NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JAVIER AMADOR-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a law-enforcement agent expressly compares the events in a case to what is typical in other cases he has investigated, is his opinion based on "specialized knowledge," and therefore admissible only as expert-opinion testimony under Federal Rule of Evidence 702?

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PRAYER

Petitioner, Javier Amador-Flores, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on April 2, 2018.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, United States v. Amador-Flores, 728 Fed. App'x 839 (10th Cir. 2018), is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, August 30, 2018, see A7, so this petition is timely.

FEDERAL RULES INVOLVED

This case implicates two federal rules of evidence, which distinguish lay-opinion testimony from expert-opinion testimony. The rule defining lay-opinion testimony is Federal Rule of Evidence 701. It reads as follows:

> **Rule 701. Opinion testimony by Lay Witnesses**
>
> 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.

Fed. R. Evid. 701.

The rule on expert-opinion testimony is Federal Rule of Evidence 702. It provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

STATEMENT OF THE CASE

In April 2015, authorities were investigating Jose Manuel Trujillo, who went by "Paisa," for selling methamphetamine. Vol. 1 at 237-38. An undercover agent first spoke with Paisa on May 1, 2015. Id. at 236, 238. Paisa was offering to sell eight pounds of methamphetamine for $13,000 a pound. Id. They arranged a deal for May 6. Id. at 242.[1]

On that morning, when the agent said he was in Hobbs, New Mexico and ready to do the deal, Paisa had "Tocayo" give him a call. Id. at 247-49. Tocayo, whose given name is Joel Dominguez-Morales, id. at 248, met the agent and his partner in the parking lot of a Buffalo Wild Wings in Hobbs. Id. at 253. Mr. Dominguez-Morales then suggested a less public place for the deal, an abandoned bar in a secluded area about nine miles away. Id. at 256, 259.

When other officers got there, they found Mr. Dominguez-Morales and his girlfriend. Id. at 177. They would recover, near the maroon SUV that Mr. Dominguez-Morales was driving, a plastic bag that contained

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[1] For this Court's convenience in the event it deems it necessary to review the record to resolve the petition, see Sup. Ct. R. 12.7, this petition will cite to the record on appeal to the Tenth Circuit.

four, one-pound packages of methamphetamine. Id. at 178-80. They also found four, one-pound packages of the drug in an Explorer that his girlfriend had driven to the abandoned bar. Id. at 182-83, 227.

Other officers approached a blue truck parked a short distance away from the abandoned bar, which they had seen meet up with the maroon SUV. Id. at 339-40; see also id. at 186 (testimony that woman driving the truck delivered four pounds of the drug to Mr. Dominguez-Morales). A woman and her two-month-old baby were in the truck. Id. at 340, 353. Although she initially said she had only pulled over to call her mother, id. at 353, she would quickly admit she was involved in the drug deal, id. at 353-54. She also directed them to methamphetamine in one of the baby's socks, id. at 354, and there was a straw in the truck for snorting the drug, id. at 225.

The woman was Myrna Orozco, id. at 350, the wife of Javier Amador-Flores, id. at 396, 411, 451. She consented to a search of their home, id. at 354, and indicated drugs might be found there, id. at 186; cf. id. at 354 (she said she did not know whether more drugs would be found at the property).

Officers went to the trailer the couple rented on a county road in Denver City, Texas. Id. at 185-86, 445. There, in a pickup with a flat tire -- which belonged to Ms. Orozco, id. at 223, 301 -- they found an ammo can, id. at 281. Inside the can were two scales, a cutting agent used to dilute drugs, and a pound of methamphetamine. Id. at 282-83.

