
OUT OF BOUNDS: WHY FEDERAL RULE OF EVIDENCE 701
LAY OPINION TESTIMONY NEEDS TO BE RESTRICTED TO
TESTIMONY BASED ON PERSONAL FIRST-HAND
PERCEPTION

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Federal Courts of Appeal have long been divided over whether Federal Rule of Evidence 701 allows the admission of lay witness opinions not based on first-hand perception. This circuit split has recently been deepened by several circuit court cases allowing the admission of evidence based on the “opinions” of non-expert, non-percipient witnesses.

As law enforcement pursues the “War on Drugs,” officers are increasingly allowed to testify under the umbrella of Rule 701 as quasi-expert witnesses regarding how drug dealers operate and how to translate coded conversations. This Note examines how the government has been able to overstep the bounds of Rule 701 in order to secure convictions through the use of non-percipient, non-expert lay opinion testimony from law enforcement agents. In addition, this Note analyzes the existing circuit split over this issue, particularly in cases dealing with law enforcement interpretation of recorded conversations in drug and terrorism cases.

In order to ensure that lay opinion testimony does not usurp the fact-finding function of the jury, this Note ultimately recommends that all courts should follow the approach of the circuits currently holding that lay opinion testimony is inadmissible unless the witness personally participated in or contemporaneously observed the subject of their testimony.

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I. INTRODUCTION

Federal Rule of Evidence (“FRE”) 701 admits opinion testimony by lay witnesses.¹ The U.S. Courts of Appeals are divided over whether lay opinions not based on first-hand perception of the underlying events are admissible under FRE 701. This circuit split has deepened recently. In numerous cases resting on highly circumstantial evidence, the government has secured convictions by using nonpercipient, nonexpert “opinion” from law enforcement agents that rested on nothing more than the same cold, *post hoc* review of the record that the jury itself can and should conduct.

Most courts believe that “[d]espite our country’s ‘war on drugs’ and its accompanying media coverage, it is still a reasonable assumption that jurors are not well versed in the behavior of drug dealers.”² “Since the United States embarked on its ‘war on drugs’ in the 1980s, law enforcement officers have routinely been allowed to testify as expert and nonexpert witnesses as to their opinions on how drug dealers operate and how to translate drug jargon.”³ Prosecutors are currently trying to have it both ways. In the past, for example, they have “asked judges to treat drug jargon testimony as ‘specialized knowledge’ in an effort to attain the imprimatur of expertise for their [law enforcement] witness[es] and to free the witness’s testimony from the constraints of personal perception.”⁴ However, “prosecutors [are also] frequently [taking] advantage of judicial laxity to elicit drug jargon opinion testimony from nonexpert [law enforcement] witnesses.”⁵ We cannot hope to rein in law enforcement witnesses on other types of crimes if we continue to allow them to enjoy “unfettered autonomy” in narcotics and terrorism cases.⁶ “As prosecution efforts shift in response to new political and social pressures, judges may be equally inclined to defer to [law enforcement officers] in prosecutions for other crimes.”⁷

Part II of this Note examines the background and evolution of FRE 701, as well as its three elements. Part III provides an in-depth analysis of the wide circuit split, including which circuits fall into which category and the cases that support the distinctions. Part IV proposes a resolution of the circuit split in favor of those circuits holding that lay opinion testimony is not admissible unless the witness participated or observed the subject of his or her testimony. Part V concludes with a brief summary of the proposed rule and the desired effects of such a rule.

1. FED. R. EVID. 701.
2. *United States v. Foster*, 939 F.2d 445, 451–52 (7th Cir. 1991).
3. Joëlle Anne Moreno, *Strategies for Challenging Police Drug Jargon Testimony*, 20 CRIM. JUST. 28, 28 (2006).
4. *Id.* at 35; *see United States v. Gibbs*, 190 F.3d 188, 211 (3d Cir. 1999); *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997).
5. Moreno, *supra* note 3, at 34.
6. *Id.* at 37.
7. *Id.* at 29.

II. BACKGROUND

A. *Pre-Federal Rule of Evidence 701*

1. *Lay Witnesses at Common Law*

At common law, lay witnesses could testify to facts, but not opinions, inferences, or conclusions.⁸ The justification for the rule was that “unless the information [was] too complex, arcane or specialized for a jury of laypeople to understand without the help of an expert, it [was] for the jury, not the witness, to interpret the evidence and draw conclusions as to who did what, with what motivation, and with what result.”⁹ There was an unfounded assumption that “facts and opinions are easily distinguishable and that jurors are as capable of forming opinions from the facts as the witness.”¹⁰

When this rule against opinions was at its strongest, however, a witness could still testify in the form of an opinion in certain circumstances. The courts recognized an exception known as the “shorthand rendition” rule or the “collective facts” exception.¹¹ This exception permitted testimony “only to the extent that ‘shorthand expressions’ by the witness were deemed ‘necessary’ because articulation of more primary components was impossible or highly impracticable.”¹² For instance, the exception “permitted opinions concerning the identity of persons, things, and handwriting; size, color, and weight of objects; times and distance; mental state or condition of another; insanity and intoxication; affection of one person for another; physical condition of another, such as health or sickness; and values of property.”¹³

2. *Criticisms of the Common Law Rule*

The common law rule was widely accepted, but also sharply attacked for several reasons. Judge Learned Hand stated that,

“[T]he exclusion of opinion evidence has been carried beyond reason in this country, and . . . it would be a large advance if courts were to admit it with freedom. . . . It is a good rule as nearly as one

8. 1 CHARLES TILFORD MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 11, at 52 (Kenneth S. Broun ed., 6th ed. 2006); *see also* 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1401, at 591–605 (4th ed. 2005) (stating the common law opinion rule and discussing its criticisms); 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1919–22, at 14–29 (1978) (criticizing the opinion rule and advocating for its abandonment).

9. CLIFFORD S. FISHMAN & ANNE T. MCDENNA, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 39:1 (7th ed. 1992).

10. LEO H. WHINERY ET AL., THE JUDGE’S EVIDENCE BENCH BOOK § 701:1 (2004).

11. *See* United States v. Thompson, 708 F.2d 1294, 1298 (8th Cir. 1983) (concluding an opinion that accused was involved in the conspiracy was admissible as a “shorthand rendition”); United States v. Freeman, 514 F.2d 1184, 1191 (10th Cir. 1975) (finding an opinion admissible as “a shorthand rendition of the witness’s knowledge of the total situation and the collective facts”).

12. PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 365 (3d ed. 2006).

13. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 22.03, at 301 (2d ed. 2006); *see also* Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417 (1952).

can, to reproduce the scene as it was, and so to correct the personal equations of the witnesses. But one must be careful not to miss the forest for the trees, as generally happens, unless much latitude is allowed.”¹⁴

There were four main criticisms to the common law rule. First, the application of the rule turned on an illusory fact-opinion categorization.¹⁵ The United States Supreme Court has noted the “arbitrary distinction between ‘fact’ and ‘opinion’” and the “inevitably arbitrary line between the various shades of fact/opinion.”¹⁶ It went on to say that,

“All statements in language are statements of opinion, i.e., statements of mental processes or perceptions. So-called ‘statements of fact’ are only more specific statements of opinion. What the judge means to say, when he asks the witness to state the facts, is: ‘The nature of this case requires that you be more specific, if you can, in your description of what you saw.’”¹⁷

To illustrate, “a witness who testifies that a defendant had ‘slurred speech’ and ‘staggered’ when he walked is using inferences as much as the witness who testifies that the defendant was ‘intoxicated’; the difference is one of degree.”¹⁸

Second, witnesses frequently use inferences while testifying, because it is the natural way, and sometimes the only way, to tell a story.¹⁹ Strict application of the opinion rule would weaken the presentation of testimony, “making it impossible for the witness to convey to the jury what he has observed.”²⁰

Third, the common law rule was often unnecessary, because the “system has built in mechanisms that mitigate [any] undesirable effects of opinion testimony.”²¹ Opposing counsel can, for instance, expose the weaknesses in opinion testimony through cross-examination.²²

Fourth, the common law rule produced unnecessary litigation, “invi[ting] numberless trivial appeals and . . . many indefensible reversals.”²³ For these reasons, Congress intervened to enact FRE 701 to apply to lay witness testimony. It was uncontroversial, underwent no changes during the rulemaking or legislative phases, and was enacted in the form first proposed by the Advisory Committee.²⁴

14. *Central R.R. Co. v. Monahan*, 11 F.2d 212, 214 (2d Cir. 1926).

15. See FED. R. EVID. 701 advisory committee’s note (“The practical impossibility of determining by rule what is a ‘fact,’ demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also.”).

16. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167, 169 (1988).

17. *Id.* at 168 (quoting *W. KING & D. PILLAGER, EVIDENCE IN ILLINOIS* 4 (1942)).

18. GIANNELLI, *supra* note 13, at § 23.03, at 301.

19. *Id.*

20. *United States v. Schneiderman*, 106 F. Supp. 892, 903 (S.D. Cal. 1952).

21. GIANNELLI, *supra* note 13, at § 22.03.

22. *Id.*

23. MODEL CODE OF EVIDENCE 34 (1942).

24. See Rule 7-01, 46 F.R.D. 161, 313 (Preliminary Draft 1969); Rule 701, 51 F.R.D. 315 (Revised Draft 1971); Rule 701, 56 F.R.D. 183, 281 (Revised Definitive Draft 1973). FED. R. EVID. 701 attracted no attention during congressional hearings.

B. Elements of Federal Rule of Evidence 701

FRE 701 concerns opinion testimony by lay witnesses. It states that, 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 702.²⁵

In effect, Rule 701 prefers that lay witnesses "testify in a specific and particular vein . . . and not in generalities."²⁶ There are several reasons for this preference. First, it "provide[s] details that help the factfinder make the necessary evaluative decisions and help[s] to keep that function from being taken over by witnesses coached by counsel."²⁷ Second, "[f]or evaluative generalities that fall somewhere between everyday opinion and highly technical appraisals," we prefer to begin with more specific testimony and "to let witnesses go further toward the general if they have special knowledge and understanding."²⁸ Third, there is a "concern that generalities mask guesswork and lack of knowledge," which can lead to lay testimony "disguis[ing] a lack of adequate factual predicate."²⁹ This would effectively do away with the personal knowledge requirement of Rule 701.

The admissibility of a lay witness' opinion is a question for the court under Rule 104(a).³⁰ The trial court has broad discretion to determine whether a lay witness is qualified to testify on a matter by opinion testimony.³¹ This decision is reversible only for an abuse of discretion.³² Generally, a lay witness may testify in the form of an opinion,

(1) when an expression of the witness' personal knowledge could be conveyed in no other form, (2) when a witness formed an accurate total impression, although unable to account for all the details upon which it was based, or (3) most importantly, when an accounting of the details alone would not accurately convey the total impression received by the witness.³³

25. FED. R. EVID. 701.

26. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 7:2 (3d ed. 2007).

27. *Id.*; see also WHINERY ET AL., *supra* note 10, at § 701:1 ("[L]ay witness testimony in the form of opinion or inferences may usurp the function of the trier of fact in making the required evaluative decisions.").

28. MUELLER & KIRKPATRICK, *supra* note 26, at § 7:2.

29. *Id.*; see also WHINERY ET AL., *supra* note 10, at § 701:1 ("[S]uch testimony may also obscure a lack of adequate factual data upon which the opinion or inference is based and encourage speculation concerning matters not observed by the witness.").

30. FED. R. EVID. 104(a).

31. See, e.g., *United States v. Borrelli*, 621 F.2d 1092, 1095 (10th Cir. 1980).

32. See *id.*

33. WHINERY ET AL., *supra* note 10, at § 701:1 (citations omitted) (*citing* *Fireman's Fund Ins. Companies v. Alaskan Pride Partnership*, 106 F.3d 1465, 1468 (9th Cir. 1997) ("Lay opinion is appropriate when a witness cannot explain through factual testimony the combination of circumstances that led him to formulate that opinion."); *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982) (stating

The topics that lay witnesses have been permitted to testify about vary widely. They include the “prototypical examples . . . relating to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.”³⁴ Some examples of topics also included are the value of property,³⁵ the financial condition of an entity,³⁶ the nature of a substance,³⁷ the meaning of a statement,³⁸ another person’s age,³⁹ a person’s insanity,⁴⁰ identification of persons in surveillance tapes,⁴¹ the description of a person’s movements,⁴² and intoxication.⁴³

that lay opinion may be admitted when it is “difficult to reproduce the data observed by the witness, or the facts are difficult of explanation, or complex, or are of a combination of circumstances which cannot be adequately described and presented with the force and clearness as they appeared to the witness.”); *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (“The primary purpose of Rule 701 is to allow nonexpert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury.”); 3 JACK B. WEINSTEIN ET AL., *WEINSTEIN’S EVIDENCE* ¶ 701.01 (1996) (“Even if a witness were able to precisely observe and describe what he saw, no one would want him to do so. To describe a man walking down the street would require a detailed description of all his parts moving at angles and speeds relative to each other that would provide an interesting joint exercise for choreographers, orthopedists and others but that would hardly help a juror or judge visualize the event. The abstraction: ‘He was walking’ or ‘He was walking slowly’, is enough in most cases. Concrete details, to the extent that they can be elicited, can come as a result of detailed questioning. . . . How much in the way of detail, how much in the way of unconscious or conscious inferences, the witness will be permitted to communicate is the practical problem for the trial court.”).

34. FED. R. EVID. 701 advisory committee’s note (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3d Cir. 1995)).

35. See *Christopher Phelps & Assocs., LLC v. Galloway*, 477 F.3d 128, 138 (4th Cir. 2007).

36. See *Argo Air Assocs., Inc. v. Houston Cas. Co.*, 128 F.3d 1452, 1456 (11th Cir. 1997).

37. See FED. R. EVID. 701 advisory committee’s note (“[C]ourts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established.”); *United States v. Espino*, 317 F.3d 788, 798 (8th Cir. 2003) (“[T]he jury heard specific testimony from witnesses, who all had substantial experience in the use and trade of illegal drugs, regarding the weight of the methamphetamine [defendant] sold.”); *United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) (“Although a drug user may not qualify as an expert, he or she may still be competent, based on past experience and personal knowledge and observation, to express an opinion as a lay witness that a particular substance perceived was cocaine or some other drug.”).

38. See *United States v. Freeman*, 498 F.3d 893, 902 (9th Cir. 2007).

39. See *United States v. Yazzie*, 976 F.2d 1252, 1255 (9th Cir. 1992).

40. See *United States v. Anthony*, 944 F.2d 780, 782–83 (10th Cir. 1991) (“Before a non-expert witness is competent to testify to the sanity or insanity of another person, he must show an acquaintance of such intimacy and duration as to clearly indicate that his testimony will be of value in determining the issue’ [A] lay witness should be required to testify regarding a person’s unusual, abnormal or bizarre conduct before being permitted to express an opinion as to that person’s insanity.”).

41. See *United States v. Pierce*, 136 F.3d 770, 774 (11th Cir. 1998) (“[L]ay opinion identification testimony may be helpful to the jury where, as here, ‘there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury’”).

42. See *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997).

43. See *Singletary v. Sec’y of Health, Educ. & Welfare*, 623 F.2d 217, 219 (2d Cir. 1980) (“The testimony of lay witnesses has always been admissible with regard to drunkenness.”).

1. “Rationally Based on the Witness’s Perception”

The Advisory Committee notes explain that “[l]imitation (a) is the familiar requirement of first-hand knowledge or observation.”⁴⁴ Black’s Law Dictionary defines “firsthand knowledge” by reference to “personal knowledge,” defined in turn as “[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.”⁴⁵ The meaning of this limitation is the core of the dispute causing the circuit split that is the subject of this Note.

