No. _____

IN THE

Supreme Court of the United States

GREGORY HARRIS, JR.,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit panel majority, deepening a mature circuit split regarding the foundational requirements of Federal Rule of Evidence 701, ruled that the district court properly allowed the government's case agents to provide lay opinion testimony as to the essential elements of the charged offenses—the existence of the charged drug conspiracy and the defendants' membership therein—without providing any foundation beyond general testimony regarding the scope of their investigation, *i.e.*, their use of wiretaps, surveillance and witness interviews. Six circuits have held that such lay opinion testimony fails the personal perception and helpfulness requirements of Rule 701 and that it fundamentally usurps the role of the jury because "if such broadly based opinion testimony as to culpability were admissible under Rule 701, 'there would be no need for the trial jury to review personally any evidence at all.'" *United States v. Garcia*, 413 F.3d 201, 214 (2d Cir. 2005) (quoting *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004)). Five circuits have held to the contrary, with at least one explicitly declaring that "'the application of Rule 701 should not be influenced by concern that opinion testimony usurps the role of the jury . . . .'" *United States v. Gadson*, 763 F.3d 1189, 1209 (9th Cir. 2014) (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure* § 6252 at 112 (1997)).

The question presented is whether the personal perception and helpfulness requirements of Rule 701 are satisfied where the government's law enforcement witnesses provide lay opinion testimony as to the essential elements of the charged offenses without providing any foundation beyond general testimony regarding the

scope of their investigation. This case is an ideal vehicle for resolving this question because the issue was preserved at trial and fully briefed on appeal, and the majority and dissenting opinions reflect the wider split among the circuits. Moreover, the majority opinion deepens the divide by forgiving lay opinion testimony, admitted absent the foundational requirements, that "'opine[s]' on the essential elements" of the charged crime. Appendix ("App'x") B at 40 (Ambro, J., dissenting).

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY HARRIS, JR.,
PETITIONER,

- VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 13, 2019, in *United States v. Gregory Harris, Jr.*, Third Circuit No. 16-1537, and as to which that court denied a petition for rehearing and rehearing en banc on December 10, 2019.

OPINIONS BELOW

The Third Circuit's divided "not precedential" decision was filed on September 13, 2019. The judgment is attached as Appendix (App'x) A. The opinion is attached as App'x B and is available at 788 F. App'x. 135 (3d Cir. 2019) (not precedential). An application for en banc rehearing was filed on October 28, 2019. It was denied by order dated December 10, 2019, attached as App'x C.

JURISDICTIONAL GROUNDS

The United States District Court for the Western District of Pennsylvania had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. §

3742. That court entered judgment on September 13, 2019, and denied panel rehearing and rehearing en banc on December 10, 2019. This petition is timely filed within ninety days after denial of the petition for rehearing and two extensions of time. The first extension was granted on March 3, 2020. *See* Docket No. 19A968. The Court entered an order on March 19, 2020, extending the deadline for any petitions due on or after that date to 150 days after the entry of, *inter alia*, the denial of a timely petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties, namely, petitioner Gregory Harris, Jr., and respondent United States.[1]

FEDERAL RULE OF EVIDENCE INVOLVED

The issue raised herein concerns the Rule 701 of the Federal Rules of Evidence.

Rule 701 of the Federal Rules of Evidence provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> **(a)** rationally based on the witness's perception;
>
> **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

[1] Petitioner Gregory Harris, Jr., was tried in the United States District Court, District of Western Pennsylvania, alongside, *inter alia*, co-defendant Thomas Hopes. Hopes was also granted an extension of time for filing his petition for certiorari, *see* Docket 19A980, and will be raising the same question presented by Petitioner Harris.

> **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

STATEMENT OF THE CASE

This petition presents a recurring and important question that has deeply divided the federal courts of appeal: whether the personal perception and helpfulness requirements of Federal Rule of Evidence ("FRE") 701 are satisfied where the government's law enforcement witnesses provide lay opinion testimony as to the essential elements of the charged offenses without providing any foundation beyond their general testimony regarding the scope of their investigation. The Third Circuit panel majority answered that question in the affirmative, holding that the district court properly allowed the government's witnesses to testify to the existence of a drug organization, the "Uptown Crew," and to the defendants' membership therein. App'x B at 24–30 (Rendell, J., joined by Scirica, J.) (hereinafter "majority").