The officers found much smaller amounts of the drug among stacks of tires in each of two sheds on the property. Id. at 285-88. In one shed, there was about sixty-one and a quarter grams of the drug hidden in a soap box. Id. at 285-87, 348. In the other, there was a little under fifty-two grams of the drug in a pipe with plastic caps at each end. Id. at 287-88, 349. Nine days later, authorities searched a white Monte Carlo with California plates that belonged to Paisa and that was parked there (and that had been there too on May 6th). Id. at 190, 207, 316, 350, 402. They discovered that the cavities behind the rear panel on each side had been modified into compartments, which could be unlocked by a switch that had been installed under the dashboard, id. at 190-93, and which together could hold more than the eight pounds of methamphetamine involved in the May 6th

deal, id. at 193. In the pocket of a pair of pants that was stuffed into one compartment was a small amount of methamphetamine. Id. at 192.

Mr. Amador-Flores came home from his job in the oil fields while the officers were searching the trailer and the surrounding property. Id. at 279-80, 309, 322, 452. He was not arrested at that time.

A one-count indictment was eventually returned in the United States District Court for the District of New Mexico. It charged a conspiracy, for the period of May 1 to May 6, 2015, to distribute five hundred or more grams of a mixture or substance containing methamphetamine. Vol. 1 at 14. The named conspirators were Paisa (Juan Manuel Trujillo), Mr. Dominguez-Morales and his girlfriend (a Ms. Cardoza-Burciaga), Ms. Orozco and Mr. Amador-Flores. Mr. Amador-Flores was tried alone on that indictment. Vol. 1 at 60-61, Vol. 3 at 83-84.

Mr. Amador-Flores's denials of involvement and the prosecution's use of opinion testimony -- by an agent who was not qualified as an expert, and who compared this case to other drug cases -- to rebut those denials

Mr. Amador-Flores was not mentioned on any of the recorded calls that Agent Martinez had with Paisa. Vol. 3 at 260. Nor was there any

proof he had engaged in any drug activity with Paisa or Mr. Dominguez-Morales (or anyone else) at any earlier time.

When questioned on May 6th by an officer who had been searching his house for drugs, Mr. Amador-Flores acknowledged that he thought Paisa might be involved in drug dealing. Vol. 3 at 312. In later interviews, he would state he had been friends for a couple of years with Paisa -- whom he had met through his landlord, who had previously rented the trailer to Paisa, id. at 445 -- and also with Mr. Dominguez-Morales. Id. at 203-04. He knew the two men were involved in drug trafficking, with Paisa being the leader and the one who brought drugs to Denver City. Id. at 205, 211, 443.

The two men, Mr. Amador-Flores recounted, repeatedly asked him to be involved in selling drugs, id. at 205, 211, especially Paisa, whose horse he cared for, id. at 226, 456, and with whom Mr. Amador-Flores spoke every day or every other day, id. at 212, 444. But, Mr. Amador-Flores maintained, he always turned them down. Indeed, although he at first would accept gifts of boots and belts from Paisa, he later declined even

this. Id. at 210, 217. One agent described how Mr. Amador-Flores said that he had told both Paisa and Mr. Dominguez-Morales that "he did not want drugs stored [at] his residence," id. at 451, and that he was "very angry" that "his wife was a meth user," id.

Mr. Amador-Flores's rejection of the two men's entreaties included an offer by Paisa to pay him $2,000 for handling the sale of the eight pounds of methamphetamine on May 6, 2015, the object of the charged conspiracy. Mr. Dominguez-Morales, who would eventually take the lead of the sale that day in Hobbs, had gone to Mexico the previous week. Id. at 207, 399. Paisa offered to have Mr. Amador-Flores do the deal, because he did not think Mr. Dominguez-Morales would be back in time. Id. at 209. As the jury would hear through Rene Robles -- who in 2015 was a task force agent with Homeland Security, id. at 171, and who interviewed Mr. Amador-Flores after his arrest at the end of July 2015, id. at 201 -- Mr. Amador-Flores insisted he had declined that offer too, id. at 210.