Rule 701 incorporates the personal knowledge standard of FRE 602.⁴⁶ “Personal knowledge” is comprised of four elements: “(1) sensory perception, (2) comprehension of what was perceived, (3) present recollection, and (4) ability to testify based on what was perceived.”⁴⁷ The entire process begins with perception through the senses of the witness.⁴⁸ Opinion testimony by lay witnesses must be “predicated upon concrete facts within their own observation and recollection—that is, facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts.”⁴⁹

The lay opinion needs to be rationally based on the perception and the “firsthand knowledge of the factual predicates that form the basis for the opinion.”⁵⁰

[T]he idea is that the witness must know enough from firsthand observation about the underlying events or acts to support the inference or opinion that is to be given, and embedded in this standard is a notion that a reasonable person who knows what the witness knows might reach the conclusion he has reached.⁵¹

A commentator on Rule 701(a) has stated that:

The standard of rational perception is not rigorous. It does not require the proponent to show, for example, a basis in knowledge of experience that would support a conclusion to a scientific certainty.

44. FED. R. EVID. 701 advisory committee’s note.

45. BLACK’S LAW DICTIONARY 17c (9th ed. 2009).

46. See FED. R. EVID. 602; *United States v. Dotson*, 799 F.2d 189, 192 n.2 (5th Cir. 1986); see also MUELLER & KIRKPATRICK, *supra* note 26, at § 7.3.

47. WRIGHT & GOLD, 29 FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6254 (1997).

48. See C. Rauch Wise, *It Means What It Needs to Mean: Combating Drug Jargon Testimony*, CHAMPION, Dec. 2011, at 28, 29. “If the rule were otherwise, a case agent could interview the witness, listen to the tapes, and then testify that based upon the telephone conversation and the facts of the case, the defendant was involved in a conspiracy.” *Id.* See, e.g., *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (“[P]ost-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.”); *United States v. Grinage*, 390 F.3d 746, 749 (2d Cir. 2004) (holding Rule 701 not intended to permit witnesses to summarize other evidence).

49. *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982) (quoting *Randolph v. Collectra-tratic, Inc.*, 590 F.2d 844, 847–48 (10th Cir. 1979)).

50. *United States v. Hirst*, 544 F.3d 221, 225 (3d Cir. 2008) (quoting *Gov’t of V.I. v. Knight*, 989 F.2d 619, 629 (3d Cir. 1993) (citing FED. R. EVID. 701(a) advisory committee’s note)); see also *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002) (“[A] lay opinion must be rationally based on the perception of the witness. This requirement is the familiar requirement of first-hand knowledge or observation.”); cf. FED. R. EVID. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

51. MUELLER & KIRKPATRICK, *supra* note 26, at § 7.3.

It does not even require that the witness be personally sure of his conclusions, or that he have knowledge of every fact that would be needed in order to make the inference or conclusion compelling. Like juries, witnesses too may employ inductive logic, which by its nature involves drawing on experience and common sense to reach conclusions that the known underlying facts do not categorically demonstrate.⁵²

2. *“Helpful to Clearly Understanding the Witness’s Testimony or to Determining a Fact in Issue”*

Limitation (b) requires testimony to be helpful in resolving issues. If “attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.”⁵³ The relevant determination is one of “helpfulness,” not one of “necessity.”⁵⁴ The Advisory notes that, “[N]ecessity as a standard for permitting opinions and conclusions have proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration.”⁵⁵ Most cases concerning this limitation center around the witness not being permitted to testify to things the jury can view or decide for themselves.

Factors to be considered in determining helpfulness are the need for testimony, the extent and reliability of the underlying facts upon which the opinion is based, the ability of the witness to convey information in the form of specific facts, the centrality of the witness’ testimony in the resolution the issue in the case and the ability of the jurors to form their own opinions or inferences from the underlying facts.⁵⁶

The more articulate the witness, the less need for an opinion.⁵⁷ The more crucial the issue, the more important it is for the witness to supply, if possible, the underlying facts.

[T]he relationship of the opinion to the issues in the case is important to determine helpfulness. The closer the subject of the opinion gets to critical issues the likelier the judge is to require the witness to be more concrete . . . because the jury is not sufficiently helped in resolving disputes by testimony which merely tells it what result to reach.⁵⁸

52. *Id.*

53. FED. R. EVID. 701 advisory committee’s note.

54. *See id.*

55. *See id.*

56. WHINERY ET AL., *supra* note 10, at § 701:4.

57. *See Gov’t of Virgin Islands v. Knight*, 989 F.2d 619, 630 (3d Cir. 1993) (“[A]n eye witness’ testimony that Knight fired the gun accidentally would be helpful to the jury. The eyewitness described the circumstances that led to his opinion. It is difficult, however, to articulate all of the factors that lead one to conclude a person did not intend to fire a gun. Therefore, the witness’ opinion that the gunshot was accidental would have permitted him to relate the facts with greater clarity, and hence would have aided the jury.”).

58. *United States v. Allen*, 10 F.3d 405, 414 (7th Cir. 1993) (citation omitted).

Federal courts generally agree that a nonexpert should be permitted to give opinion testimony “where the facts could not otherwise be adequately presented or described to the jury in such a way as to enable the jury to form an opinion or reach an intelligent conclusion.”⁵⁹ Modern courts often admit opinion testimony when it is significantly based on personal knowledge and subject to cross-examination.⁶⁰ These opinions are helpful to the jury because they allow the witness to testify the events and circumstances more clearly.

Cases decided under Rule 701 cover a wide range of subjects. These include a person’s insanity,⁶¹ the identification of persons in surveillance videotapes,⁶² the description of a person’s movements as “suspicious,”⁶³ the identity of drugs,⁶⁴ and intoxication.⁶⁵

3. “Not Based on Scientific, Technical, or Other Specialized Knowledge Within the Scope of Rule 702”

The third limitation was added to the Rule in 2000 “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.”⁶⁶ Essentially, over time, the distinction between lay and expert tes-

59. *Lauria v. National Railroad Passenger Corp.*, 145 F.3d 593, 600 (3d Cir. 1998) (quoting *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982)).

60. *Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 339, 403 (3d Cir. 1980).

61. *See United States v. Anthony*, 944 F.2d 780, 782–83 (10th Cir. 1991) (“[B]efore a non-expert witness is competent to testify to the sanity or insanity of another person, he must show an acquaintance of such intimacy and duration as to clearly indicate that his testimony will be of value in determining the issue. . . . [A] lay witness should be required to testify regarding a person’s unusual, abnormal or bizarre conduct before being permitted to express an opinion as to that person’s insanity.”).

62. *See United States v. Zepeda-Lopez*, 478 F.3d 1213, 1222 (10th Cir. 2007) (admitting officer’s testimony identifying the defendant in a surveillance video because officer’s testimony was helpful in determining if the defendant appeared on the video since he had the opportunity to view the video many times while the jury did not have that opportunity); *United States v. Pierce*, 136 F.3d 770, 774 (11th Cir. 1998) (“[L]ay opinion identification testimony may be helpful to the jury where, as here, ‘there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.’”); *United States v. Brannon*, 616 F.2d 413, 417 (9th Cir. 1980) (allowing bank tellers and friends of defendant all allowed to testify that bank robber in bank surveillance photo was the defendant); *United States v. Borrelli*, 621 F.2d 1092, 1094 (10th Cir. 1980) (holding that where defendant had changed appearance after crime so identification would be difficult at trial, stepfather of defendant who had lived with him for five years allowed to testify bank surveillance photos resembled defendant). *But see generally* *United States v. Monsour*, 893 F.2d 126 (6th Cir. 1990).

63. *See United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997).

64. *See United States v. Espino*, 317 F.3d 788, 798 (8th Cir. 2003) (“[T]he jury heard specific testimony from witnesses, who all had substantial experience in the use and trade of illegal drugs, regarding the weight of the methamphetamine Espino sold.”); *United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) (“Although a drug user may not qualify as an expert, he or she may still be competent, based on past experience and personal knowledge and observation, to express an opinion as a lay witness that a particular substance perceived was cocaine or some other drug.”); *United States v. Honneus*, 508 F.2d 566, 576 (1st Cir. 1974) (holding that the witness had independent knowledge and could testify that material “appeared similar to marijuana”).

65. *See United States v. Horn*, 185 F. Supp. 2d 530, 560 (D. Md. 2002) (“[T]here is near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible.”); *Singletary v. Secretary of Health*, 623 F.2d 217, 219 (2d Cir. 1980) (“[T]he testimony of lay witnesses has always been admissible with regard to drunkenness.”).

66. FED. R. EVID. 701 advisory committee’s note.

timony had blurred:⁶⁷ sometimes lay witnesses gave testimony that resembled that of experts, while sometimes experts looked more like lay witnesses because of their lack of formal training in a recognized discipline. The overlap of the categories converged because “there is less pressure on lay witnesses to stay absolutely within the factual or concrete in testifying (more willingness to tolerate some general or conclusory testimony), and . . . witnesses may qualify as experts by virtue of experience, so most people are experts in something.”⁶⁸

There are inherent risks in the blurring of the two categories: generous application of the rules on lay testimony may let parties escape the obligation to give pretrial notice and establish important qualifying fact, while generous application of the expert testimony rules may let witnesses with little or no understanding rely on secondhand information and venture opinions in which there is little reason for confidence.⁶⁹

The amendment also “ensures that a party will not evade the expert witness disclosure requirements set forth in Federal Rule of Civil Procedure 26 and Federal Rule of Criminal Procedure 16 by simply calling an expert witness in the guise of a layperson.”⁷⁰ “[T]here is no good reason to allow what is essentially surprise expert testimony,” thus, “the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process.”⁷¹ The addition of section (c) to Rule 701 brings home the lesson of the *Kumho Tire*⁷² decision; all testimony requiring “expertise” is subject to the *Daubert* standard and the implementing standards in Rule 702 that were adopted in response to *Daubert*.⁷³

The addition of this requirement was not intended to affect the prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 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, distance, and an endless number of items that cannot be described factually in words apart from inferences.⁷⁴ As an illustration, the Advisory Committee uses the example of courts being able to permit “the owner or officer of a business to testify to the

67. See ROTHSTEIN, *supra* note 12, at 369 (“[U]nder the rule as constituted before subdivision (c) was added in Dec. 2000, the distinction between whether a witness was a lay witness (Rule 701) or an expert witness (Rule 702) had lost some of its importance since both Rules 701 and 702 allow opinion.”); Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551, 568 (2012) (“The line between lay and expert opinion has never been clearly drawn. Traditionally, there has always been an area of overlap between the two.”).

68. MUELLER & KIRKPATRICK, *supra* note 26, at § 7:6.

69. *Id.*

70. FED. R. EVID. 701 advisory committee’s note.

71. Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996).

72. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

73. *Id.* at 138.

74. FED. R. EVID. 701. advisory committee’s notes (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3d Cir. 1995)).

value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert.”⁷⁵ This type of lay opinion testimony is permitted “because of the particularized knowledge that the witness has by virtue of his or her position in the business,” “not because of experience, training or specialized knowledge [as an] expert.”⁷⁶ Courts may, for instance, “permit[] lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established.”⁷⁷ The witness, however, would have to qualify as an expert under Rule 702 in order to describe how “a narcotic was manufactured” or the “intricate workings of a narcotic distribution network.”⁷⁸

Rule 701 distinguishes between expert and lay testimony, and not between expert and lay witnesses.⁷⁹ Thus, the same witness can offer both lay and expert testimony in a single case.⁸⁰ “Any part of a witness’ testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.”⁸¹ The 2000 amendment to Rule 701 sought to incorporate a distinction set forth by the Supreme Court of Tennessee in *State v. Brown*,⁸² 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.”⁸³ An illustration the *State v. Brown* court used to show this distinction was “that a lay witness with experience could testify that a substance appeared to be blood, but [that] a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma.”⁸⁴ The important difference between lay opinion and expert testimony has been described in this way: “the lay witness is using his opinion as a composite expression of his observations otherwise difficult to state, whereas the expert is expressing his scientific knowledge through his opinions.”⁸⁵

75. *Id.*

76. *Id.*

77. *Id.*; see *United States v. Westbrook*, 896 F.2d 330, 336 (8th Cir. 1990) (holding two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines).

78. FED. R. EVID. 701 advisory committee’s notes (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997)).

79. See FED. R. EVID. 701.

80. FED. R. EVID. 701 advisory committee’s notes, citing *Figueroa-Lopez*, 125 F.3d at 1246 (holding that law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices).

81. FED. R. EVID. 701 advisory committee’s notes.

82. 836 S.W.2d 530 (Tenn. 1992).

83. *Id.* at 549. See FED. R. EVID. 701 advisory committee’s notes.

84. *Brown*, 836 S.W.2d at 549. See FED. R. EVID. 701 advisory committee’s notes.

85. Ladd, *supra* note 13, at 419.

The rules governing expert opinion and lay opinion testimony differ in numerous respects.⁸⁶ First, a lay witness is qualified to testify to any facts of which he or she has first-hand knowledge.⁸⁷ Before a witness may testify as an expert, however, he or she must testify to his or her credentials and show the reliability of the principles underlying the testimony and its contents.⁸⁸ Second, lay witnesses must rely on personal everyday life experiences and can testify only to facts with a direct connection to the events at issue in the trial. Expert witnesses, however, may rely on information not directly related to the specific case and not admissible on its own, and can testify to information that does not have a direct connection to the events at issue in the trial.⁸⁹ Third, an expert witness may be allowed to express his or her opinions on an ultimate issue in cases where a lay witness could not do the same.⁹⁰ Fourth, prior to an expert testifying, the opposing side must be notified of the expert's identity, the subject matter of the testimony, and a summary of it.⁹¹ There is, however, no similar requirement of lay witnesses.⁹²

Since 2000, the courts have frequently been called upon to draw the line between lay opinion and expert testimony. The importance of this line drawing is particularly pronounced when prosecutors have offered lay opinion testimony by experienced police officers.⁹³ The line is critical because, in many cases, lay and expert witnesses can testify on the same topic.⁹⁴ The issue seems to be “not what topic the witness's opinion relates to; rather, the question is how the witness reaches the opinion on that topic.”⁹⁵

86. FISHMAN & MCDENNA, *supra* note 9, at § 39:9.

87. See FED. R. EVID. 701.

88. See FED. R. EVID. 702.

89. See FED. R. EVID. 703.

90. See FED. R. EVID. 704.

91. See FED. R. CIV. P. 26(a)(2), (b); FED. R. CRIM. P. 16(a)(1)(G).

92. See FED. R. CRIM. P. 16(a)(2) (stating that the government is not required to disclose); FED. R. CRIM. P. 16(b)(2) (stating that the defense is not required to disclose). In criminal cases in most jurisdictions, a party generally may keep the identity of a witness secret until the very moment when the attorney calls the witness. See Liza I. Karsai, *You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience*, 79 TENN. L. REV. 29, 34 (2011). In civil cases, the parties are required to exchange witness lists, and each party gets to depose all witnesses and potential witnesses. FED. R. CIV. P. 26(a)(3), (b)(4).

93. See *United States v. Jones*, 218 Fed. Appx. 916, 917–18 (11th Cir. 2007) (holding that, under Rule 701, a police officer could testify that the quantity of drugs seized in the instant case indicated that it was intended for distribution); *United States v. Oriedo*, 498 F.3d 593, 603 (7th Cir. 2007) (holding trial court committed harmless error by admitting testimony of an officer regarding how baggies are used in distributing cocaine as lay opinion testimony instead of expert testimony. The court reasoned that the witness' testimony fit with the circuit's precedent defining expert testimony by officers regarding their experience with narcotics trafficking practices, and therefore should have been subject to expert testimony disclosure requirements); *United States v. Maher*, 454 F.3d 13, 23–24 (1st Cir. 2006) (noting that under Rule 701, a police officer was permitted to testify that the post-it note found in the defendant's van was a list of customers' orders for drugs and was a “[d]rug distributors' way of being organized”).