But, as Judge Ambro recognized in his dissenting opinion, the law enforcement witnesses who offered these opinions "never explained the specific observations, statements, or other perceptible facts" supporting their conclusions that a "cohesive 'Uptown' organization" even existed, much less "the link between that supposed organization and the 'U' sign or University of Miami clothing, nor the link between any of this and the trafficking of heroin." App'x B at 38 (Ambro, J., dissenting) (hereinafter "dissent") (regarding Caterino's testimony); *id.* at 36–37 (dissent) (regarding Francis's testimony). Francis, for example, merely "described in general terms the techniques he and the investigative team used . . . .

surveillance, witness interviews, wiretaps, and controlled deliveries." *Id.* at 36 (dissent). As Judge Ambro further recognized, this type of opinion testimony has been found by other circuits to fail the helpfulness requirement of Rule 701 by invading the jury's role as factfinder *Id.* at 41 (dissent) (citing *United States v Garcia.* 413 F.3d 201, 214–15 (2d Cir. 2005). The testimony was especially troubling in the instant case, Judge Ambro observed, given the government's stunning admission on appeal that the case agents "manufactured the label 'Uptown Crew.'" *Id.* at 43 (dissent) (quoting Gov't Opp'n to Hopes Br. at 76 n.29). Specifically, they "[a]ffix[ed] the name 'Uptown'" to defendants and their alleged associates because it was 'helpful conceptually.'" *Id.* Judge Ambro's astonishment fairly leaps off the page.

> You read that right. . . . In other words, aside from being a useful framing device created by law enforcement, there may be no such thing as the "Uptown Crew." The Government's own case agents created that label as a helpful concept for themselves—as well as the jury—and "affixed it" to the group of individuals they had decided to charge with a conspiracy.

Id. (dissent).

The "invent[ion]" of the "'Uptown Crew' label" was critical in this case, Judge Ambro recognized, because "[t]o reach the quantities of heroin for which defendants were convicted, the Government expanded the scope of the alleged conspiracy to include the many individuals it described as the 'Uptown Crew.'" *Id.* Moreover, the government not only "invent[ed] the 'Uptown Crew,'" but it also "leaned hard on that concept to obtain defendants' convictions." *Id.* at 43–44.

A. The Trial

Gregory Harris, Jr. ("Greg" to distinguish him from his brother and co-defendant, Keith Harris ("Keith")) was charged in two indictments returned in the District Court for the Western District of Pennsylvania: 2:13-cr-00057-7 and 2:13-cr-00058-6. Indictment 13-57 and Indictment 13-58 stemmed from an investigation into heroin trafficking in the Homestead, Pennsylvania area. JA 115.[2] Both charged a drug-trafficking conspiracy at Count One.[3] JA 49–50, 59–60. Count One of Indictment 13-58 ("Indictment 58") charged Greg with conspiracy to possess with intent to distribute and distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(1). JA 59–60. He was neither charged nor named in Count One of Indictment 13–57 ("Indictment 57"). JA 49–50.

The indictments were consolidated for trial. JA 19–20 (ECF 342; Docket Entry 11/12/2014). Greg, Keith, and Hopes proceeded to trial, as did Ronnell Robinson, who was only named in the § 924(c) count of Indictment 13-57. JA 51–52.

The jury rejected much of the government's case against Greg. It acquitted him of the 18 U.S.C. § 924(c) charge. JA 1822–23. And it rejected the charge that he conspired to distribute more than 1 kilogram of heroin, finding him guilty of the lesser included offense of conspiracy to distribute more than 100 grams of heroin.

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[2] "JA" refers to the Joint Appendix of Gregory Harris and Thomas Hopes submitted to the Third Circuit Court of Appeals along with their briefs.

[3] Count Two of Indictment 13-57 charged a firearms conspiracy in violation of 18 U.S.C. § 924(c). All four defendants were acquitted at trial of this count. JA 1813–16, 1818–20, 1822–27.