The prosecution elicited opinion testimony that somebody like Paisa would not typically make such an offer to one who was not already

involved with him in drug trafficking. But it did not introduce the opinion testimony from the agent from the Drug Enforcement Agency for whom it gave pre-trial notice of proposed expert testimony, Vol. 1 at 33-39, and whom it qualified as an expert at trial, Vol. 3 at 370-80. Instead, the prosecution brought out the opinion from Agent Robles, the first witness at trial. Agent Robles, who had worked some fifty drug investigations, id. at 172, compared what Mr. Amador-Flores said happened here to what he had seen in those other cases, in the following exchange:

> Q. Did you find it consistent -- His statement about the May 4th call from Paisa, offering him, you know, $2,000 to, you know, do this deal in place of Joel Dominguez-Morales, did you find that to be consistent with what you typically see in these type of investigations for someone who never is involved in drug trafficking?
>
> A. No.
>
> Q. And could you explain why?
>
> A. Yes. You know, typically when a drug coordinator or a drug trafficker, when he's looking for, whether it be drivers or couriers, if he goes to them for that, it's more than likely because he's used them before, especially if dealt with on a regular basis.

Id. at 234.

Mr. Amador-Flores had also told Agent Robles he had wired money to Paisa in Mexico. Id. at 215. As the agent would explain on cross-examination, Mr. Amador-Flores said the money wired was the proceeds from the sale of a saddle he had done for Paisa. Id. at 219. As to the wire transfer too, Agent Robles gave his opinion as to why such a transfer was significant, based again on what he had seen in other drug investigations:

> Q. Okay. Why was it significant to you that Mr. Amador-Flores admitted to wiring money for Paisa?
>
> A. Well, again, you know, in my experience in drug-trafficking organizations or criminal enterprises, it's not rare to see co-conspirators or suspects transfer money or deposit money, number one, to avoid immediate possession on themselves if encountered by law enforcement; and, number two, to make it easier or faster to get money from one location to another.

Id. at 215.

The district court's view of the weakness of the case, and the verdict

In denying Mr. Amador-Flores's motion for judgment of acquittal, the district court observed that the case was not especially strong. At the outset, the court noted that knowing participation was required and that

"there have been instances . . . where the evidence has been a lot stronger." Id. at 466. After summarizing the evidence it considered, and finding that it met the light-most-favorable-to-the-government test for sufficiency, id. at 466-67, the court told the prosecutors that they "ha[d] a lot of work to do in [their] closing," id. at 467. The court then added: "So all that to say it's not an easy call." Id.

The jury convicted Mr. Amador-Flores of the charged conspiracy. The district court imposed the statutory minimum of ten years in prison. Id. at 525.

The Tenth Circuit rejects Mr. Amador-Flores's challenge that the comparison testimony could not be admitted as a lay opinion, but only as an expert opinion

On appeal, Mr. Amador-Flores argued that Agent Robles's testimony could not be admitted as lay-opinion testimony, but only as expert-opinion testimony. The agent twice expressly compared what happened here to what he had seen in his investigations of other drug cases. This was the use of "specialized knowledge," as an ordinary person would have no idea how drug dealers typically act, and so could not make such comparisons.

Federal Rule of Evidence 701 specifically precludes lay-opinion testimony on matters involving "specialized knowledge." Such testimony can come in only through the opinion of a properly noticed and qualified expert. As the prosecution did not take either step with respect to Agent Robles, Mr. Amador-Flores argued, he was entitled to relief for plain error.

The Tenth Circuit denied relief. United States v. Amador-Flores, 728 Fed. App'x 839 (10th Cir. 2018); A1. It first considered the exchange about Mr. Amador-Flores's statement that he turned down an offer of $2,000 to do the eight-pound deal in this case. Id. at 843-44; A4. There, the prosecutor asked the agent, "'did you find that to be consistent with what you typically see in these types of investigations for someone who never is involved in drug trafficking?'" Id. at 844 (quoting record); A4. Taking the prosecutor's lead, the agent responded in terms of what "'typically'" occurred. Id. (quoting record).