94. See Edward J. Imwinkelried, *Expert Witness: Lay and Expert Opinion*, 31 NAT'L L.J. 13, 13 (2008).

95. *Id.*

III. ANALYSIS

The Courts of Appeals are divided into three groups over whether lay opinions not based on first-hand perception of the underlying events are admissible under FRE 701. The Fifth, Tenth, and Eleventh Circuits hold that “lay opinion testimony is admissible even if ‘based solely on information gathered during an after-the-fact investigation.’”⁹⁶ The Seventh and Ninth Circuits hold that lay opinion testimony is admissible in certain cases when based on a mixture of first- and second-hand knowledge.⁹⁷ The First, Second, Third, Fourth, and Eighth Circuits hold “that lay opinion testimony is not admissible unless the witness personally participated in or contemporaneously observed the subject of their testimony.”⁹⁸ Finally, the Sixth and D.C. Circuits have not yet decided this issue, but there is speculation that they would join with the third group.⁹⁹ This Note will largely focus on the decisions in these Circuits that deal with law enforcement’s interpretation of coded jargon and recorded conversations in drug and terrorism cases, as well as their attempted proffers of both overview and dual testimony.

A. *Lay Opinion Testimony is Always Admissible*

Some circuits hold that lay opinion testimony is admissible even if based solely on information gathered during an after-the-fact investigation. These courts have “permitted lay opinion testimony [when there] is no indication that the [person testifying] had perceived the relevant events first-hand.”¹⁰⁰ “Rule 701’s ‘first-hand’ experience requirement is met so long as the [person testifying] has taken part in an investigation, even if the [person] has no first-hand knowledge of the particular events in question.”¹⁰¹ The Fifth, Tenth, and Eleventh Circuits fall into this category.¹⁰²

These circuits hold that a witness may offer a lay opinion about any materials he or she examined based upon the firsthand knowledge he or she gained as a result of that examination.¹⁰³ Thus, this sort of testimony may be admissible even if the witness did not participate in, or at least contemporaneously observe, the communications to which those materi-

96. Nicholas J. Wagoner, *Lost in Translation: When a Lay Witness Speaks Without First-Hand Knowledge, Can a Jury Listen?*, CIRCUIT SPLITS (May 11, 2012, 5:20 AM), <http://www.circuitsplits.com/federal-bureau-of-investigation/>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See *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. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001); *United States v. Garcia*, 994 F.2d 1499, 1507 (10th Cir. 1993).

103. Wagoner, *supra* note 96.

als pertain. These courts hold that the witness does possess firsthand knowledge of the materials about which he can testify and any arguments against this testimony should be limited to only weight and relevance. Supporters of this view believe that precluding testimony like this “would invite nonsensical results.”¹⁰⁴ They see “no practical reason for distinguishing between . . . an agent in a surveillance van who listens to a wiretap in real time and an agent in that same van who listens on a tape delay.”¹⁰⁵

1. *Terrorism Cases*

The Fifth and Eleventh Circuits permitted the use of law enforcement lay opinion testimony in recent terrorism-related cases.¹⁰⁶ They held that the testimony of Federal Bureau of Investigation (“FBI”) agents were admissible under Rule 701; specifically, that it was rationally based on their perceptions, thereby satisfying Rule 701(a).

In *United States v. Jayyousi*, the Eleventh Circuit permitted an FBI agent to provide lay testimony concerning code words used in international terrorism activities.¹⁰⁷ At trial, the agent provided lay testimony about the meaning of code words in intercepted telephone calls among the defendants and about the context of the recorded communications and other documents.¹⁰⁸ This testimony was based on the agent’s involvement in more than twenty terrorism-related cases, his five-year participation in the current investigation, and his review of numerous records pertaining to the case.¹⁰⁹ The Eleventh Circuit concluded the agent’s testimony was admissible under Rule 701.¹¹⁰ It was “rationally based on his perception” under 701(a) due to his five-year involvement in the investigation, his review of “thousands of wiretap summaries plus hundreds of verbatim transcripts, as well as faxes, publications, and speeches,” and his experience listening to numerous “intercepted calls in English and Arabic.”¹¹¹ Thus, the court rejected the defense’s claim that this lay tes-

104. Brief of Petitioner at 11, *Iacoboni v. United States*, 133 S.Ct. 2389 (2013) (Nos. 12-1009 & 12-8840).

105. *Id.*

106. See *El-Mezain*, 664 F.3d at 515; *Jayyousi*, 657 F.3d at 1104.

107. *Jayyousi*, 657 F.3d at 1104.

108. *Id.* at 1095 (explaining the meaning of the following words: “‘football’ and ‘soccer’ for jihad; ‘tourism’ for jihad; ‘tourist’ for mujahideen; ‘sneakers’ for support; ‘going on the picnic’ for travel to jihad; ‘married’ for martyrdom; ‘trade’ for jihad; ‘open up a market’ for opening a group in support of jihad; open up a ‘branch’ for starting a jihad support group; ‘the first area’ for Afghanistan; ‘school over there to teach football’ for a place to train in jihad; ‘students’ for Taliban; ‘iron’ for weapon; ‘joint venture’ for a group of mujahideen; ‘full sponsorship’ for income for room and board (at training camp); and ‘open the door’ for opportunity to go to jihad”).

109. *Id.* (records included “telephone intercepts, the summaries for the intercepts, financial records, interview summations, faxes, and other documents pertaining to the case”).

110. *Id.* at 1104.

111. *Id.* at 1102. The court also held it was helpful for determining the facts in issue, under 701(b), because the jury was unlikely to understand some of the international transactions and methods employed. “[The Agent’s] knowledge of the investigation enabled him to draw inferences about the meanings of code words that the jury could not have readily drawn. His testimony helped the jury understand better the defendants’ conversations that related to their support of international terrorism

timony was inadmissible because the agent “did not personally observe or participate in the defendants’ conversations and based his testimony largely on documents admitted into evidence.”¹¹² The court stated that,

We have never held that a lay witness must be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation. We have allowed a lay witness to base his opinion testimony on his examination of documents even when the witness was not involved in the activity about which he testified.¹¹³

Similarly, in *United States v. El-Mezain*, the Fifth Circuit permitted several FBI agents to testify to the meaning of terms used in conversations and documents and the relationships between the defendants they were investigating.¹¹⁴ The defendants were “convicted of conspiracy and substantive offenses for providing material aid and support to a designated terrorist organization.”¹¹⁵ The court found that the testimony was admissible as long as “the agents’ opinions were limited to their personal perceptions from their investigation of this case.”¹¹⁶ The court allowed the testimony “even if some specialized knowledge on the part of the agents was required, [as long as] it was based on first-hand observations in a specific investigation.”¹¹⁷ Here, simply because the agents were “extensively involved in the investigation,” the court concluded that “their testimony was either descriptive or based on their participation in, and understanding of, the events in *this* case.”¹¹⁸

2. *Drug Cases*

All three circuits (the Fifth, Tenth, and Eleventh) permit law enforcement lay opinion testimony in drug offense cases.¹¹⁹ The testimony has concerned the use and meaning of code words in recorded calls, the

because they would likely be unfamiliar with the complexities of terrorist activities. In his testimony he linked the defendants’ specific calls to checks, wire transfers, and other discrete acts of material support that put the code words into context.” *Id.* at 1103. It was not expert testimony, under 701(c), because his understanding was based on “what he learned during this particular investigation.” “[The agent] based his testimony about the meaning of the code words on his experience from this particular investigation. . . . The district court also limited the agent’s testimony to facts he learned in his investigation of the defendants.” *Id.* at 1104.

112. *Id.* at 1102.

113. *Id.*; see also *United States v. Hamaker*, 455 F.3d 1316, 1331–32 (11th Cir. 2006) (holding that the testimony of a financial analyst of the F.B.I. who “simply reviewed and summarized over seven thousand financial documents” was properly admitted under Rule 701).

114. 664 F.3d 467, 513–14 (5th Cir. 2011).

115. *Id.* at 483.

116. *Id.* at 513–14.

117. *Id.* at 514.

118. *Id.*; see also *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (holding a law enforcement officer does not provide expert testimony if it is merely “descriptive,” or if it is based on “common sense or the officer’s past experience formed from firsthand observation”).

119. See, e.g., *United States v. Diaz*, 637 F.3d 592, 600 (5th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1222–23 (10th Cir. 2007); *Miranda*, 248 F.3d at 441; *United States v. Novaton*, 271 F.3d 968, 1007–09 (11th Cir. 2001); *United States v. Garcia*, 994 F.2d 1499, 1506 (10th Cir. 1993).

defendant acting as a lookout, identification of the defendant's voice on recorded calls, and identification of the defendant on videotape.¹²⁰

In *United States v. Miranda*, the Fifth Circuit admitted lay opinion testimony of an FBI Special Agent regarding the use of code words in recorded calls.¹²¹ The agent had been involved in the investigation of the drug conspiracy and had translated the intercepted phone calls from Spanish to English, but did not have contemporaneous observation of many of the conversations and interpretations the agent testified about.¹²² The Fifth Circuit held the agent's testimony was admissible pursuant to Rule 701 and was not expert opinion testimony.¹²³ The agent's

extensive participation in the investigation of this conspiracy, including surveillance, undercover purchases of drugs, debriefings of cooperating witnesses familiar with the drug negotiations of the defendants, and the monitoring and translating of intercepted telephone conversations, allowed him to form opinions concerning the meaning of certain code words used in this drug ring based on his personal perceptions.¹²⁴

In *United States v. Garcia*, the Tenth Circuit admitted an FBI language specialist's lay opinion testimony connecting the defendant to the charged drug conspiracy.¹²⁵ The language specialist translated telephone conversations between coconspirators to link the defendant to the conspiracy and offered his opinion on what terms in the conversations meant.¹²⁶ The court found that the requirement that the lay opinion be "rationally based on the perception of the witness" derived from FRE 602, which permits a witness to "testify to what he heard unless what he heard is excluded under the hearsay rules."¹²⁷ Since the language specialist's opinion was based on listening to the conversations between coconspirators which were admissible out of court statements, his opinion was admissible lay opinion testimony.¹²⁸

In *United States v. Novaton*, the Eleventh Circuit permitted lay opinion testimony of law enforcement agents regarding the use of code words in a prosecution for drug-related crimes.¹²⁹ The law enforcement agents, who had only monitored the telephone wiretaps, testified to the meaning of certain words used by the defendants in taped conversa-

120. See, e.g., *Diaz*, 637 F.3d at 600; *Zepeda-Lopez*, 478 F.3d at 1222–23; *Miranda*, 248 F.3d at 441; *Novaton*, 271 F.3d at 1007–09; *Garcia*, 994 F.2d at 1506.

121. 248 F.3d at 441.

122. *Id.*

123. *Id.*

124. *Id.*

125. 994 F.2d 1499, 1507 (10th Cir. 1993).

126. *Id.* at 1503. The language specialist "offered his opinion that the term 'half' means half of a quantity of drugs, and 'the ugly one' means old, deteriorating marijuana . . . [A] 'load' referred to marijuana, and a 'small hit, around [forty]' referred to forty pounds of marijuana . . . '[M]erchandise' was drug related and the 'checkpoint' referred to the border . . . '[o]ld man' referred to . . . [the] Defendant." *Id.* (emphasis added).

127. *Id.* at 1506 (citation omitted). See also FED. R. EVID. 602.

128. *Garcia*, 994 F.2d at 1507. See also FED. R. EVID. 801(d)(2)(e).

129. 271 F.3d 968, 1009 (11th Cir. 2001).

tions.¹³⁰ The defense argued that the testimony was expert testimony governed by Rule 702.¹³¹ The court noted, however, that it permits police officers to testify under Rule 701 about their understanding of the meaning of conversations by or with criminal defendants.¹³² Thus, even though the agents did not have contemporaneous observation of the conversations, they were permitted to give lay opinion testimony “based on their perceptions and on their experience as police officers about the meaning of code words employed by the defendants in their intercepted telephone conversations.”¹³³ The court did note several safeguards that caused the defendants’ objections to go “to the weight, rather than the admissibility, of the agents’ testimony.”¹³⁴ The district court instructed the jury that the agents were not expert witnesses and the jurors should independently determine the meaning of the statements.¹³⁵ Additionally, each of the witnesses was subject to cross-examination to challenge the agents’ interpretations of the taped conversations.¹³⁶

The Fifth Circuit has permitted lay opinion testimony by government agents that a defendant was acting as a lookout during a drug transaction.¹³⁷ The Tenth Circuit, in a drug conspiracy case, has also admitted lay opinion testimony from an FBI agent that the defendant was the person whose voice was on an audio tape and his image was depicted on a video tape.¹³⁸

130. *Id.* at 1007. For example, agents testified that when the defendants used the phrases “fifteen year old girl” or “fifty year old grandmother,” they were actually referring to fifteen and fifty kilogram quantities of cocaine. *Id.*

131. *Id.* The defense argued the testimony should not have been admitted because the prosecution had not taken the steps necessary to qualify the witnesses as experts because the prosecution had not laid the proper foundation to qualify the witnesses as experts and, contrary to Federal Rule of Criminal Procedure 16(a)(1)(E) and the court’s pre-trial orders, the government had not identified those witnesses as experts or provided summaries of their testimony before trial. *Id.*

132. *Id.* at 1008–09. *See, e.g.,* United States v. Awan, 966 F.2d 1415, 1430 (11th Cir. 1992) (admitting testimony by an undercover agent concerning the “meaning and import” of statements that were part of tape-recorded conversations with the defendants; agent’s testimony was based on his perceptions of the conversations and that testimony could have been helpful to the jury); United States v. Russell, 703 F.2d 1243, 1248 (11th Cir. 1983) (admitting agents’ testimony interpreting tape-recorded conversations with the defendants).

133. *Novaton*, 271 F.3d at 1009. The government presented testimony that the wiretap monitors were familiar with the voices of the conspirators, their speech patterns, and the usual subject matter of their conversations because the same agents were assigned to monitor the wiretaps throughout the surveillance period. *Id.* at 980. Also, all the supervisors had experience in drug trafficking investigations and were familiar with the code terms that drug traffickers often use in order to evade detection. *Id.*

134. *Id.* at 1009.

135. *Id.*

136. *Id.*

137. United States v. Diaz, 637 F.3d 592, 597 (5th Cir. 2011). The DEA agents testified that the defendant looked from side to side, observing vehicles that drove by, walked to where he could watch the transfer of drugs into the van, and closed the van doors. *Id.* The testimony must “result from a process of reasoning familiar in everyday life.” *Id.* at 600 (quoting United States v. Yanez Sosa, 513 F.3d 194, 200 (5th Cir. 2008)). Thus, where the testimony is based on an officer’s personal perceptions of the defendant’s conduct, the opinion “would clarify for the jury that the officer believed defendant was more than a disinterested observer.” *Id.* (quoting United States v. Valdez-Reyes, 165 F. App’x 387, 392 (6th Cir. 2006)).