JA 1821–22. But the evidence overwhelmingly indicated that Greg operated independently, not as a member of the conspiracy charged in Indictment 58 or as a member of the larger conspiracy the government portrayed in closing. Despite calling 31 witnesses in a trial spanning 13 days, the government failed to call a single witness who actually bought heroin from or sold heroin to Greg, or who saw Greg buy or sell or cut or package heroin, or who testified that Greg was a member of the purported "Uptown" organization, which the government claimed was a "heroin distribution organization" in the Homestead, Pennsylvania area. *See e.g.,* JA 80, 115.

The evidence at trial, however, apart from the case agents' opinions regarding "Uptown" revealed that Gregg conducted his own business, which he kept separate and apart from Hopes and Keith. Indeed, at Greg's sentencing, the district court expressed its view that the government failed to prove, even by a preponderance, that Greg conspired with Hopes or Keith.[4] JA 1861.

[4] That Greg operated independently of Keith and Hopes was evidenced, for example, by a call between Greg and James Walker, who was a heroin supplier who separately supplied Greg, Keith, and Hopes. In this call, Walker asked Greg if instead of purchasing a half ounce of heroin, as they had previously discussed, Greg instead would purchase the entire ounce and sell half of it to his brother. Greg replied "no," that he didn't know what Keith needed and that he did not want to take that risk. JA 1970. Similarly, in a January 1, 2013 call between Hopes and Keith, Hopes, according to the interpretation of one of the government's case agents, asked Keith whether they could borrow any of Greg's stamp bags. JA 2188-89. Keith responded that they could not, and that he was afraid of his brother's "temper tantrums." JA 2189. As the case agent interpreted the call, Keith recognized that Greg might need the bags for his own customers. JA 351-52.

Only two witnesses testified about personal interactions with Greg in a way that bore on the drug conspiracy charge. Lisa Saldana, a cooperating witness, JA 1028–29, sold boxes of "stamp bags," *inter alia*, at a flea market stall.[5] JA 1032. She testified that a man she identified as "G" in two photographs, one from August 19, 2012, JA 1033–34, and the other from September 15, 2012, JA 1036, bought ten boxes of stamp bags on each occasion.[6] JA 1034, 1041. The government did not ask Saldana whether Greg pooled his money with anybody else to buy these boxes, whether he indicated in any other way that he worked cooperatively with others, or whether he bought so much as a single box of stamp bags on any other occasion.

Arlene Hernandez, known as "Pooky," testified under a grant of immunity. With respect to Greg, she testified that she "stamped bags," meaning she used an ink stamp to place an image on the bags, as a favor to Greg. JA 1237–38. She testified that she stamped three boxes of bags, that she did not know the purpose of the bags, explicitly stated "they didn't have any drug substances inside of the bags," but were, rather, "brand new bags," and that she gave them to Greg when she was done. JA 1239, 1240. The government did not ask her whether she heard Greg talking to anybody else while she was stamping the bags or whether she knew Greg to be involved in drug dealing.

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[5] An expert witness testified that heroin is typically packaged in "stamp bags" that each stamp bag typically holds a dosage unit of heroin, consisting of approximately .02 grams of "cut," as opposed to raw, heroin; that sellers sometimes stamp a name on the bag to indicate their brand; that heroin typically comes in powder form; and that these bags are only used for heroin. JA 139, 142–46.

[6] Agent Countryman later identified "G" as Greg. *See*, *e.g.*, JA 382, 1285.

Other witnesses testified to their own direct involvement in drug trafficking, but they did not deal with Greg. Brent Harber, III, for example, testified that he sold heroin for Hopes and Keith, JA 643, that he stole a gun and heroin from Greg and Keith's house, JA 651, and about the events underlying the § 924(c) charge, JA 652–82. But he expressly denied ever selling drugs for Greg or even talking with Greg about drug selling. JA 714. And Greg Morris, Sr., who pleaded guilty to his involvement in a drug-trafficking conspiracy, JA 1410, testified he sold drugs to James Walker, JA 1411–12, but said he never dealt with Greg. JA 1417.

Nor did the wiretap evidence connect Greg to this charged conspiracy.[7] The jury heard Greg arrange three small purchases totaling 56 grams from two different people—one for an ounce from Antonio Hardin (JA 1915), and two half-ounces from James Walker (JA 1967–68 and JA 1973), and heard Thomas Hopes refer one possible sale to him. JA 2202.