The Tenth Circuit wrote that it did not follow that there was the use of specialized knowledge that would make this testimony admissible only under the expert-opinion rule unless the agent "was actually *applying* his

specialized knowledge or experience to arrive at his given opinion." Id. at 844; A5 (emphasis in original). If he were not, the court continued, his comparison to what was typical in other cases "is nothing more than an attempt to give gravitas to his unremarkable, non-expert observations." Id. Stating that the "line between Rule 701 and Rule 702 is hazy," and Agent Robles's testimony is "somewhat near it," the court stated that it would not decide "on which side of that blurred line his testimony belongs." Id.

The Tenth Circuit likewise declined to decide whether there was error as to the second piece of challenged testimony. Id. at 845; A5. In that exchange, the agent gave his views on what was "'not rare'" in his "'experience in drug-trafficking organizations or criminal enterprises'" regarding the wiring of money. Id. at 844 (quoting record); A5.

Instead, the Tenth Circuit decided that if there were error, it was not plain. Id. at 845; A5. It did so on the theory that the agent's testimony was "not obviously inadmissible under Rule 701." Id. For this, the court cited nothing other than (a) its own contention that (on his testimony about Mr. Amador-Flores being offered $2,000 to do the deal) the agent might not

have been applying his specialized knowledge, but only seeking to bolster his opinion, and (b) the prosecution's claim that his observations were common enough to be made by a lay person (even though they were not couched in such terms).

REASONS FOR GRANTING THE WRIT

This Court should grant review to correct the Tenth Circuit's plainly wrong reading of the federal rules on lay and expert-opinion testimony, a reading that conflicts with the decisions of other circuits.

The Federal Rules of Evidence preclude lay-opinion testimony that is based on "specialized knowledge." Fed. R. Evid. 701(c). Only a witness who is qualified as an expert may testify on such a basis. Id., Rule 702(a). And the Advisory Committee Notes to the 2000 amendment to Rule 701 expressly warns about allowing lay-opinion testimony to do an end-run around Rule 702:

> Rule 701 has been amended 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.

Fed. R. Evid. 701, 2000 Advisory Committee Notes. The notes likewise warn that this simple expedient will improperly permit circumvention of the notice requirements for expert opinions in Federal Rule of Criminal Procedure 16. Id.

The Tenth Circuit decision in this case worked just such an end-run around the plain language of Rule 701. There can be no doubt that Agent

Robles used specialized knowledge in denigrating Mr. Amador-Flores's account of turning down an offer to do the drug deal, a point central to his defense. The prosecutor expressly asked the agent to give an opinion based on what he had seen in other cases. He asked the agent whether Mr. Amador-Flores's account was "consistent with what you typically see in these type of investigations for someone who never is involved in drug trafficking." Vol. 3 at 234. And after the agent answered "No," id., the prosecutor asked him to explain why, leading to a response that was phrased in what was typical for those in the drug trade:

> You know, typically when a drug coordinator or a drug trafficker, when he's looking for, whether it be drivers or couriers, if he goes to them for that, it's more than likely because he's used them before, especially if dealt with on a regular basis.

Id.

A comparison to what occurred in other drug investigations involves specialized knowledge. A lay person would not have any experience in drug investigations. And so, he or she would not be able to compare what Mr. Amador-Flores said happened here with what happens in a typical

drug case. The only people who could make such comparisons would be those who were familiar with other drug investigations.

It does not matter whether, as the government claimed in the Tenth Circuit, it is sensible that one without prior involvement would not be asked to do a large drug deal. Amador-Flores, 728 Fed. App'x at 844; A4. The agent was not asked what was logical in these circumstances. He was asked what was typical in his investigation of drug cases. Nor could he have given his opinion as to what was logical. In that regard, he was no better positioned than the jurors, so his opinion would not meet the admissibility requirement for lay-opinion testimony that it be helpful to the jurors. Fed. R. Evid. 701(b).