138. United States v. Zepeda-Lopez, 478 F.3d 1213, 1215 (10th Cir. 2007). The court held that the agent had personal knowledge because he viewed the defendant in court, viewed the video tape “many

3. Overview Testimony

At least the Fifth Circuit, however, has warned against the use of law enforcement overview testimony, finding it inadmissible.¹³⁹ Overview testimony is essentially a preview of the prosecution's case to come. It usually occurs where a government witness testifies about the results of an investigation, usually including aspects of the investigation the witness did not participate in, before the government has presented supporting evidence.¹⁴⁰ In *United States v. Griffin*, the prosecution called an FBI agent as one of its first witnesses in the case to provide overview lay testimony.¹⁴¹ The court recognized that it and many other circuits permit a "summary of evidence to be put before the jury with proper limiting instructions . . . to aid the jury in its examination of the evidence already admitted."¹⁴² In this case, however, the evidence had not yet been presented, so the agent was "testifying more as an 'overview witness' than a summary witness."¹⁴³

The Fifth Circuit "unequivocally condemn[s] this practice as a tool employed by the government to paint a picture of guilt before the evidence has been introduced."¹⁴⁴ A witness may "describe a complicated government program in terms that do not address witness credibility," but allowing that witness to give "tendentious testimony is unacceptable."¹⁴⁵ It would "greatly increase the danger that a jury 'might rely upon the alleged facts in the [overview] as if [those] facts had already been proved,' or might use the overview 'as a substitute for assessing the credibility of witnesses' that have not yet testified."¹⁴⁶ Thus, the agent's overview testimony was inadmissible.¹⁴⁷

B. Lay Opinion Testimony is Admissible in Certain Cases

Some circuits hold that lay opinion testimony is admissible in certain cases when based on a mixture of first- and second-hand knowledge. The Seventh and Ninth Circuits fall into this category.¹⁴⁸ The cases cen-

times," and identified the defendant's voice by using a "baseline call." *Id.* at 1215, 1222. Also, the agent did not "invade[] the province of the jury" because the jury was not able to view the video tape or hear the defendant's voice as many times. *Id.* at 1222.

139. *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003).

140. *United States v. Rosado-Perez*, 605 F.3d 48, 55 (1st Cir. 2010).

141. 324 F.3d at 347. The Agent was the second witness, but the first witness did not testify to most of the facts of the case. *Id.* at 348.

142. *Id.* (quoting *United States v. Scales*, 594 F.2d 558, 563 (6th Cir. 1979)).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (quoting *United States v. Scales*, 594 F.2d 558, 564 (6th Cir. 1979)).

147. *Id.*

148. *United States v. Moreland*, 703 F.3d 976, 983 (7th Cir. 2012); *United States v. Curescu*, 674 F.3d 735, 740 (7th Cir. 2012); *United States v. Christian*, 673 F.3d 702, 709 (7th Cir. 2012); *United States v. Hicks*, 635 F.3d 1063, 1069 (7th Cir. 2011); *United States v. Anchrum*, 590 F.3d 795, 798 (9th Cir. 2009); *United States v. Rollins*, 544 F.3d 820, 833 (7th Cir. 2008); *United States v. York*, 572 F.3d 415, 425 (7th Cir. 2008); *United States v. Upton*, 512 F.3d 394, 401–02 (7th Cir. 2008); *United States v.*

ter around interpretation of intercepted, recorded conversations and identification in surveillance photographs.¹⁴⁹ Additionally, these circuits discuss extensively the various implications of introducing dual witness testimony under both Rule 701 and Rule 702.¹⁵⁰

1. *Interpretation of Recorded Conversations*

In *United States v. Rollins*, a drug conspiracy case, the Seventh Circuit held admissible the testimony of a Drug and Enforcement Administration (“DEA”) agent regarding his “impressions” of intercepted telephone conversations.¹⁵¹ The agent listened to the intercepted wiretap calls every day from the start of the investigation.¹⁵² The court distinguished this lay testimony from the code word testimony of “witnesses who rely on their years of experience as a law enforcement officer.”¹⁵³ In this case, the code words were “unique to the conversations that . . . occurred throughout this particular alleged conspiracy.”¹⁵⁴ The court found that the testimony would not be admitted based on the agent’s experience as a law enforcement officer, but instead it is based on his experience “only within this conspiracy.”¹⁵⁵ The court emphasized that the witness had listened to intercepted calls the same day the calls were intercepted and that many of the witness’ opinions were based on the combination of contemporaneous surveillance and wiretaps, rather than solely on after-the-fact investigation.¹⁵⁶ Thus, the court held the agent’s “impressions” testimony was rationally based on his first-hand perception of the intercepted phone calls . . . as well as his personal, extensive experience with this particular drug investigation.¹⁵⁷ Additionally, the Seventh Circuit made clear that the agent’s testimony was lay opinion testimony under Rule 701, rather than expert testimony under Rule 702.¹⁵⁸ The court noted, however, that the testimony approached the “line dividing lay opinion testimony from expert opinion testimony”¹⁵⁹

Freeman, 498 F.3d 893, 902 (9th Cir. 2007); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1245 (9th Cir. 1997); *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

149. See, e.g., *Moreland*, 703 F.3d at 983; *Curescu*, 674 F.3d at 740; *Rollins*, 544 F.3d at 833; *Freeman*, 498 F.3d at 902; *LaPierre*, 998 F.2d at 1465.

150. See, e.g., *Moreland*, 703 F.3d at 983; *Anchrum*, 590 F.3d at 798; *York*, 572 F.3d at 425; *Freeman*, 498 F.3d at 902.

151. 544 F.3d at 833.

152. *Id.* at 827.

153. *Id.* at 831.

154. *Id.*

155. *Id.*

156. *Id.* at 827, 831–32.

157. *Id.* at 831–32 (explaining that law enforcement surveillance of the conspirators’ activities assisted in giving meaning to various words used in the recorded conversations; officers’ observations of the conspirators’ activities often confirmed their understanding of a recorded conversation).

158. *Id.* at 833.

159. *Id.* The agent’s “impressions” testimony was not based on any specialized knowledge gained from his law enforcement training and experience in narcotics trafficking generally. Rather, his understanding of these conversations came only as a result of the particular things he perceived from monitoring intercepted calls, observing drug transactions of these conspirators, and talking with the coop-

In *United States v. Freeman*, another drug conspiracy case, the Ninth Circuit outlined what type of interpretation of recorded phone conversations lay opinion witnesses may testify to.¹⁶⁰ There, the detective was permitted to offer lay opinion testimony on his interpretations of ambiguous recorded conversations, but his interpretation of already clear statements was inadmissible.¹⁶¹ During trial, the detective interpreted five different types of words or phrases used in the recorded conversations: (1) jargon commonly used by drug traffickers and familiar to the detective before the investigation;¹⁶² (2) words unfamiliar to the detective before the investigation, but easily decoded based on a manner of speaking common to drug traffickers;¹⁶³ (3) jargon the detective was not familiar with before the investigation, but was able to decipher on the basis of the investigation and his general experience with drug trafficking;¹⁶⁴ (4) phrases that were not encoded drug jargon, but were more likely to be understood by the jurors without assistance;¹⁶⁵ and (5) phrases that were not encoded drug jargon, but were ambiguous statements consisting of ordinary terms.¹⁶⁶

The detective offered both expert testimony and lay opinion testimony in these different instances.¹⁶⁷ He offered expert testimony when he interpreted the first three types of phrases above, but he provided lay opinion testimony when he interpreted the last two types.¹⁶⁸ The court held the expert testimony was admissible.¹⁶⁹ The requirements of Rule 701 were also met when the detective “testified regarding his understanding of the meaning of a declarant’s vague or ambiguous statements” based upon his direct knowledge of the investigation.¹⁷⁰ The detective

erating conspirators about this drug operation” *Id.* at 832. The court did not think the Agent was “cloaked with an ‘aura of expertise’ which allowed the jury to be unduly swayed by his testimony” *Id.* at 833.

160. 498 F.3d 893, 905 (9th Cir. 2007).

161. *Id.*

162. *Id.* at 899.

163. *Id.*

164. *Id.* at 899–900.

165. *Id.* at 900 (explaining that “particulars” was a reference to “details”; asking how everything had turned out meant how did the “drug deal turn out”).

166. *Id.* at 900, 902 (explaining that “long route” meant a specific method for completing the drug transactions; “that” meant money in one instance and cocaine in another; “touched bases with two of those” meant obtained two kilograms of cocaine; “man, it’s done already” meant he’s given the cocaine and received his money for it).

167. *Id.* at 901–02.

168. *Id.*

169. *Id.* at 901. In order for the detective to offer this expert testimony, the government was required to make an adequate showing of the witness’ experience and the witness needed to explain in detail the methods he used to arrive at his interpretations of words that he was not familiar with before the investigation. *Id.* (citing *United States v. Hermanek*, 289 F.3d 1076 (9th Cir. 2002)). Several terms were familiar to the detective before the investigation; other terms were unfamiliar before the investigation, but the detective explained during his testimony how he arrived at his interpretations. *Id.* Interpretations of altered words used a methodology that satisfies *Hermanek*. *Id.* at 901–02.

170. *Id.* at 902, 904–05 (“[I]n these instances [the detective] ceased to apply his specialized knowledge of drug jargon and the drug trade and began to interpret ambiguous statements based on his general knowledge of the investigation. He was therefore no longer testifying as an expert but rather as a lay witness.”).

was not a participant in the conversations he interpreted, but rather his interpretations were based on his direct perception of intercepted conversations, direct observation of the conspirators, and other facts he learned during the investigation.¹⁷¹ The interpretation of *clear* statements, however, was barred by the helpfulness requirement of both Rule 701 and Rule 702.¹⁷²

More recently in *Moreland*, discussed below¹⁷³, the Seventh Circuit admitted lay opinion testimony of a DEA agent concerning drug codes used in intercepted phone conversations.¹⁷⁴ Additionally, the Seventh Circuit recently ruled on lay opinion testimony interpreting intercepted conversations not concerning drug-related offenses in *United States v. Curescu*.¹⁷⁵ Discussing the bribing of a local government agency, the court noted how this type of testimony interpreting “coded” conversations differed in kind, though not in type, between drug crimes and other nondrug related criminal conduct.¹⁷⁶ The court provided the underlying rationale of admitting testimony about codes as lay testimony even in non-drug cases, noting that “[j]ust as dealers in illegal drugs do not name the drugs in their phone conversations but instead use code words, so parties to other illegal transactions often avoid incriminating terms, knowing they may be overheard electronically.”¹⁷⁷ Strangers to the conversation “need an interpreter, and a party to the conversation is the obvious choice to be that interpreter. . . . [Defendant] might as well be arguing that a translator can’t testify to the meaning of a statement in a foreign language.”¹⁷⁸

2. *Identification in Photographs*

The Ninth Circuit does not permit the lay opinion testimony of an investigating officer that the defendant was pictured in surveillance photographs.¹⁷⁹ In *United States v. LaPierre*, the police officer who investigated a bank robbery gave lay opinion testimony that the defendant was the individual pictured in the bank surveillance photographs.¹⁸⁰ The lay opinion testimony was inadmissible as running the “risk of invading the province of the jury and unfairly prejudicing [the defendant].”¹⁸¹ The jury was able to view the photographs and make an independent determi-

171. *Id.* at 904–05.

172. *Id.* at 905 (citing *United States v. Dicker*, 853 F.2d 1103, 1109 (3d Cir. 1988)). Thus, the detective’s testimony consisting of “speculation or repetition of already clear statements” was inadmissible. *Id.*

173. *See infra* Part III.B.3.

174. *United States v. Moreland*, 703 F.3d 976 (7th Cir. 2012).

175. 674 F.3d 735 (7th Cir. 2012).

176. *Id.* at 739–40.

177. *Id.* at 740.

178. *Id.*

179. 998 F.2d 1460, 1465 (9th Cir. 1993).

180. *Id.*

181. *Id.*

nation regarding the identity of the defendant.¹⁸² There are, however, two types of cases upholding the use of this kind of testimony in the Ninth Circuit.¹⁸³ These are those cases in which the witness has had “substantial and sustained contact with the person in the photograph” and those cases in which “the defendant’s appearance in the photograph is different from his appearance before the jury and the witness is familiar with the defendant as he appears in the photograph.”¹⁸⁴ The common thread in those cases is that there is reason to believe the witness is more likely to correctly identify the person than the jury.¹⁸⁵

3. *Dual Testimony*

Dual testimony occurs when the same witness provides both lay opinion testimony under Rule 701 and expert testimony under Rule 702. The Seventh and Ninth Circuits have offered in-depth analyses of the dangers of dual testimony and various ways in which to prevent or mitigate these dangers.

In the *Freeman* case discussed above, the Ninth Circuit offered a discussion of the dangers of using dual witness testimony.¹⁸⁶ The Circuit expressly adopts the concerns, highlighted by the Second Circuit in *United States v. Dukagjini*, that arise “when a case agent goes beyond interpreting code words as an expert and testifies as to the defendant’s conduct based upon the agent’s knowledge of the case.”¹⁸⁷ First, a case agent who testifies as an expert may receive unmerited credibility for lay testimony.¹⁸⁸ In *Freeman*, the line between the detective’s lay and expert testimony was never articulated for the jury, creating a risk that there was an “imprimatur or scientific or technical validity to the entirety of his testimony.”¹⁸⁹ Second, the Ninth Circuit was concerned that the case agent would give his opinion as to the meaning of numerous words, regardless of whether his testimony was speculative or unnecessarily repetitive.¹⁹⁰ This type of testimony may come “dangerously close to usurping the jury’s function [and] implicate[] Rule 403 as a needless presentation of cumulative evidence and a waste of time.”¹⁹¹ Third, the “blurred dis-

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *United States v. Freeman*, 498 F.3d 893, 902–04 (9th Cir. 2007).

187. *Id.* at 902–03 (citing *United States v. Dukagjini*, 326 F.3d 45, 53–55 (2d Cir. 2003)).

188. *Id.* at 903 (quoting *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003); *Jinro Am. Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001) (noting that because expert testimony is “likely to carry special weight with the jury . . . care must be taken to assure that a proffered witness truly qualifies as an expert”); *United States v. Foster*, 939 F.2d 445, 452 (7th Cir. 1991) (noting when an expert witness also serves as an eyewitness, district court and the prosecutor should be vigilant in ensuring that “the jury understands its function in evaluating the evidence and is not confused by the witness’s dual role”).

189. *Id.*

190. *Id.* at 903–04 (citing *United States v. Dukagjini*, 326 F.3d 45, 53–55 (2d Cir. 2003)).

191. *Id.*

inction” between expert and lay testimony may allow the case agent to “rely upon and convey inadmissible hearsay evidence.”¹⁹²

The Ninth Circuit holds, however, that the use of case agents as both expert and lay witnesses is “not so inherently suspect that it should be categorically prohibited.”¹⁹³ This type of testimony “may save time and expense and will not necessarily result in juror confusion, provided that the district court engages in vigilant gatekeeping” to ensure jurors are aware of the witness’ dual roles.¹⁹⁴ The opportunity to clarify this demarcation in the eyes of the jury lies with the district court and can be revealed through direct or cross examination.¹⁹⁵

The Seventh Circuit found the dual witness testimony to be an error in *United States v. York*.¹⁹⁶ The court noted that “things got murky” in this case because it was not clear if the agent was testifying as an expert or as the case agent.¹⁹⁷ The prosecution’s questioning did not aid in distinguishing the expert from the fact witness role, and questions on direct were intermingled with questions based on agent’s expertise and questions about the investigation.¹⁹⁸ Furthermore, the trial judge failed to instruct the jury on how it should evaluate opinion testimony from witnesses with special knowledge at the time witness was testifying.¹⁹⁹ The Seventh Circuit held it was insufficient to give this instruction only at the end of the trial.²⁰⁰ The preferred approach instead was to explain the witness’s dual role before the testimony “and then flag for the jury when [the witness] testified as a fact witness and when he testified as an expert.”²⁰¹

The court then went on to explain the three main reasons why dual testimony, despite its convenience for a party, might not be advisable.²⁰² First, the witness’s dual role might “confuse the jury.”²⁰³ Second, “the jury might be smitten by an expert’s ‘aura of special reliability’ and there-

192. *Id.* at 904 (“Once [the case agent] stop[s] testifying as an expert and beg[ins] providing lay testimony, he [is] no longer ‘allowed’ . . . to testify based on hearsay information, and to couch his observations as generalized ‘opinions’ rather than as firsthand knowledge” *Jinro Am. Inc.*, 266 F.3d at 1004; *Cree v. Flores*, 157 F.3d 762, 773 (9th Cir. 1998) (noting that expert testimony is “not subject to the strictures of Federal Rules of Evidence 602 and 803”).