The government attempted to fill this evidentiary gap with the lay opinion of law enforcement officers. The prosecutor argued both in opening and closing that the two charged conspiracies, 13-57 and 13-58, were "subgroups" of an overarching heroin conspiracy, the "Uptown Crew," and that Greg, Keith, and Hopes were all members. JA80, 1588–89. The existence of the supposed Uptown Crew, however, essentially came only from the government's law enforcement witnesses. It began with the first witness, case agent Aaron Francis. Echoing the prosecutor's opening, Francis testified that he was a member of a "Safe Streets Task Force" whose "goal

[7] Greg's phone was not wiretapped. JA 323.

was to identify members and associates of Uptown [and to] dismantle that heroin-trafficking organization." JA 115. Over a foundation objection lodged by Keith's attorney, Francis elaborated on the Uptown organization and how its members would identify themselves:

> The Uptown was a group of individuals based again primarily in Homestead and Munhall. They generated income for the organization or for themselves by trafficking heroin and other narcotics at times. They would primarily associate with each other by making a fist with the index finger and the little finger pointed up in the shape of a U for Uptown. They would also wear University of Miami clothing primarily with the large U symbol on it.

JA 115–16.

Later, Francis claimed that Uptown was comprised of four subgroups, two of which corresponded to the conspiracies before the jury:

> we learned that there were four subsets within the Uptown organization. Each had a distinct source of supply. Some of them shared the same source of supply, but they all had one person within each subset that had access to that source of supply.

JA 184–85.

Francis provided no foundation for his testimony regarding Uptown beyond general assertions regarding the scope of the investigation, including surveillance, interviews of informants, wiretaps and controlled purchases. He never explained, however, how any of this actually established the existence of an overarching "Uptown Crew," as opposed to the defendants being separate heroin dealers, either working alone or in small groups. That the latter was indeed a possibility was made clear by the government's own drug trafficking expert, who admitted that western Pennsylvania is known for having "freelance" heroin dealers. JA171.

Over an objection as to foundation, Detective James Caterino provided additional testimony regarding "Uptown." He was permitted to testify that the "Uptown organization" is comprised of "[y]oung black males wearing the Miami University hoodie or hat, the U." JA 767. He then proceeded, over additional objections, to identify pictures, which he took from You Tube rap videos, of Greg and other alleged co-conspirators wearing Miami University clothing and making what he claimed to be the Uptown hand signal. JA 768–84. Caterino also testified that when watching the videos he could hear the word "Uptown." JA 784. On cross-examination, however, Caterino acknowledged that "Uptown" is the name of a predominantly black section of Homestead. JA 791. He also conceded that the alleged "Uptown" hand signal, the index finger and pinkie extended, can "mean a lot of different things." JA 787.[8]

Like Francis, Caterino provided no foundation for any of his "Uptown" testimony beyond generally testifying about the investigation—the wiretaps and the surveillance—and his experience as a local detective from which he knew the defendants on trial. And, like Francis, Caterino offered no specifics as to how he reached the conclusion that there was an overarching organization to which the defendants belonged.

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[8] Given that Uptown is where Greg and the others lived, Caterino did not actually contend that the You Tube videos provided any foundation for his "Uptown Heroin Organization" opinions, and rightfully so. Indeed, the lack of foundation was illuminated by the government's concession on appeal that the "Uptown Crew" was nothing but a label that Caterino and the other agents invented. Gov. Opp'n to Hopes Br. at 76 n.29.

B. The Appeal

In its appellate brief, the government made a stunning admission. It represented that its case agents "affix[ed]" the name "Uptown" to the defendants and their alleged associates because it was "helpful conceptually." Gov't Br. at 76 n.29. The government confirmed this at oral argument. When asked specifically about this footnote, the prosecutor explained:

> That's right, because -- so the Uptown is sort of a *handy label* for this association that you see happening among the defendants through the phone calls, through Saldana's testimony, cause remember she's seeing them come in in pairs and trios together to buy stamp bags -- through this social media footage. It's helpful to give a handy name to what you're --
> . . .
> Right, right. So, a -- but the bottom line is that is a handy label for the collection and the association and the relationships you see. But if you take that way we still have the calls, we still have the conduct of the defendants, when -- you know we still have the -- the stamp bag numbers, everything else.