The rationale that the Tenth Circuit used is equally unavailing. The Tenth Circuit did not deny that what the agent knew from investigating other drug cases was not specialized knowledge. Instead, it wrote that his opinion would be an expert one only if he "was actually *applying* his specialized knowledge or experience" to reach his opinion. Amador-Flores, 728 Fed. App'x at 844 (emphasis in original); A5. If that were not

the case, it continued, "then his comparison to other cases is nothing more than an attempt to give gravitas to his unremarkable, non-expert observations." Id.

Of course, the exchange (not to mention the requirement that a lay opinion be helpful to the jury) forecloses that possibility. But more troubling still is the gravitas rationale on its own terms. Nothing in Rules 701 or 702 allows the use of specialized knowledge to shine up, and give additional heft to, a non-expert opinion. The Tenth Circuit created an outside-the-rules use of specialized knowledge that is inconsistent with the rules on lay and expert-opinion testimony. Even if it were possible to separate a lay opinion from such a boosting comparison -- and it certainly is not in this case -- that would not save the comparison from being improper. That portion would be an expert opinion and inadmissible under the rules. To allow all of it in as a lay opinion would be to do what, as the Advisory Committee Notes say, was a critical reason for the 2000 changes to Rule 701. It would allow (and not just merely create the risk of

allowing) an expert to testify "in lay witness clothing." Fed. R. Evid. 701, 2000 Advisory Committee Notes.

Agent Robles's other opinion was just as surely an expert one. In discussing the wiring of money, the agent spoke from "'[his] experience in drug-trafficking organizations or criminal enterprises,'" and that it was "'not rare to see co-conspirators or suspects'" do. Amador-Flores, 728 Fed. App'x at 844 (quoting record); A5. His testimony was not something within the knowledge of the average person, but only within the knowledge of one steeped in the way of drug traffickers.

The Tenth Circuit's decision flies in the face of the rules. It is also inconsistent with the decisions of other circuits that hold that opinions of the type here are expert ones that must be properly noticed and satisfy Rule 702.

Consider United States v. Oriedo, 498 F.3d 593 (7th Cir. 2007). There, an undercover officer was asked how to comment on the packaging of crack cocaine based on his own observations. Id. at 603. His answer listed a variety of ways that "they" would package the drug. Id. The Seventh

Circuit held this to be expert testimony, inadmissible through the officer as a lay witness. Id. This was because the officer had testified to something within "[his] experience observing narcotics trafficking practices." Id. He did not just speak to what he saw, or to facts he learned in the investigation at hand, but rather brought to bear "the wealth of his experience as a narcotics officer." Id. That is just what happened here, when Agent Robles testified to whether Mr. Amador-Flores's account was consistent with what he had seen in other cases, and on the significance of wiring money based on what he had seen in his experience with drug-trafficking organizations and criminal enterprises.

Or consider United States v. Garcia, 413 F.3d 201 (2d Cir. 2005). In that case, an agent gave an opinion on the role of various conspirators based on intercepted calls. Id. at 216. But the prosecution elicited that the agent had extensive experience with calls in other investigations, and also had the benefit of what cooperating witnesses had said in some of those other cases. Id. The Second Circuit noted that this "was certainly outside the ken of the average person." Id. This made his opinion an expert one,

as it "was not that of an average person in everyday life," but rather "that of a law enforcement officer with considerable specialized training and experience in narcotics trafficking." Id. at 217. This meant that the opinion testimony was improper:

> As such, his opinion testimony was not admissible under Rule 701. The government was obliged to demonstrate its admissibility under Rule 702 or forego its use.

Id.

It is the same here. With each of Agent Robles's challenged opinions expressly based on a comparison with other narcotics cases, his "reasoning process" necessarily "depended, in whole or in part, on his specialized training and experience." Id. at 216. This made them expert opinions.