193. *Id.* at 904 (citing *United States v. Dukagjini*, 326 F.3d 45, 53–55 (2d Cir. 2003)).

194. *Id.*

195. *Id.*

196. 572 F.3d 415 (7th Cir. 2009).

197. *Id.* at 426.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 425.

203. *Id.* (citing *United States v. Goodwin*, 496 F.3d 636, 641 (7th Cir. 2007); see *Goodwin*, 496 F.3d at 641 (“We previously have held that while testimony in dual roles could be confusing, it is permissible provided that the district court takes precautions to minimize potential prejudice.”); *United States v. Mansoori*, 304 F.3d 635, 654 (7th Cir. 2002) (“Although we have acknowledged that there is a greater danger of undue prejudice to the defendants when a witness testifies as both an expert and a fact witness . . . we have also indicated that a police officer may permissibly testify in both capacities.”) (internal citations omitted).

fore give his factual testimony undue weight.”²⁰⁴ Third, “[t]he jury might unduly credit the opinion of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial.”²⁰⁵

The court also outlined three “precautions” a court might consider when faced with the prospect of allowing a witness to present both lay opinion and expert testimony.²⁰⁶ First, the court must clarify the separate roles, to ensure the jury knows “when an agent is testifying as an expert and when he is testifying as a fact witness.”²⁰⁷

The potential for prejudice in this circumstance can be addressed by means of appropriate cautionary instructions and by examination of the witness that is structured in such a way as to make clear when the witness is testifying to facts and when he is offering his opinion as an expert.²⁰⁸

Second, the proponent should establish “the proper foundation for the witness’s expert opinions.”²⁰⁹ Third, the trial judge should allow “the defense to rigorously cross-examine the expert about his interpretation of the drug lingo” if the expert is testifying as a dual witness.²¹⁰

A good example of how to properly admit dual testimony in these circuits comes from *United States v. Anchrum*.²¹¹ The trial court avoided potential problems from dual testimony by clear separation of lay opin-

204. *York*, 572 F.3d at 425 (citing *United States v. Brown*, 7 F.3d 648, 655 (7th Cir. 1993); see *Brown*, 7 F.3d at 655 (“We recognize that in a close case the danger of unfair prejudice may be heightened by the ‘aura of special reliability’ that often surrounds expert testimony, and that jurors may tend to give such testimony undue weight. The danger of unfair prejudice is most serious where the expert also is an occurrence witness.”) (internal citations omitted)).

205. *York*, 572 F.3d at 425 (quoting *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008); see *Upton*, 512 F.3d at 425 (“But it is precisely because an expert provides much of the structure for the jury’s understanding of the drug trade that courts must be mindful when the same witness provides both lay and expert testimony. The jury may unduly credit the witness’s fact testimony given his status as an expert.”)).

206. *Id.*

207. *Id.* (citing *United States v. Mansoori*, 304 F.3d 635, 654 (7th Cir. 2002)).

208. *Id.*

Telling the jury that a witness is both a lay witness and an expert witness and will be alternating between the two roles is potentially confusing—and unnecessary. The lawyer examining the witness need only ask him the basis for his answer to a question, and the witness will then explain whether it was his investigation of the defendants’ conspiracy or his general experience in decoding drug code. That tells the jury what it needs to know in order to determine how much weight to give the testimony and tells opposing counsel what he needs to know in order to be able to cross-examine the witness effectively. Using terms like ‘lay witness’ and ‘expert witness’ and trying to explain to the jury the difference between the two types of witness is inessential and, it seems to us, ill advised.

U.S. v. Moreland, 703 F.3d 976, 983–84 (7th Cir. 2012).

209. *York*, 572 F.3d at 425 (citing *United States v. Farmer*, 543 F.3d 363, 370–71 (7th Cir. 2008); see *Farmer*, 543 F.3d at 370–71 (noting where witness was “undoubtedly qualified” and neither party “specifically requested that the district court evaluate [the witness] qualifications as an expert under Rule 701” the court is not required to undertake the Rule 702 analysis)).

210. *York*, 572 F.3d at 425 (citing *United States v. Parra*, 402 F.3d 752, 759–60 (7th Cir. 2005)); see *Parra*, 402 F.3d at 759–60 (noting that because defense counsel “engaged in rigorous cross-examination of Agent Becka regarding his expertise and the substance of his testimony” admission of dual fact/expert testimony was not an error).

211. 590 F.3d 795 (9th Cir. 2009).

ion testimony in a first phase and expert testimony in a second phase.²¹² Additionally, the jury was given instructions reminding them that they were the finders of fact.²¹³ Another practice to avoid dual testimony is to use two witnesses, one to provide lay testimony concerning the facts of the case and another to provide expert testimony from a witness who was not involved in the case.²¹⁴ When the same witness is used for dual testimony, though, the *Anchrum* case provides a useful roadmap to compartmentalize the testimony.²¹⁵

The trial court's limiting instruction to the jury about dual witness testimony was crucial in the Seventh Circuit case *United States v. Moreland*.²¹⁶ The limiting instruction "allow[ed] the prosecutor to elicit the fact that the agent had been determined in previous trials to be an expert on drug codes," yet it instructed the jury not to depend on labels.²¹⁷ The trial judge, prior to the testimony, explained to the jury

when you hear a witness give an opinion about matters requiring special knowledge or skill, you should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean you are required to accept it. Give the testimony whatever weight you think it deserves, consider the reasons for the opinion, the witness's qualifications, and all of the other evidence in the case.²¹⁸

C. Lay Opinion Testimony is Not Admissible

Some circuits hold that lay opinion testimony is inadmissible unless the witness personally participated in or contemporaneously observed the subject of their testimony. The First, Second, Third, Fourth, and Eighth Circuits fall into this category.²¹⁹

212. *Id.* at 804.

213. *Id.* at 803.

214. *See id.* at 805.

215. *See id.* at 803–05.

216. 703 F.3d 976 (7th Cir. 2012). The agent testified about both code words "he had learned the meaning of in the course of investigating this very drug conspiracy and code words commonly used in drug trade that he had learned from other investigations." *Id.* at 983. The Seventh Circuit held the agent only proffered lay opinion testimony when he testified about code words particular to the specific drug conspiracy. *Id.* All testimony based on past experience was admitted as expert testimony. *Id.*

217. *Id.* at 984.

218. *Id.* (internal quotations omitted).

219. *See, e.g.*, *United States v. Albertelli*, 687 F.3d 439, 447 (1st Cir. 2012); *United States v. Brown*, 669 F.3d 10, 23–24 (1st Cir. 2012); *United States v. Vazquez-Rivera*, 665 F.3d 351 (1st Cir. 2011); *United States v. Meises*, 645 F.3d 5, 16 (1st Cir. 2011); *United States v. Johnson*, 617 F.3d 286, 294 (4th Cir. 2010); *United States v. Rosado-Perez*, 605 F.3d 48, 56 (1st Cir. 2010); *United States v. Baptiste*, 596 F.3d 214, 224 (4th Cir. 2010); *United States v. Flores-de-Jesus*, 569 F.3d 8, 20 (1st Cir. 2009); *United States v. Santiago*, 560 F.3d 62, 67 (1st Cir. 2009); *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 225–28 (3d Cir. 2008); *United States v. Garcia*, 413 F.3d 201, 210–17 (2d Cir. 2005); *United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004); *United States v. Casas*, 356 F.3d 104, 117–19 (1st Cir. 2004); *United States v. Dukagjini*, 326 F.3d 45, 56 (2d Cir. 2003); *United States v. Peoples*, 250 F.3d 630, 639–42 (8th Cir. 2001).

1. *Interpretation of Coded Language*

In *United States v. Albertelli*, the First Circuit identified five problems that arise when admitting lay testimony about a defendant's use of coded language in intercepted conversations.²²⁰ These are

that the testimony may effectively smuggle in inadmissible evidence (e.g., hearsay not within some exception and perhaps inadmissible under the Confrontation Clause); that the witness may be drawing inferences that counsel could do but with advantages as to timing, repetition and the imprimatur of testifying as a law enforcement officer; that the witness may usurp the jury's function by effectively testifying as to guilt rather than merely providing building blocks for the jury to draw its own conclusion; that the witness may be unable to point to any rational basis for the interpretation offered or be doing nothing more than speculating; and that the witness may act as a summary witness without meeting the usual requirements.²²¹

The court noted that “[t]hese dangers . . . vary (both in degree and kind) with the facts – as do the need for the testimony and the extent to which the witness’ unique experience permits him to be helpful.”²²² The court also noted what the trial court judge could do to minimize the identified problems, including such tools as “supervision by the judge, cautionary instructions, and above all cross-examination.”²²³ Additionally, where the witness can explain the basis for his or her specific interpretations, the courts may be more willing to admit the testimony, especially in organized crime and terrorism cases.²²⁴

In *Albertelli*, a racketeering case, the First Circuit recounted how the trial judge employed these tools to minimize any problems with the agent's lay testimony, ultimately resulting in the testimony being admissible.²²⁵ Here, the court limited the testimony to conversations that were unclear.²²⁶ Additionally, the trial court judge “sustained [numerous] objections to . . . speculative answers and gave a cautionary instruction at the end of the trial.”²²⁷ The cross-examination in this case also helped to minimize any problems with the lay testimony, resulting in “concessions that certain opinions were not derived from [the witness's] expertise” and “acknowledgements of alternative interpretations of several ambiguous statements.”²²⁸ This was helpful because “[w]here such alternatives can be offered, the plausibility of the witness’ own position . . . is readily measured by the jury.”²²⁹

220. 687 F.3d 439, 447 (1st Cir. 2012).

221. *Id.*

222. *Id.* at 447.

223. *Id.*

224. *Id.* at 447–48.

225. *Id.* at 448.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

The First Circuit outlined a general approach to coded language lay testimony that could be employed by the trial courts in future cases.²³⁰ When assessing the admissibility of such testimony, the First Circuit considers four factors. First, the trial court should consider “whether the testimony is meaningfully helpful to the jury, compared to the traditional device of saving the interpretive inferences for counsel in closing argument.”²³¹ Second, it should determine whether the testimony is restricted to “sufficiently mitigate the dangers” of such testimony, as identified above.²³² Third, it should ensure the witness “explain[s] the basis for any challenged interpretation” and not allow the witness to “say only that it is based on ‘the totality of the investigation.’”²³³ In some cases, the court may need “to take proffers or allow cross-examination outside the presence of the jury.”²³⁴ Fourth, the court should demand that the basis for the opinion is “not unduly troubling . . . because of apparent unreliability, undue prejudice, importation of inadmissible hearsay or some other circumstance that might make it unsuitable as an explanation.”²³⁵

In *United States v. Peoples*, the lower court had permitted lay opinion testimony of a government agent interpreting intercepted conversations in a murder case.²³⁶ The witness did not, however, “personally observe the events and activities discussed in the recording, nor did she hear or observe the conversations as they occurred.”²³⁷ The agent, nevertheless, “included her opinions about what the defendants were thinking during the conversations, [which she] phrased as contentions supporting her conclusion . . . that the defendants were responsible for [the victim’s] murder.”²³⁸ The Eighth Circuit held this testimony inadmissible because the agent lacked “first-hand knowledge of the matters about which she testified,” as required under Rule 701(a).²³⁹ The agent’s “opinions were based on her investigation after the fact, not on her [contemporaneous] perception of the facts.”²⁴⁰ The problem was not solved by the trial court’s jury instruction that the agent’s “opinions constituted argument rather than evidence,” because this cannot “serve to render admissible that which was inadmissible testimony.”²⁴¹

230. *Id.* at 449–50.

231. *Id.* at 449.

232. *Id.*

233. *Id.* at 450.

234. *Id.*

235. *Id.*

236. 250 F.3d 630, 641–42 (8th Cir. 2001).

237. *Id.* at 640.

238. *Id.*

239. *Id.* at 641–42.

240. *Id.* at 641.

241. *Id.* at 641–42.

2. *Interpretation of Coded Drug Jargon*

The First Circuit admitted a law enforcement agent's lay opinion testimony interpreting coded drug jargon in *United States v. Santiago*.²⁴² The court found that Rule 701(a) was satisfied because of the undercover agent's personal involvement in the investigation of the defendants.²⁴³ The agent had "listened to over 90 percent of the intercepts, learned voices and patterns, and heard and used the coded language in his undercover drug buys relating to the investigation."²⁴⁴ The court noted that Rule 701 "is meant to admit testimony based on the lay expertise a witness personally acquires through experience, often of the job."²⁴⁵ Furthermore, the court found sufficient verification of the agent's interpretations because the meanings of the code words "were borne out by the conduct of the defendants."²⁴⁶ This alleviated any concern that the agent's interpretation testimony was merely speculative.²⁴⁷ Similarly, in *United States v. Rosado-Perez*, the First Circuit allowed lay opinion testimony of a government agent in another drug conspiracy case.²⁴⁸

The Second Circuit did not permit lay opinion testimony interpreting intercepted conversations in *United States v. Grinage*, a drug conspiracy case.²⁴⁹ The court found that the DEA agent who supervised the wiretap did not have personal knowledge from simply listening to the wiretapped calls.²⁵⁰ If it permitted this testimony, the court argued "there would be no need for the trial jury to review personally any evidence at all."²⁵¹ "The jurors could be 'helped' by a [government] witness . . . who could not only tell them what was in the evidence but tell them what inferences to draw from it," which is "not the point of lay opinion" testimony.²⁵² By "interpret[ing] both the calls the jury heard and [those it] did not hear . . . [the agent] usurped the function of the jury to decide what to infer from the content of the calls."²⁵³ Additionally, the agent revealed "that his interpretations were 'based on [his] knowledge of the entire in-

242. 560 F.3d 62, 67 (1st Cir. 2009).

243. *Id.* at 66–67.

244. *Id.* at 66.

245. *Id.* See also *United States v. Maher*, 454 F.3d 13, 24 (1st Cir. 2006); *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005).

246. *Santiago*, 560 F.3d at 67.

247. *Id.*

248. 605 F.3d 48, 51 (1st Cir. 2010). The lead investigator "identified drug activity and interpreted coded language." *Id.* at 55. The court held the witness had testified from personal knowledge based on his experience and personal observations. *Id.* at 51. The agent "was a lead investigator; went to El Cerro at least fifty times; and repeatedly participated in video and personal surveillance, wiretap surveillance, and controlled drug buys." *Id.* at 55–56.

249. 390 F.3d 746, 752 (2d Cir. 2004).

250. *Id.* at 749, 752.

251. *Id.* at 750.

