 n.6.

Instead, petitioner objects that the district court "fail[ed] to undertake any judicial gatekeeping inquiry into the reliability of the Coast Guard officers' opinion testimony." Pet. 23. But as this Court has explained, the reliability inquiry required under Rule 702 itself "may focus upon personal knowledge or experience." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 150 (1999). And here, the district court expressly found that the Coast Guard officers each had "substantial experience in interdiction" and had "describe[d] the bales that they observed being jettisoned as similar to, if not identical, to bales that they had personally observed and in several instances personally handled in terms of shape and appearance." 1/9/18 Tr. 55; see *id.* at 56 (district court observing that, "with one or two exceptions," "all of [the Coast Guard witnesses' prior] interdictions involved cocaine bales"); see also 1/4/18 Tr. 55-56, 175-176, 201-202, 213; 1/5/18 Tr. 11-12, 202-203. Such findings were sufficient to establish the witnesses' reliability in identifying bales of cocaine by appearance. See, *e.g.*, *United States* v. *Walker*, 657 F.3d 160, 176 (3d Cir. 2011) (finding that officer's "personal experiences interacting with drug traffickers and law enforcement personnel over a period of decades" and "numerous opportunities to investigate" the subject matter of his expert testimony were sufficient to assure reliability for purposes of Rule 702), cert. denied, 565 U.S. 1170 (2012); *United States* v. *Brumley*, 217 F.3d 905, 911-912 (7th Cir. 2000) (finding that law enforcement witness's expert opinions about methamphetamine packaging and distribution were sufficiently reliable because they were "based on [the witness's] extensive investigative experience").

Petitioner also observes in a footnote (Pet. 22 n.5) that, had the Coast Guard witnesses testified as experts, the government would have been required to provide expert disclosures under Federal Rule of Criminal Procedure 16(a)(1)(G). Petitioner does not, however, suggest that he was prejudiced by the absence of such disclosures. Petitioner knew the content of the Coast Guard witnesses' testimony well before trial. See D. Ct. Doc. 136, at 2 (Dec. 22, 2017) (citing a November 11, 2017 filing by the government indicating that the witnesses would "claim that they observed and recorded the defendants jettisoning bales of cocaine from the go-fast vessel"). He had the opportunity to cross-examine the witnesses on the basis and reliability of their opinions. See, *e.g.*, 1/4/18 Tr. 150-151, 159-161, 196-197, 229. And he was able to introduce his own expert witness who, among other things, testified that the objects jettisoned from the go-fast vessel "didn't look like" the cocaine bales depicted in photographs that the defense had introduced into evidence. 1/9/18 Tr. 162. Under the circumstances, any error under Rule 16 was harmless. See, *e.g.*, *United States* v. *White*, 492 F.3d 380, 407 (6th Cir. 2007) (finding that the government's failure to comply with Rule 16(a)(1)(G)'s notice requirements was harmless because defendants failed to suggest any prejudice, were prepared to cross-examine the government witnesses with respect to the relevant testimony, and put on a witness of their own to counter the government witnesses); *United States* v. *Hamaker*, 455 F.3d 1316, 1332 (11th Cir. 2006) (finding that any Rule 16(a)(1)(G) error was harmless because the defendants were aware of the disputed testimony before trial); *Figueroa-Lopez*, 125 F.3d at 1247 ("Figueroa-Lopez has not demon-

strated how or why the verdict would have been different if he had been given notice that Agent Larsen planned to testify about his drug trafficking modus operandi.").

Further, even in the absence of any of the challenged lay testimony from the Coast Guard officers, the result at trial would have been the same. Both Officer Velazquez, who was proffered as an expert, Pet. App. 8 n.2, and Baron-Palacio, the government informant, also testified that the bales in question appeared to be cocaine. *Id.* at 3. Petitioner does not challenge either of these witnesses' testimony before this Court, and the court of appeals listed a wealth of additional evidence—including the recording of the interdiction itself and petitioner's confession to Baron—that strongly supported the conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
DANIEL J. KANE
Attorney

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