App'x D at 84–85 (emphasis added).[9]

1. The majority opinion

The majority concluded that the District Court "likely abused its discretion by admitting" Francis's initial testimony about the existence and structure of the "uptown crew" because it was admitted "without any proper foundation." App'x B

[9] Government's counsel's reference to "Saldana" was to Lisa Saldana, who sold packaging material. She testified to Greg's purchases, but not that he was ever accompanied by Hopes or Keith. Accordingly, using the vernacular of government counsel, "when you take away the handy label" of Uptown, what remains, as found by the district court at Greg's sentencing, does not even prove by a preponderance that Greg and Hopes conspired together. JA 1861.

at 25 (majority). At that point, the majority explained, "Francis had only discussed his general role in the investigation before proceeding to the bases for his opinion about the existence of an uptown crew." *Id.* at 25–26 (majority).

The majority found the error harmless, however, on the ground that Francis later clarified the foundation for his testimony. *Id.* at 26 (majority). According to the majority, Francis "described his personal involvement in the case" as including identifying locations where these individuals sold heroin, personally observing these locations, and working with informants to conduct controlled purchases, and said "'there were times when [he] was on the surveillance team'" and that he listened to "'[t]ens of thousands'" of wiretapped calls. App'x B at 26–27 (majority) (quoting JA 121, 126).

This testimony "eliminated" the majority's concern that his testimony "may not have been based on his personal observations." App'x B at 27 (majority). The majority also relied on Caterino's testimony, which it said "corroborated" Francis's. *Id.* Specifically, Caterino testified that he "'kn[e]w the Harris brothers, [and] . . . knew their father,'" and that he "knew 'the other two [defendants] … from working the area.'" *Id.* (quoting JA 753, 754). As for his role in the investigation, Caterino testified that he "'conducted surveillance, listened to wiretaps, made arrests, search warrants,'" worked "[a]t least 1500" hours on the case, and surveilled the area as well as the Harris' residence. *Id.* (quoting JA 754).

As for his testimony about the purported "uptown crew," he testified that he observed "'[y]oung black males wearing the Miami University hoodie or hat, the U,

that was on the basis through the Boroughs, and [he] also observed it on YouTube videos." *Id.* (quoting JA 767). The government also "admitted into evidence photographs of the YouTube videos where Caterino positively identified Greg Harris, Keith Harris, Thomas Hopes, Jay Germany, and other members of the conspiracy." *Id.* (citing JA 775–85)

This testimony, the majority concluded, was "clearly helpful to the jury, as it identified a non-obvious relationship between the defendants, which the jury could then use to conclude that the defendants are not merely arms-length negotiators selling heroin in the same neighborhood." *Id.* at 27–28. In short, the majority found "a proper foundation was laid for the existence of such an organization" through the officers' testimony about "their experiences as part of the investigation, including surveilling the neighborhood, participating in controlled buys, and conducting wiretaps." *Id.* at 28. "Thus," the majority concluded, "any error by the District Court in admitting the initial trial testimony regarding 'uptown crew' was harmless." *Id.* at 28–29.

2. <u>The dissenting opinion</u>

Judge Ambro dissented from the majority's conclusion that Francis and Caterino laid a sufficient foundation to permit their testimony about the "uptown crew" pursuant to Rule 701. Judge Ambro began by noting that "within the first few minutes of trial," Francis, the government's first witness and the principal case agent, "declared the existence of an organization called the 'Uptown Crew'" and described it as group of individuals who trafficked heroin and other drugs in the

Homestead and Munhall neighborhoods. App'x B at 35 (dissent). The questions leading up to this testimony bore only on his general background in law enforcement and his assignment to this investigation. *Id.* Judge Ambro considered the timing of Francis's Uptown testimony significant.

> In other words, before a single fact about any of the building blocks needed to convict—the charged conspiracy, the defendants, their alleged co-conspirators, the drug-trafficking, or their conduct—had been presented to the jury, the Government's principal case agent, an experienced FBI official, was "opining" to the jury on the essential facts of the very criminal conspiracy the Government must prove to convict the defendants.