252. *Id.*

253. *Id.*; see *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003) (allowing a case agent who testifies as an expert to provide sweeping conclusions about a defendant's activities "may come dangerously close to usurping the jury's function") (quoting *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1987)).

vestigation.”²⁵⁴ Thus, “the risk that he was testifying based upon information not before the jury, including hearsay, or at the least, that the jury would think he had knowledge beyond what was before them, [was] clear.”²⁵⁵

Likewise, the Fourth Circuit held inadmissible a law enforcement officer’s lay opinion testimony interpreting drug jargon in wiretapped conversations in *United States v. Johnson*.²⁵⁶ The court found the agent’s opinions “were not based on his own perceptions, but rather on his experience and training,” thus making them improper lay testimony.²⁵⁷ This was made clear when “the government elicited testimony on [the agent’s] credentials and training [instead of] his observations from the surveillance . . . in this case” when responding to defense objections.²⁵⁸ Additionally, the agent “admitted he did not participate in the surveillance during the investigation, but rather gleaned information from interviews with suspects and charged members of the conspiracy after listening to the phone calls.”²⁵⁹ The court held that the agent’s “post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.”²⁶⁰ The court emphasized that “none of this second-hand information qualifie[d] as the foundational personal perception needed under Rule 701.”²⁶¹

3. *Dual Testimony*

Both the Second and Fourth Circuits have warned against the use of dual lay opinion and expert testimony, specifically when the witness is a law enforcement officer.²⁶²

The Second Circuit, in the often-cited case of *United States v. Dukagjini*, warned against the use of dual testimony by presenting the dangers inherent in this type of testimony.²⁶³ The court identified four potential difficulties “warranting vigilance by the trial court” when the expert is also the case agent.²⁶⁴ First, the testimony may confer upon the witness “the aura of special reliability and trustworthiness surrounding expert testimony,” which “creates a risk of prejudice because the jury may infer that the [witness’] opinion . . . is based on knowledge of the de-

254. *Grinage*, 390 F.3d at 750–51.

255. *Id.* (citing *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003)).

256. 617 F.3d 286, 288 (4th Cir. 2010).

257. *Id.* at 292.

258. *Id.* at 293.

259. *Id.*

260. *Id.* The agent did not testify to directly observing the surveillance or listening to all of the relevant calls, but instead he kept referring to his experience as an agent, the interviews he conducted, and statements of codefendants. *Id.*

261. *Id.*

262. 596 F.3d 214, 224–25 (4th Cir. 2010); *United States v. Dukagjini*, 326 F.3d 45, 53–54 (2d Cir. 2003).

263. *Dukagjini*, 326 F.3d at 53.

264. *Id.*

defendant beyond the evidence at trial.”²⁶⁵ By doing so, “the witness attains unmerited credibility when testifying about factual matters from first-hand knowledge.”²⁶⁶ Second, “expert testimony by a fact witness can inhibit cross-examination, thereby impairing the trial’s truth-seeking function.”²⁶⁷ For instance, “a failed effort to impeach the witness as an expert may effectively enhance his [or her] credibility as a fact witness,” leading the defense “to make the strategic choice of declining to cross-examine the witness at all.”²⁶⁸ Third, “there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness’s ‘sweeping conclusions’ about [the defendant’s] activities.”²⁶⁹ This may unfairly “provide the government with an additional summation by having the expert interpret the evidence” and “may come dangerously close to usurping the jury’s function.”²⁷⁰ Fourth, juror confusion may result when the jurors “find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case.”²⁷¹ When the expert is also the case agent, a juror “understandably will find it difficult to navigate the tangled thicket of expert and factual testimony from the single witness, thus impairing the juror’s ability to evaluate credibility.”²⁷²

The Circuit declined to “prohibit categorically the use of case agents as experts,” but noted it is the district courts responsibility to be “vigilant gatekeepers.”²⁷³ Here, the court condemned the dual testimony of the agent also testifying as an expert to interpret the coded drug jargon.²⁷⁴ The problem with the expert testimony was that the witness’ “conclusions appear[ed] to have been drawn largely from his knowledge of the case file and upon his conversations with co-conspirators, rather than upon his extensive general experience with the drug industry.”²⁷⁵

In *United States v. Baptiste*, the Fourth Circuit highlighted various safeguards the trial courts could implement to protect against the problems of dual testimony, as outlined above.²⁷⁶ First, the trial court can give a cautionary instruction to the jury to remind them that they can give

265. *Id.* (internal quotation marks omitted).

266. *Id.*

267. *Id.*

268. *Id.* at 54.

269. *Id.* (quoting *United States v. Simmons*, 923 F.2d 934, 946–47 n.5 (2d Cir. 1991)).

270. *Id.* (quoting *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1984)); see also *United States v. Rivera*, 22 F.3d 430, 434 (2d Cir. 1994); *Simmons*, 923 F.2d at 947.

271. *Dukagjini*, 326 F.3d at 54.

272. *Id.*

273. *Id.* at 56 (internal citations omitted).

274. *Dukagjini*, 326 F.3d at 55.

275. *Id.* The court noted that the testimony illustrated two examples of how an expert on drug code can stray from the scope of his expertise. First, the witness “testified about the meaning of conversations in general, beyond the interpretation of code words.” *Id.* Second, the witness “interpreted ambiguous slang terms that only at first glance might appear to be code or jargon.” *Id.*

276. 596 F.3d 214, 224 (4th Cir. 2010) (“While such dual witnesses could confuse the jury, dual-role testimony is acceptable where the district court took adequate steps to make certain that the witness’s dual role did not prejudice or confuse the jury.”) (internal quotations marks omitted).

whatever weight they determine is appropriate to the testimony.²⁷⁷ Second, the defense can challenge the expert opinion through cross-examination.²⁷⁸ Third, an adequate foundation for the expert testimony should be established.²⁷⁹ Fourth, proper questioning can demarcate the expert opinion testimony from the lay testimony.²⁸⁰ Ultimately, the Fourth Circuit places responsibility on the trial court to ensure the line between the lay and expert testimony is drawn “clearly in order to prevent juror confusion and to prevent jurors from giving undue weight to” the witness’s lay testimony.²⁸¹

4. *Overview Testimony*

The First Circuit has warned heavily against the use of overview testimony by the government.²⁸² An overview witness is identified as “a government agent who testifies in a criminal matter as the prosecution’s first witness (or at least as one of its earliest witnesses) and provides an overview of the prosecution’s case to come.”²⁸³ Certain overview testimony is prohibited as a result of “the basic principles in the Federal Rules of Evidence that witnesses, other than experts giving expert opinions, should testify from personal knowledge.”²⁸⁴ Thus, “[a] foundation should be laid establishing the basis of a witness’s knowledge, opinion, or expertise.”²⁸⁵

The First Circuit has identified three potential ramifications of overview testimony that make it “inherently problematic.”²⁸⁶ First, “the jury could be influenced by statements of facts and credibility determinations not in evidence.”²⁸⁷ Second, “later testimony could be different from what the overview witness assumed” and presented.²⁸⁸ The evidence promised by the overview witness may never materialize.²⁸⁹ Third, “the jury may place greater weight on evidence that they perceive has the

277. *Id.*

278. *Id.* (noting this approach further clarifies the testimonial capacities for the jury).

279. *Id.*

280. *Id.*

281. *Id.* at 224–25.

282. *United States v. Brown*, 669 F.3d 10, 24 (1st Cir. 2012); *United States v. Vazquez-Rivera*, 665 F.3d 351, 356 (1st Cir. 2011); *United States v. Meises*, 645 F.3d 5, 9 (1st Cir. 2011); *United States v. Rosado-Perez*, 605 F.3d 48, 55 (1st Cir. 2010); *United States v. Flores-de-Jesus*, 569 F.3d 8, 14 (1st Cir. 2009); *United States v. Casas*, 356 F.3d 104, 119 (1st Cir. 2004).

283. *Brown*, 669 F.3d at 24; *see, e.g., Flores-de-Jesus*, 569 F.3d at 16; *Casas*, 356 F.3d at 119–20.

284. *Rosado-Perez*, 605 F.3d at 55; *see FED. R. EVID.* 602, 701, 802; *see also Casas*, 356 F.3d at 118–20 (criticizing overview testimony because it was not based on the witness’s personal knowledge); *United States v. Mazza*, 792 F.2d 1210, 1214–16 (1st Cir. 1986) (holding that an officer’s testimony was inadmissible hearsay when he gave an overview of an investigation based in part on what other officers told him).

285. *Rosado-Perez*, 605 F.3d at 55; *see FED. R. EVID.* 602, 701, 702; *see also United States v. Garcia-Morales*, 382 F.3d 12, 17 (1st Cir. 2004) (criticizing overview testimony “that [the defendant] was a member of the drug conspiracy, even though the prosecution had not yet introduced evidence supporting this conclusion”).

286. *Brown*, 669 F.3d at 24.

287. *Id.*; *Flores-de-Jesus*, 569 F.3d at 16–17; *Casas*, 356 F.3d at 119–20.

288. *Brown*, 669 F.3d at 24; *Flores-de-Jesus*, 569 F.3d at 16–17; *Casas*, 356 F.3d at 119–20.

289. *Flores-de-Jesus*, 569 F.3d at 17.

imprimatur of the government.”²⁹⁰ It “is not simply a repetition . . . of other evidence, [but] also, in effect, an endorsement of the veracity of the testimony that will follow.”²⁹¹

D. Undecided Circuits

The Sixth and D.C. Circuits have yet to decide on this issue. There has been speculation, however, that they would join the third group based on their rulings pertaining to other aspects of Rule 701.²⁹²

1. Line Between Lay Opinion Testimony and Expert Testimony

In *United States v. Ganier*, the Sixth Circuit cited approvingly to the Eighth Circuit case of *United States v. Peoples*, part of the third approach discussed above.²⁹³ It agreed with the Eighth Circuit that

[w]hen a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.²⁹⁴

Witnesses who performed “after-the-fact investigations” are generally not allowed to apply specialized knowledge in giving lay testimony.²⁹⁵ Here, the government wanted to elicit lay opinion testimony of a government computer specialist in an obstruction of justice case.²⁹⁶ The defense argued this was expert testimony and the court agreed.²⁹⁷ The court noted that

290. *Brown*, 669 F.3d at 24; *Flores-de-Jesus*, 569 F.3d at 16–17; *Casas*, 356 F.3d at 119–20; see also *United States v. Garcia*, 413 F.3d 201, 214 (2d Cir. 2005) (noting that even if the testimony of an overview witness does prove to be “a summary of the evidence admitted at trial,” it is “generally viewed as ‘improper . . . for a party to open its case with an overview witness who summarizes evidence that has not yet been presented to the jury’” and that “[t]he law already provides an adequate vehicle for the government to ‘help’ the jury gain an overview of anticipated evidence as well as a preview of its theory of each defendant’s culpability: the opening statement”) (internal quotation marks omitted); *United States v. Aviles-Colon*, 536 F.3d 1, 21 n.13 (1st Cir. 2008) (expressing concern about the use of a government agent “to endorse the testimony of other witnesses, who testify from personal knowledge about the involvement of the defendant in the conspiracy, and thereby add the imprimatur of the government to those witnesses’ testimony”).

291. *Flores-de-Jesus*, 569 F.3d at 17–18; see *Garcia*, 413 F.3d at 213 (noting that an overview witness did more than simply summarize the trial testimony; in addition, he “told the jury that . . . an experienced DEA agent[] had determined, based on the total investigation of the charged crimes, that [the defendant] was a culpable member of the conspiracy”).

292. See *United States v. Moore*, 651 F.3d 30, 61 (D.C. Cir. 2011); *United States v. Smith*, 640 F.3d 358, 366–68 (D.C. Cir. 2011); *United States v. Wilson*, 605 F.3d 985, 1025–26 (D.C. Cir. 2010); *United States v. Ganier*, 468 F.3d 920, 926–27 (6th Cir. 2006); *United States v. Lopez-Medina*, 461 F.3d 724, 742–45 (6th Cir. 2006).

293. 468 F.3d at 926; see also *United States v. Peoples*, 250 F.3d 630, 640–41 (8th Cir. 2001).

294. *Ganier*, 468 F.3d at 927 (quoting *United States v. Peoples*, 250 F.3d 630, 640–41 (8th Cir. 2001)).

295. *Id.*

296. *Id.* at 922–23.

297. *Id.* at 923.

[t]he average layperson today may be able to interpret the outputs of popular software programs as easily as he or she interprets everyday vernacular, but the interpretation [of the witness here] needed to apply to make sense of the software reports is more similar to the specialized knowledge police officers use to interpret slang and code words used by drug dealers.²⁹⁸

Thus, this dicta shows the Sixth Circuit is likely to rule that any after-the-fact investigation of encoded intercepted phone conversations will only be permitted under Rule 702, not as lay opinion testimony.

The D.C. Circuit has held that a former drug dealer could not testify as a lay witness in a drug conspiracy prosecution about terminology used in drug operations.²⁹⁹ The Circuit had previously held that “[a] witness with firsthand experience of a particular drug operation may testify under Rule 701;” however, “[i]n the absence of firsthand experience, a witness with the requisite expertise may testify as an expert about the many aspects of drug operations falling outside the scope of lay knowledge.”³⁰⁰ The court agreed with three other Circuits (the Second, Seventh, and Ninth) that hold “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 under Rule 701” and “[s]uch a witness may be permitted to testify only as an expert under Rule 702.”³⁰¹ Thus, this court thinks that “if a witness lacks firsthand knowledge of a matter outside the scope of lay expertise, he may testify only if qualified as an expert.”³⁰² In this case, the dealer had no personal experience with the implicated drug ring; instead, he was testifying “based entirely on his own experience as a dealer elsewhere.”³⁰³ Thus, the dealer’s testimony could not be admitted as lay opinion testimony.³⁰⁴

2. Overview Testimony

The D.C. Circuit has commented on the limits of overview testimony in two recent cases.³⁰⁵ First, in *United States v. Smith*, the court assumed, without deciding, that “hearsay does not become admissible

298. *Ganier*, 468 F.3d at 926.

299. *United States v. Wilson*, 605 F.3d 985, 1026 (D.C. Cir. 2010).

300. *Id.* at 1025 (citing *United States v. Williams*, 212 F.3d 1305, 1309 (D.C. Cir. 2000); *United States v. Boney*, 977 F.2d 624, 628 (D.C. Cir. 1992) (“‘Operations of narcotics dealers’ are ‘a suitable topic for expert testimony because they are not within the common knowledge of the average juror.’”).

301. *Wilson*, 605 F.3d at 1025-26 (citing *United States v. Oriedo*, 498 F.3d 593, 603-04 (7th Cir. 2007); *United States v. Garcia*, 413 F.3d 201, 215-17 (2d Cir. 2005); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997)). The court noted that the basis of an opinion “must come from one of two sources: the firsthand experience of a lay witness or the sort of ‘knowledge, skill, experience, training, or education’ that would qualify the witness as an expert.” *Id.* at 1026 (citations omitted).

302. *Id.* at 1026.

303. *Id.*

304. *Id.*

305. See generally *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011).

merely because it is provided by a government agent in the form of an overview of the evidence.³⁰⁶ The court cited the First, Second, and Fifth Circuits as following this principle.³⁰⁷ Those courts have “viewed agents’ hearsay-laden or hearsay-based overview testimony at the onset of trial as a rather blatant prosecutorial attempt to circumvent hearsay rules.”³⁰⁸ Thus, the D.C. Circuit held that the principle articulated by the First, Second, and Fifth Circuits would apply in the D.C. Circuit as well.³⁰⁹

In *United States v. Moore*, the D.C. Circuit expressly joined the circuits that have condemned the admission of overview testimony.³¹⁰ Here, an FBI agent testifying as the first witness in the government’s case-in-chief “provided an overview of the government’s case, setting forth . . . the scripts of the testimony and evidence the jury could expect the government to present.”³¹¹ The court noted three problems that warn against use of a government overview witness at the outset of its case:

First, the jury might treat the summary evidence as additional or corroborative evidence that unfairly strengthens the government’s case. . . . Second, summary witness testimony posed the risk that otherwise inadmissible evidence might be introduced. . . . Third, a summary witness might permit the government to have an extra closing argument.³¹²

The court found that this case was infected by all three of those dangers, making the agent’s testimony erroneously admitted.³¹³ “After-the-fact limiting instructions can, at best, mitigate prejudice, rather than invariably eliminate its effects completely. The view of the government’s case has been implanted in the mind of the jury by an agent . . . who worked

306. 640 F.3d at 367 (citing *United States v. Garcia-Morales*, 382 F.3d 12, 17 (1st Cir. 2004)). The court noted that, typically, the testifying agent offering lay opinion testimony will be forbidden from recounting “hearsay or offering hearsay-based opinions based on information learned during his or her conversations with witnesses, informants, and other agents.” *Id.* at 366. In this case, however, the agent was offering his opinion based on statements he had heard from the defendant and coconspirator when listening to thousands of intercepted conversations, making the statements admissible hearsay. *Id.* at 367-68. See generally FED. R. EVID. 801(d)(2).