The Second Circuit's decision in Garcia also points up the evident flaw in the Tenth Circuit's gravitas rationale. The Second Circuit noted that a lay opinion must be "the product of reasoning processes familiar to the average person in everyday life." Id. at 215. It then explained that the reason for this was to "prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness

without satisfying the reliability standard for expert testimony set forth in Rule 702 and the pre-trial disclosure requirement set forth in Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26." Id. That is precisely what the Tenth Circuit, with its gravitas rationale, countenanced in this case.

The Tenth Circuit also stated that "[t]he line between Rule 701 and Rule 702 is hazy," and that it did not need to decide on which side of "that blurred line" the agent's testimony fell. Amador-Flores, 728 Fed. App'x at 844; A5. Even if it could be said that the line is hazy, that would present a problem only at the margins. The offending testimony here is nowhere near the line. Nor is such testimony borderline as a general matter. A law-enforcement agent's comparison to what he or she has seen in other cases is plainly based on specialized knowledge, as it cannot be made by an average person. And so, it is plainly an expert opinion.

The Tenth Circuit's resolution of the case on the plainness prong of the plain-error test of United States v. Olano, 507 U.S. 725, 734 (1993), see Amador-Flores, 728 Fed. App'x at 845; A5, is no reason to deny review on the merits question. The main reason the Tenth Circuit gave for the errors

not being plain was what it said about the merits. Amador-Flores, 728 Fed. App'x at 845; A5. That is contrary to the terms of the relevant rules and to the decisions of other circuits.

That the testimony could have been admitted through an expert, id., does nothing to show that its admission as a lay opinion was proper. The whole point is that an opinion that depends on specialized knowledge can only come in as an expert opinion under Rule 702, and not as a lay opinion under Rule 701.[2]

After that, the Tenth Circuit said that the testimony was not "obviously prejudicial." Id. This conflates the third prong of Olano (that the error affect substantial rights, Olano, 507 U.S. at 735) and its second prong (that the error be plain). It is therefore no holding that the claim fails

[2] Of course, before such an expert opinion could have been given, there would have had to be notice of the opinion under Federal Rule of Criminal Procedure 16, and the expert would have had to be properly qualified to give such an opinion. Although not reflected in the passage of the oral argument to which the Tenth Circuit cited as an acknowledgment that the testimony could come in as an expert opinion, see United States v. Amador-Flores, 728 Fed. App'x 839, 845 (10th Cir. 2018) (citing Oral Arg. 12:24-12:28), in which a question came right on the heels of the quoted remark, Oral Arg. at 12:29-12:42, Mr. Amador-Flores later stressed these points, id. 14:02-14:11.

on an independent basis other than plainness. The application of a too-high standard would itself preclude such a conclusion. And the Tenth Circuit did not purport to make such a determination. To the contrary, the the comments about obvious prejudice came in a section titled, "Second Prong -- Plain Error," id. (bolding and italics omitted), the citations in the two-paragraph section went only to the second prong of Olano, id., and the express holding at the end of the section was "that any presumed error was not plain," id. The Tenth Circuit then wrote, in the concluding section, that in light of its holding on plainness, it "decline[d] to reach the third or fourth prong of the plain-error test." Id.

This case thus squarely presents an important issue about what can be admitted as a lay opinion. Rule 701 is clear that such an opinion cannot be based on specialized knowledge. There is no other way to characterize a law-enforcement agent's express comparison of what occurred in a given case to what the agent had seen in other cases. The Tenth Circuit opinion directly contravenes the rule, and is inconsistent with the views of at least two other circuits. And The Tenth Circuit's gravitas rationale has no

footing in Rule 701. As the Second Circuit has recognized, such bolstering of a lay opinion does precisely what the drafters of Rule 701 warned against when the rule was amended in 2000.

With the Tenth Circuit having so far strayed from the express terms of the rule in blessing the testimony here, this Court's review is warranted.

CONCLUSION

This Court should grant Mr. Amador-Flores a writ of certiorari.

Respectfully submitted,

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