Id. at 37–38.

Francis testified that his opinions about the Uptown Crew were "based generally on his extensive investigation leading to the prosecution in this case." *Id.* at 36. The steps the general investigation used to gather information about Uptown included "surveillance, witness interviews, wiretaps, and controlled deliveries to determine that members of Uptown were selling heroin in Pittsburgh." *Id.* at 36. He further "testified that he spent 'hundreds' of 'man-hours' and reviewed 'tens of thousands' of wiretapped phone calls in the course of investigating this case." *Id.* (quoting JA 118–19). All of these statements, Judge Ambro wrote, were "general conclusions." *Id.* Francis failed to "identify the specific observations, statements, or events that underpinned his determination that an organization called the Uptown Crew existed, trafficked heroin, or used the "U" symbol or University of Miami clothing to identify themselves." *Id.* at 36–37. Similarly, Francis's statements about

the membership, relationships among various individuals, and the organization, were "based on his overall investigation." *Id.* at 37.

Judge Ambro described the overall impact of the District Court's decision to allow this testimony.

> In other words, the District Court ruled, and instructed the jury, that Francis could opine under FRE 701 about the existence, structure, emblems, objectives, and membership of the supposed Uptown Crew based generally on his investigation of appellants, without presenting to the jury the specific perceptions made in that investigation, so long as Francis was personally involved in it.

Id. at 37–38.

Judge Ambro found the foundation for Caterino's testimony about Uptown similarly deficient. Like Francis, Caterino relied largely on his general involvement in the investigation, which included "at least 1500 'man-hours.'" *Id.* at 38 (quoting JA 754). In the course of the investigation, he testified he had "'seen evidence of an organization known as Uptown.'" *Id.* (quoting JA 767). This evidence included observing "'[y]oung black males wearing the Miami University hoodie or hat, the U ... [in] the [neighborhood], and I also observed it on YouTube videos.'" *Id.* (quoting JA 767–68). He "identified defendants and others wearing University of Miami clothing and making what he called "the Uptown" sign in photographs and a rap video." *Id.* Like Francis, Caterino "never explained the specific observations, statements, or other perceptible facts from which he determined the existence of a cohesive 'Uptown' organization (as opposed to young black individuals living in the same neighborhood and wearing clothing that references it), nor the link between

that supposed organization and the "U" sign or University of Miami clothing, nor the link between any of this and the trafficking of heroin." *Id.*

Judge Ambro concluded that the admission of the Uptown testimony by Francis and Caterino violated Rule 701. He stated the principle succinctly: "[A] law enforcement witness's general description of his 'personal involvement' in a criminal investigation is not an adequate foundation to opine on elements of the charged crime." *Id.* at 39. He acknowledged that "federal courts generally allow law enforcement witnesses to draw on their personal perceptions in an investigation to interpret for the jury code language used by defendants and their alleged co-conspirators in written messages and wiretapped conversations." *Id.* at 39 (citing *United States v. Gadson*, 763 F.3d 1189, 1212–13 (9th Cir. 2014); *United States v. Albertelli*, 687 F.3d 439, 447 (1st Cir. 2012)). But the testimony of Francis and Caterino in this case, Judge Ambro concluded, exceeded the bounds of that "limited permission" when the agents relied generally on the overall investigation of the defendants to offer lay opinion testimony about "the existence, objectives, and membership of an alleged conspiracy." *Id.* at 39–40.

The admission of this improper testimony, Judge Ambro concluded, was not harmless. To the contrary, the government "leaned hard" on the "invent[ed]" concept of an organization called the "Uptown Crew" and the testimony that Greg and others belonged to it "to obtain defendants' convictions." *Id.* at 44. The "idea of the Uptown Crew," Judge Ambro concluded, was "[t]he glue holding together [the government's] broad theory of conspiracy in this case," an idea it "emphasized in

opening arguments, reinforced through law-enforcement testimony, and hammered again in closing." *Id.* at 44. In its closing, "the Government expressly told the jury that the legally relevant conspiracy in the case was 'Uptown,' and the main question for the jury was 'did these four [defendants] actually sign onto it [i.e., Uptown] and take part." *Id.* Absent "the overarching 'Uptown' conspiracy to hold together the numerous alleged co-conspirators, the jury may not have reached the same convictions (Hopes for 1 kilogram, Keith Harris for 1 kilogram, Greg Harris for 100 grams)." *Id.*