307. *Smith*, 640 F.3d at 366-67 (citing *United States v. Flores-de-Jesus*, 569 F.3d 8, 24 (1st Cir. 2009) (“most of [the challenged testimony] was based on inadmissible hearsay.”); *United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005); *United States v. Griffin*, 324 F.3d 330, 348 (5th Cir. 2003) (“[Witness] admitted that his statement . . . was not based on personal knowledge but on what someone told him.”)).

308. *Id.* at 367 (citing *Flores-de-Jesus*, 569 F.3d at 27 (“[I]f prosecutors fail to heed our guidance in the future, they may be referred for sanctions.”); *United States v. Aviles-Colon*, 536 F.3d 1, 21 n.13 (1st Cir. 2008) (“It is troubling to us that the government’s use of the overview testimony indicates an unawareness of our prior precedent on this issue.”); *United States v. Rodriguez*, 525 F.3d 85, 95 (1st Cir. 2008) (“This court on several occasions has strongly cautioned the Government against the practice.”); *Garcia*, 413 F.3d at 214 (“‘We share this concern’ previously expressed by the Fifth Circuit ‘and similarly condemn the practice.’”); *United States v. Casas*, 356 F.3d 104, 120 (1st Cir. 2004) (“The fact that we and the Fifth Circuit have now had to address the government’s use of such preliminary overview government agent witnesses is a troubling development.”); *Griffin*, 324 F.3d at 349 (“We unequivocally condemn this practice.”)).

309. See *id.* at 367.

310. 651 F.3d 30, 60 (D.C. Cir. 2011).

311. *Id.* at 54-55.

312. *Id.* at 56 (citing *United States v. Lemire*, 720 F.2d 1327, 1348-50 (D.C. Cir. 1983)).

313. *Id.* at 58.

on the case.”³¹⁴ The court did note, however, that there could be overview testimony subject to numerous restrictions.³¹⁵ The law enforcement officer “could properly describe, based on his personal knowledge, how the . . . investigation in this case was initiated, what law enforcement entities were involved, and what investigative techniques were used.”³¹⁶ The witness could not, however, “present lay opinion testimony about investigative techniques in general and opine on what generally works and what does not, as illustrated by informants who pled guilty” or “anticipate evidence that the government would hope to introduce at trial about the charged offenses or express an opinion, directly or indirectly, about the strength of the evidence or the credibility of any of the government’s potential witnesses, including the cooperating co-conspirators.”³¹⁷

IV. RECOMMENDATION

All courts should adhere to the rulings of the third group of circuits above. That is, lay opinion testimony should be held inadmissible unless the witness personally participated in or contemporaneously observed the subject of the testimony. Witnesses can testify to the words used in conversations they witnessed or participated in. The question that arises in these cases is “whether the witness should be able to offer an interpretive gloss, pointing out what she thinks is the ‘real meaning’ of the words.”³¹⁸ In this setting, “courts really face a difficult task because they cannot know very much about how perceptive the witness is or whether she likely ‘has it right’ in paraphrasing or interpreting the meaning of the conversation.”³¹⁹ Thus, this rule will ensure only proper lay opinion testimony is admitted.

A. The Witness Must Have Personally Participated In or Contemporaneously Observed the Subject of the Testimony

All circuits should adopt the approach that has been taken by the First, Second, Third, Fourth, and Eighth Circuits. Lay opinion testimony requires that a witness have first-hand perception of the events in question. By allowing after-the-fact review to suffice under Rule 701, the other circuits have made a mockery of this requirement. Additionally, it poses a particular threat to the safeguards surrounding the use of expert testimony under Rule 702.

The other circuits, in effect, are endorsing a new type of witness, one who has neither first-hand perception nor expertise, creating excep-

314. *Id.* at 60 (citing *United States v. Curley*, 639 F.3d 50, 57 (2d Cir. 2011); *Woodcock v. Amaral*, 511 F.2d 985, 994 (1st Cir. 1974)).

315. *Id.* at 60–61.

316. *Id.* at 61.

317. *Id.*

318. MUELLER & KIRKPATRICK, *supra* note 26, at § 7:3, at 755.

319. *Id.*

tions that swallow the rule. All opinions are based on perceptions of *something*, but Rule 701 requires *first-hand* impressions. “Reading the journals of Lewis and Clark does not give [a witness] first-hand knowledge of the events they describe.”³²⁰ “Reading an eyewitness account of the fall of the Berlin Wall . . . does not give the reader ‘first-hand’ knowledge of the events and people they describe.”³²¹ Lay opinion testimony based on after the fact review would simply read the requirement of first-hand knowledge right out of Rule 701. Then anyone could obtain such knowledge by simply reviewing records of an event.³²²

Proper lay opinion must be based on the witness’ first-hand knowledge. Even though Rule 701 permits lay witnesses to testify to the inferences they have drawn, “the inferences must be tethered to perception, to what the witness saw or heard.”³²³ Thus, when a law enforcement agent is not qualified as an expert, his or her “testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.”³²⁴

The First Circuit factors outlined in *United States v. Albertelli* provide the proper model for assessing the admissibility of lay opinion testimony on coded language. First, the trial court should consider whether the testimony is “meaningfully helpful to the jury, compared to the traditional device of saving the interpretive inferences for counsel in closing argument.”³²⁵ Second, it should determine whether the testimony is restricted to “sufficiently mitigate the dangers” of such testimony.³²⁶ Third, it should ensure the witness explains “the basis for any challenged interpretation and [not allow the witness to] say only that it is based on ‘the totality of the investigation.’”³²⁷ In some cases, the court may need to “take proffers or allow cross-examination outside the presence of the jury.”³²⁸ Fourth, the court should demand that the basis for the opinion is

320. Brief for Petitioner at 4, *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).

321. *Id.* at 22.

322. See *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *United States v. Peoples*, 250 F.3d 630, 641–42 (8th Cir. 2001).

323. *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000); see also FED. R. EVID. 602 (noting that, except for experts, witnesses may only testify to matters within their personal knowledge).

324. *Peoples*, 250 F.3d at 641; see also *United States v. Parsee*, 178 F.3d 374, 379 (5th Cir. 1999) (holding the witness “was a participant in the conversation”); *United States v. Saulter*, 60 F.3d 270, 276 (7th Cir. 1995) (holding an undercover agent was a participant in the conversations and had personal knowledge of the facts being discussed).

325. 687 F.3d 439, 449 (1st Cir. 2012).

326. *Id.* These are

that the testimony may effectively smuggle in inadmissible evidence (e.g., hearsay not within some exception and perhaps inadmissible under the Confrontation Clause); that the witness may be drawing inferences that counsel could do but with advantages as to timing, repetition and the imprimatur of testifying as a law enforcement officer; that the witness may usurp the jury’s function by effectively testifying as to guilt rather than merely providing building blocks for the jury to draw its own conclusion; that the witness may be unable to point to any rational basis for the interpretation offered or be doing nothing more than speculating; and that the witness may act as a summary witness without meeting the usual requirements.

Id. at 447.

327. *Id.* at 450.

328. *Id.*

not “unduly troubling” because of “apparent unreliability, undue prejudice, importation of inadmissible hearsay or some other circumstance that might make it unsuitable as an explanation.”³²⁹

Finally, the courts should always take into consideration the dangers of both overview testimony and dual witness testimony. The dangers and safeguards to mitigate these dangers are outlined above in the various analysis sections. Specifically, courts should follow the First and Seventh Circuits’ approaches to overview testimony and the Second, Fourth, Seventh, and Ninth Circuits’ approaches to dual witness testimony.³³⁰

B. Arguments in Favor of This Rule

This Note’s rule prevents the testimony from usurping the fact-finding function of the jury. Additionally, it ensures that expert testimony will not be admitted under the guise of lay opinions. Finally, there have been successful government prosecutions in light of this rule.³³¹

1. Testimony Should Not Usurp the Fact-Finding Function of the Jury

In our legal system, “it is the jury’s function to weigh the credibility of witnesses, to draw inferences from contradictory evidence, and to reach conclusions about the evidence.”³³² Lay opinion testimony under Rule 701 is permitted because “it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness’s sensory and experiential observations that were made as a first-hand witness to a particular event.”³³³ To make an intelligent decision on a contested issue of fact, the jurors need data to resolve the issue. Testimony, however, which merely tells the jury to decide an issue in a particular way is both useless and confusing.³³⁴ It is “the jury’s singular responsibility to decide from the evidence admitted at trial whether the government has carried its burden of proof beyond a reasonable doubt.”³³⁵ The Second Circuit offers a useful scenario where lay opinion testimony is helpful to the jury without usurping its decision-making function:

329. *Id.*

330. *See supra* Part III.

331. *See, e.g.*, *United States v. Albertelli*, 687 F.3d 439 (1st Cir. 2012); *United States v. Rosado-Perez*, 605 F.3d 48 (1st Cir. 2010); *United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010); *United States v. Santiago*, 560 F.3d 62 (1st Cir. 2009); *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2003).

332. *United States v. Jayyousi*, 657 F.3d 1085, 1119 (11th Cir. 2011) (Barkett, J., concurring in part, dissenting in part).

333. *Id.* at 1120.

334. GEORGE E. DIX ET AL., *MCCORMICK ON EVIDENCE* § 12, at 60 (Kenneth S. Broun eds., 6th ed. 1999) (admitting such testimony would give the appearance that the court was shifting to the witness the responsibility to decide the case).

335. *United States v. Meises*, 645 F.3d 5, 18 (1st Cir. 2011) (quoting *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005)); *see also* *United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004) (“[T]he agent was presented to the jury with an aura of expertise and authority which increased the risk that the jury would be swayed by his testimony, rather than rely on its own interpretation.”).

[W]hen an undercover agent participates in a hand-to-hand drug exchange with a number of persons, the agent may well testify that, in his opinion, a particular participant, “X,” was the person directing the transaction. Such an opinion is based on his personal perception of such subjective factors as the respect various participants showed “X,” their deference to “X” when he spoke, and their consummation of the deal only upon a subtly signaled approval by “X.” By allowing the agent to state his opinion as to a person’s role in such circumstances, Rule 701 affords the jury an insight into an event that was uniquely available to an eyewitness.³³⁶

The lay opinion testimony usurps the jury’s function when it effectively testifies to guilt rather than offering the jury facts and admissible opinions upon which to draw its own conclusions. The purpose of lay opinion testimony is to “inform the jury what is in the evidence, not to tell it what inferences to draw from that evidence.”³³⁷ Testimony should be excluded where the witness is not any better suited than the jury to make the inference or judgment testified to. This is just telling the jury what result to reach.³³⁸ Thus, the rule is intended to prevent a party from presenting a closing argument in the guise of a lay opinion. The most fatal of this usurping testimony is when it tells the jury that the investigation has proven that the defendant is guilty of the charged offenses.³³⁹ This hampers the ability of the jury to determine for itself both whether the defendant’s guilt depended has been proven and the fairness of the defendant’s trial.

Usurpation also occurs when a witness offers lay opinion testimony based on evidence that was also available to the jurors. In that instance, that witness offers incriminating evidence not from any direct knowledge, but instead “from the same circumstantial evidence that was before the jury.”³⁴⁰ Thus, the testimony could be categorized as argumentative interpretation. It is “perfectly appropriate for the prosecutor to argue” the substance of this testimony in summation, but having the witness “so testify amount[s] to dressing up the argument as evidence.”³⁴¹ This type of lay opinion testimony is of dubious value because the jury is able to view and hear the evidence and make its own independent determination. This testimony carries the risk both of invading the province of the jury and of unfairly prejudicing the defendant.

The government’s erosion of the rationally based perception requirement

transforms Rule 701 from a narrow exception based on the common-sense recognition that a direct observer of events may have unique insights into a broad invitation for juries . . . to abdicate their

336. *Garcia*, 413 F.3d at 211–12.

337. *United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009).

338. *Meises*, 645 F.3d at 16.

339. *Id.* at 17–18.

340. *Id.* at 16–17.

341. *Id.*

independent fact-finding role to a single lay witness . . . offering “opinions” based solely on a review of the evidence.³⁴²

If this erosion continues, there will be no need for the jury to personally review any of the evidence at all. The jurors “could be ‘helped’ by a summary witness for the government, who could not only tell them what was in the evidence but tell them what inferences to draw from it.”³⁴³ That, however, is clearly not the intent of Rule 701 or purpose of lay opinion testimony.

Furthermore, keeping the underlying evidence from the jury increases the risk that the jury’s fact-finding role will be usurped; the jury will not be able to make an independent judgment whether the evidence not admitted actually supports the witness’s opinion. There is also a risk that the witness’s opinions are based, in whole or in part, on inadmissible hearsay testimony.³⁴⁴ They may “rest on the collective insight of other unknown investigators who may not themselves be present at [the] trial.”³⁴⁵ Under *Crawford v. Washington*, admission of these testimonial statements violates the Confrontation Clause.³⁴⁶ Additionally, since the underlying evidence is not available, the jury may “improperly defer to the [witness] opinion,” thinking his or her knowledge of pertinent facts are more extensive than its own.³⁴⁷

In the realm of coded drug jargon testimony, the trial court judges should have guidelines to determine whether such testimony should be admitted and how to control its scope. The judges should exclude drug jargon testimony whenever the defendant’s conversation concerns “a legitimate topic;” is spoken “clearly and in full sentences;” uses “words that make sense contextually;” is “not confusing and disjointed;” and does not involve “unusually short or cryptic statements . . . ‘sharp and abbreviated language,’ ‘unfinished sentences,’ or ‘ambiguous references.’”³⁴⁸ When law enforcement law opinion testimony is admitted without first “requiring the prosecutor to prove that the defendant’s statements are incoherent, [it] allow[s] the government to direct the jury what to conclude on a matter that it should decide in the first instance.”³⁴⁹ Proper foundation concerning personal knowledge needs to be laid before any testimony is elicited.

Two overarching guidelines emerge on the admissibility of drug jargon testimony. First, it is “only admissible if the [law enforcement] wit-

342. Petition for Writ of Certiorari at 24, *Hassoun v. United States*, 133 S. Ct. 29 (2012).

343. *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004) (“The agent interpreted both the calls that the jury heard and the calls that the jury did not hear. In doing so, he usurped the function of the jury to decide what to infer from the content of the calls.”).

344. *See id.* at 750–51.

345. *See United States v. Vazquez-Rivera*, 665 F.3d 351, 359 (1st Cir. 2011).

346. 541 U.S. 36, 36 (2004).

347. *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). The problem is more severe in cases in which the witness is a law enforcement agent whose opinions are likely to be given substantial weight by the jury. *See United States v. Meises*, 645 F.3d 5, 17 (1st Cir. 2011).

348. *United States v. Garcia*, 291 F.3d 127, 142 (2d Cir. 2002) (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)).

349. *Id.*

ness is restricted to the translation of specific drug code that has a demonstrable and fixed meaning, either in the drug trade generally or in the transaction at issue.”³⁵⁰ “Second, the witness cannot opine about the meaning of the defendant’s conversations generally, about the defendant’s conduct, or translate ambiguous statements that are not demonstrably drug code.”³⁵¹

2. *Expert Testimony Should Not Be Admitted Under the Guise of Lay Opinions*

What is essentially expert testimony may not be admitted under the guise of lay opinions.³⁵² In 2000, Rule 701 was amended to provide that testimony cannot be received as lay opinion if it is based on “scientific, technical, or other specialized knowledge.”³⁵³ A lay opinion must be the product of reasoning processes familiar to the average person in everyday life.³⁵⁴ By adopting this Note’s proposed rule, the courts will ensure that lay opinion testimony does not bypass the reliability and disclosure safeguards of expert testimony, conflate the basis of opinion necessary for lay versus expert testimony, or allow inadmissible evidence into the trial through the lay witness’s testimony.

An alternative approach to Rule 701 would allow litigants to forego the burden of expert testimony, proving the opinions are “reliable,” while still capturing the benefit of expert testimony, the ability to offer opinions not based on “firsthand knowledge or observation.”³⁵⁵ For instance, law enforcement officers are often qualified as experts to interpret intercepted conversations using slang and jargon, but the erosion of Rule 701 would permit these officers to proffer such interpretations based not on the required expertise and reliable methodology but on a mere review of the record.³⁵⁶ The government would no longer be prevented from offering any available law enforcement officer to testify “as to a person’s culpable role in a charged crime” based on a mere review of “the ‘entirety’ or ‘totality’ of information gathered in an investigation.”³⁵⁷

350. Moreno, *supra* note 3, at 32.

351. *Id.*

352. See FED. R. EVID. 701 advisory committee notes (2000 amendments) (stating Rule 701 should “eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing”); see also *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001) (stating that lay opinions from police witnesses are only admissible when the officer “a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred”).

353. FED. R. EVID. 701(c).

354. FED. R. EVID. 701 advisory committee notes (2000 amendments) (explaining 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’” (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992))).

355. See FED. R. EVID. 701, 702.

356. See *Peoples*, 250 F.3d at 641.

357. *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005).

a. Bypass Safeguards

One purpose of the foundation requirements is to prevent a party from blending expert and lay opinion testimony, principally because this would bestow an aura of expertise on the witness without having satisfied the reliability standards for expert testimony and the pre-trial disclosure requirements.³⁵⁸ Experts are given latitude to comment on matters about which they have no first-hand knowledge or perception. They are only allowed this leeway, however, because their testimony is subject to rigorous methodological and procedural safeguards.³⁵⁹ These rigorous safeguards ensure that the “expert’s opinion testimony will have a reliable basis in the knowledge and experience of his discipline.”³⁶⁰

The procedural safeguards required under Rule 702, that are bypassed when the testimony is instead admitted under Rule 701, are as follows. Rule 702 requires that an expert be qualified “by knowledge, skill, experience, training, or education” to render his opinion and that the opinion “assist the trier of fact to understand the evidence or to determine a fact in issue.”³⁶¹ It also requires that “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”³⁶² Furthermore, prior to trial, the government must disclose a written summary of the expert’s testimony to the defendant “describing the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.”³⁶³ The disclosure requirements are important because they are “intended to minimize surprise that often results from unexpected testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert’s testimony through focused cross-examination.”³⁶⁴ When the defense is deprived of proper discovery, “counsel has been effectively prevented from questioning the expert’s authority, attacking the reliability of the expert’s evidence, and preparing any other necessary challenges.”³⁶⁵ Finally, when the expert is also testifying as a lay witness, special precautions must be taken, which are outlined above in the various dual testimony discussions.³⁶⁶

Lay opinion testimony, however, is not protected by the safeguards granted to expert testimony. Instead, lay opinion testimony is checked,

358. See FED. R. EVID. 702; FED. R. CRIM. P. 16; FED. R. CIV. P. 26.

359. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

360. *Id.*

361. FED. R. EVID. 702.

362. FED. R. EVID. 702.

363. FED. R. CRIM. P. 16(a)(1)(G); see also FED. R. CIV. P. 26.

364. FED. R. CRIM. P. 16(a)(1)(E) advisory committee notes; see also Joseph, *supra* note 73, at 108 (noting that “there is no good reason to allow what is essentially surprise expert testimony,” and that “the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process”).

365. Moreno, *supra* note 3, at 36.

366. See *supra* Part III.B.3, III.C.3.

in part, by the first hand perception requirement.³⁶⁷ Thus, there would exist a strong incentive not to present expert testimony at all if the first hand perception limitation of lay testimony could be overcome by a review of recordings and documents. Parties could evade the typical challenges faced by expert testimony, while still being able to testify about what a defendant said and meant.

In the realm of coded drug jargon testimony, law enforcement officers are often qualified as experts to interpret intercepted conversations “using slang, street language, and the jargon of the illegal drug trade.”³⁶⁸ What is essentially expert testimony, however, may not be admitted under the guise of lay opinions.³⁶⁹ Even the comments accompanying Rule 702 support the proposition that coded drug jargon may be a proper subject for expert testimony, but not lay opinion testimony.³⁷⁰ The Advisory Committee notes state “when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities.”³⁷¹

b. Basis of Opinion

The basis of opinion differs depending on if the opinion is being offered as lay testimony or expert testimony. Lay opinion testimony must be based on personal knowledge and the perception of the witness.³⁷² An expert witness opinion, in contrast, “must possess some specialized knowledge or skills or education that is not in possession of the jurors.”³⁷³ This distinction goes to the heart of the reason why “Rule 701 forbids the admission of expert testimony dressed in lay witness clothing.”³⁷⁴

Lay opinion testimony must be based on personal knowledge, but expert opinions may also be based on first-hand observation and experience.³⁷⁵ This muddies the interpretive waters.³⁷⁶ Rule 702 should not be trumped, however, simply because a witness perceived first-hand the facts that underlie his or her opinion.³⁷⁷ An extreme example of the re-

367. See FED. R. EVID. 701.

368. *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001); see, e.g., *United States v. Farmer*, 543 F.3d 363, 370 (7th Cir. 2008); *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (holding that police officer gave expert testimony based on his specialized knowledge of narcotics code terminology); *United States v. Delpit*, 94 F.3d 1134, 1144 (8th Cir. 1996) (holding that police officer gave expert testimony interpreting slang and drug codes in connection with recorded telephone calls); *United States v. Foster*, 939 F.3d 445, 451 (7th Cir. 1991).

369. See, e.g., *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244–46 (9th Cir. 1997); *Harvey v. Wal-Mart Stores, Inc.*, 33 F.3d 969, 971 (8th Cir. 1994); *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 351 (8th Cir. 1994).

370. FED. R. EVID. 702 advisory committee notes.

371. *Id.*

372. See, FED. R. EVID. 701.

373. *Certain Underwriters at Lloyd’s v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000).

374. See *United States v. Johnson*, 617 F.3d 286, 292–93 (4th Cir. 2010); *Perkins*, 470 F.3d at 156.

375. *Perkins*, 470 F.3d at 155–56.

376. *United States v. Roe*, 606 F.3d 180, 185 (4th Cir. 2010); *Perkins*, 470 F.3d at 155–56.

377. *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997).

sulting consequences would be that “a lay person witnessing the removal of a bullet from a heart during an autopsy could opine as to the cause of the decedent’s death.”³⁷⁸ The witness would need to be qualified as an expert witness to offer this testimony, just as the law enforcement officer who wishes to present testimony on coded drug jargon he or she did not personally perceive should be required to do so as an expert, not as a lay witness. Additionally, the comments to Rule 702 state that “if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusions reached, why that experience is a sufficient basis for the opinion, and how the experience is reliably applied to the facts.”³⁷⁹

The basis required to offer lay opinion testimony under Rule 701 cannot consist of the second-hand information that some circuits have allowed to pass muster. Additionally, if the witness is unable to point to any rational basis for the interpretation offered, he or she may be doing nothing more than speculating.

c. Inadmissible Evidence

There is a danger that this type of lay opinion testimony may effectively smuggle in inadmissible evidence. This can include hearsay not within an exception and hearsay inadmissible under the Confrontation Clause. A prevalent example is when a law enforcement agent, while offering lay opinion testimony, recounts hearsay or offers hearsay-based opinions from information learned during a conversation with the witnesses, informants, and other agents.³⁸⁰ Admitting these types of testimonial statements, even indirectly in the form of a lay opinion, may violate the Confrontation Clause unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine the declarant.³⁸¹ Even under the guise of lay opinion testimony, the Sixth Amendment cannot be trumped.

3. *Successful Government Prosecutions with this Rule*

The final justification for this rule is that the government has been able to obtain successful prosecutions with the proposed rule in place.³⁸² Thus, adoption of this rule by all circuits will not foreclose any ability of the government to prosecute these crimes. It will, however, prevent them from overstepping the boundaries of lay opinion testimony. Testi-

378. *Id.*

379. FED. R. EVID. 702 advisory committee notes.

380. *See* United States v. Smith, 591 F.3d 974 (D.C. Cir. 2010).

381. *See* Crawford v. Washington, 541 U.S. 36 (2004); United States v. Meises, 645 F.3d 5, 19, 21–22 & n.25 (1st Cir. 2011).

382. *See, e.g.,* United States v. Albertelli, 687 F.3d 439 (1st Cir. 2012); United States v. Rosado-Perez, 605 F.3d 48 (1st Cir. 2010); United States v. Baptiste, 596 F.3d 214 (4th Cir. 2010); United States v. Santiago, 560 F.3d 62 (1st Cir. 2009); United States v. Stewart, 590 F.3d 93 (2d Cir. 2009); United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003).

mony of this type can still be offered at trial by an expert witness, by a law enforcement agent that was a party to the events or witnessed the events, or by other co-conspirators who witnessed the events. Additionally, there may be an opportunity to introduce some hearsay that is not inadmissible, for instance, admissions of a party opponent or co-conspirator statements.³⁸³

a. Can Be Admitted as Expert Testimony

In many of these controversial cases, the law enforcement officer may testify as an expert witness, as long as he or she has the necessary expertise. The expert will need to “explain how [their] experience leads to the conclusion reached, why that experience is a sufficient basis of the opinion, and how that experience is reliably applied to the facts.”³⁸⁴ Rule 702 states that if “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” a qualified expert witness may provide opinion testimony on the issue.³⁸⁵ This is because an intelligent evaluation of the facts by the fact-finder is “often difficult or impossible without the application of some . . . specialized knowledge.”³⁸⁶ Thus, many courts allow law enforcement agents to testify as experts “that a defendant’s activities were consistent with a common criminal modus operandi.”³⁸⁷ This testimony “helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior.”³⁸⁸

In the drug realm, law enforcement agents frequently testify as expert witnesses on drug trafficking.³⁸⁹ In particular, many courts hold the narcotics code words or jargon are an appropriate subject for expert testimony.³⁹⁰ A witness’s understanding of the drug trade, derived “from that agent’s prior experience policing illicit narcotics transactions, is ‘spe-

383. See FED. R. EVID. 801(d)(2).

384. FED. R. EVID. 702 advisory committee notes.

385. FED. R. EVID. 702.

386. FED. R. EVID. 702 advisory committee notes.

387. *United States v. Webb*, 115 F.3d 711, 713–14 (9th Cir. 1997).

388. *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984).

389. See *United States v. Wilson*, 605 F.3d 985, 1025–26 (D.C. Cir. 2010); *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008); *United States v. Oriedo*, 498 F.3d 593, 603–04 (7th Cir. 2007); *United States v. Garcia*, 413 F.3d 201, 215–17 (2d Cir. 2005); *United States v. Garcia*, 291 F.3d 127, 139 (2d Cir. 2002); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997); *United States v. Gonzalez*, 933 F.2d 417, 428 (7th Cir. 1991); *United States v. Foster*, 939 F.2d 445, 451–52 (7th Cir. 1991); *United States v. de Soto*, 885 F.2d 354, 359–60 (7th Cir. 1989).

390. See *United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010); *United States v. York*, 572 F.3d 415, 421 (7th Cir. 2009); *United States v. Farmer*, 543 F.3d 363, 370 (7th Cir. 2008); *United States v. Wilson*, 484 F.3d 267 (4th Cir. 2007); *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007); *United States v. Garcia*, 447 F.3d 1327 (11th Cir. 2006); *United States v. Dukagjini*, 326 F.3d 45, 52 (2d Cir. 2003); *United States v. Cabellos*, 302 F.3d 679 (7th Cir. 2002); *Garcia*, 291 F.3d at 139; *United States v. Plunk*, 153 F.3d 1011 (9th Cir. 1998) (“The jargon of the narcotics trade and the codes that drug dealers often use constitute specialized bodies of knowledge—certainly beyond the ken of the average jurors—and are therefore proper subject of expert opinion.”); *United States v. Cordoba*, 104 F.2d 225, 229–30 (9th Cir. 1997); *Foster*, 939 F.3d at 451; *United States v. Espinosa*, 827 F.2d 604, 611–12 (9th Cir. 1987); *United States v. Patterson*, 819 F.2d 1495, 1507 (9th Cir. 1987); *United States v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981).

cialized knowledge' within Rule 702."³⁹¹ The prevalent rationale for this is that it is "still a reasonable assumption that jurors are not well versed in the behavior of drug dealers."³⁹² Thus, expert testimony is helpful in explaining to jurors why otherwise innocent behavior may be evidence of drug dealing, how particular drug markets functions, or the meaning of coded jargon.³⁹³

b. Other Parties Satisfying Perception Requirement Can Testify

Additionally, the government may still introduce the desired testimony about criminal activity through other witnesses that are able to satisfy the personal perception requirement. Some examples of these potential witnesses include parties to the conversation, undercover agents participating in the activity, other co-conspirators, or perhaps another agent at the scene of the activity or listening to the conversation.³⁹⁴

V. CONCLUSION

The current wide federal circuit split concerning Rule 701(a) must be resolved. In order to respect the spirit and rationale behind the rule, the split needs to be resolved in favor of required personal perception. All courts should follow the approach of the circuits currently holding that lay opinion testimony is inadmissible unless the witness personally participated in or contemporaneously observed the subject of their testimony. Testimony should not be admitted when it is based on information gathered during an after-the-fact investigation or even when it is based a mixture of first- and second-hand knowledge. In the circuits that have followed the latter two approaches, the government has been able to overstep the bounds of Rule 701 by securing convictions through the use of nonpercipient, nonexpert lay opinion testimony from law enforcement agents. At times, this testimony has rested solely on cold, post-hoc review of the record.

The approach advocated in this Note ensures that the testimony will not usurp the fact-finding function of the jury and that expert testimony will not be admitted under the guise of lay opinions. Furthermore, under this approach, the government has still been able to achieve successful prosecutions. These prosecutions were secured safely within the bounds of Rule 701. This approach also better helps to safeguard against the dangers of both dual witness testimony and overview testimony. Resolution of this circuit split will reinstate the boundaries of Rule 701, especially as it pertains to recent narcotics and terrorism cases resting on

391. *United States v. York*, 572 F.3d 415, 421 (7th Cir. 2008); *see Oriedo*, 498 F.3d at 603.

392. *Foster*, 939 F.2d at 452.

393. *See Upton*, 512 F.3d at 401; *United States v. Brown*, 7 F.3d 648, 652 (7th Cir. 1993); *United States v. Hughes*, 970 F.2d 227, 236 (7th Cir. 1992).

394. *See United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008); *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001).

highly circumstantial evidence. This resolution needs to take place quickly, before the government is able to expand these confines of Rule 701 further and in the context of other crimes.