REASON FOR GRANTING THE PETITION

THE PANEL DECISION PERMITTING LAW ENFORCEMENT LAY OPINION TESTIMONY REGARDING THE EXISTENCE OF THE CHARGED DRUG CONSPIRACY AND THE DEFENDANTS' MEMBERSHIP THEREIN HIGHLIGHTS A CIRCUIT CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT.

The split between the majority and dissent in this case highlights the wider and longstanding split among the circuits on the question whether of whether FRE 701 permits the admission of lay opinion testimony that is not based on personal perception but on the agent's involvement in the investigation as a whole. As discussed further below, five of the circuits, including the Third Circuit in the instant case, have allowed lay opinion testimony from law enforcement witnesses where the agents have provided no foundation for their opinions beyond general testimony regarding their knowledge of the scope of the investigation. By contrast, six circuits have found such testimony fails the personal perception and helpfulness requirements of FRE 701.

Cases such as the one at bar, where the lay opinions at issue concern the

essential elements of the charged offense—here, the existence of the charged drug conspiracy and the defendants' membership therein—illuminate the critical need for this Court's resolution of the circuit conflict. The courts that have permitted this—essentially trial by case agent—have either explicitly or implicitly accepted that "'the application of Rule 701 should not be influenced by concern that opinion testimony usurps the role of the jury . . . .'" *Gadson*, 763 F.3d at 1209 (quoting 29 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6252 at 112 (1997)). Other circuits, by contrast, have held that such testimony fails the helpfulness requirement of Rule 701, recognizing that "if such broadly based opinion testimony as to culpability were admissible under Rule 701, 'there would be no need for the trial jury to review personally any evidence at all.'" *Garcia*, 413 F.3d at 214 (quoting *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004)).

This case presents the question in its starkest form because the testimony at issue bore directly on the elements of the charged offense. And it is a particularly ideal vehicle for this Court to resolve the question because the facts are undisputed and the issue is case dispositive. Absent the lay opinion testimony at issue, it is undisputed that the jury's verdict cannot stand.

A. The Circuit Conflict Over The Foundational Requirements Of Rule 701 Is Clear And Longstanding.

Rule 701 permits opinion testimony by lay witnesses only in certain circumstances. *See* Fed.R.Evid. 701 advisory committee's note (1972 Proposed Rules).

Specifically, FRE 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Fed.R.Evid. 701.

The federal courts of appeal are deeply divided as to how these requirements should be applied to law enforcement opinion testimony where the witness bases his opinion not only on his own personal perceptions but upon his knowledge of the investigation that he and others have conducted in the case, without providing the specific observations, statements or other perceptible facts from which his opinions are based.

Six federal courts of appeal—the First, Second, Fourth, Sixth and D.C. Circuits—have rejected lay opinion testimony from law enforcement agents that was not based solely upon their own personal perceptions but instead relied at least in part upon the perceptions of others involved in the investigation. See, *e.g.*, *United States v. Freeman*, 730 F.3d 590, 595–97 (6th Cir. 2013) (reversing conviction and holding that the personal perception and helpfulness requirements of Rule 701 were not met where agent "interpreted conversations . . . to broadly illustrate the prosecution's theory of the case for the jury" but "never specified *personal* experiences that led him to obtain his information, but, instead, repeatedly relied on the general knowledge of the FBI and the investigation as a whole") (emphasis in original); *United States v Hampton*, 718 F.3d 978, 982–83 (D.C. Cir. 2013)

(reversing conviction where agent's interpretations of wiretapped conversations were based on overall investigation, including calls not admitted into evidence, "jury had no way of verifying his inferences or of independently reaching its own conclusion"); *United States v. Meises*, 645 F.3d 5, 15 (1st Cir. 2011) (reversing conviction where case agent's opinion as to defendant's role in the charged drug conspiracy was partially based on information provided by an informant, and recognizing that law enforcement officers' opinion testimony about defendant's culpability, when based on overall investigation, "often involve impermissible lay opinion testimony, without any basis in personal knowledge, about the role of the defendant in the conspiracy") (citations and internal quotation marks omitted); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (reversing conviction where case agent interpreted recorded phone calls "by referencing his experience as a DEA agent, the post-wiretap interviews he conducted, and statements made to him by co-defendants" and holding that "[n]one of this second-hand information qualifies as the foundational personal perception needed under Rule 701."); *Garcia*, 413 F.3d at 212–14 (case agent's opinion as to defendant's role in the charged conspiracy improperly permitted where it "was not limited to his personal perceptions but drew on the total information developed by all the officials who participated in the investigation," would invade province of jury, and is "precisely what the second foundation requirement of rule 701 is meant to protect against."); *United States v. Peoples*, 250 F.3d 630, 641–42 (8th Cir. 2001) (reversing conviction where agent's opinions were not based on first-hand knowledge, but "on her

investigation after the fact" and agent "was allowed to emboss apparently neutral conversations between the defendants with the imprimatur of the government's case.").

In contrast to the six Circuits that have held a firm line in enforcing the foundational requirements of Rule 701, the Third Circuit in the case at bar, and four other circuits—the Fifth, Seventh, Ninth, and Eleventh Circuits—have affirmed the admission of lay opinion testimony where law enforcement agents made only general references to their knowledge of the investigation and or relied upon the personal perceptions of others. *See United States v Hilliard*, 851 F.3d 768, 780 (7th Cir. 2017) (agent's opinion that defendant had been involved in an uncharged drug transaction was properly admitted because although he "had not been present . . . and had not personally witnessed the events, he had "presumably spoke[n] with the surveillance officer who had witnessed those things, or reviewed the [relevant] surveillance report"); *Gadson*, 763 F.3d at 1209–10 (finding no plain error in admitting agent's interpretations of phone calls "based on the investigation as a whole, including the police report and information contributed by other officers, rather than merely his personal observations" and rejecting other circuits' concerns that "'the application of rule 701 should . . . be influenced by concerns that the opinion testimony usurps the role of the jury . . . .") (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure*, § 6252, at 112 (1997)); *United States v Jayyousi*, 657 F.3d 1085, 1103 (11th Cir. 2011) (approving admission of agent's interpretations of Arabic phone conversations though he did not speak

Arabic and did not personally observe or participate in the conversations where interpretations were based on his "familiarity with the investigation" and his "examinat[ion] [of] thousands of documents, many of which were not admitted into evidence."); *id.* at 1122 (Barkett, J., concurring in part, and dissenting in part) (finding agent's lay opinion testimony inadmissible because based on involvement in case, not first-hand knowledge, and noting that agent did not speak or read Arabic); *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (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.") (emphasis added).

The longstanding division between the federal courts of appeal on this issue has been recognized by both courts and commentators. In *Gadson*, for example, the Ninth Circuit panel majority held that the district court properly admitted lay opinion testimony from a law enforcement agent interpreting recorded phone conversations involving the defendant, where the agent based his opinions on the "investigation as a whole, including the police report and information contributed by other officers, rather than merely his personal observations." 763 F.3d at 1210. As the majority recognized, however, some circuits "have construed Rule 701 much more narrowly and barred officers from interpreting intercepted communications

based on their review of the recordings and personal involvement in an investigation." *Id.* at 1208 ("According to the D.C. Circuit, such testimony rais[es] a risk that the agent 'was testifying based upon information not before the jury' and the jury 'had no way of verifying his inferences or independently reaching its own interpretations.'") (quoting *United States v. Hampton*, 718 F.3d 978, 983) (D.C. Cir. 2013), and citing *Grinage*, 390 F.3d at 750–51, for same principle). The *Gadson* majority disagreed with this approach: "Contrary to the rationale of *Hampton* and *Grinage*, 'the application of Rule 701 should not be influenced by concerns that opinion testimony usurps the role of the jury[.]'" *Id.* at 1209 (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure* § 6252 at 112 (1997)).[10]

Numerous commentators have also recognized this split among the circuits. *See* Kristine Osentoski, *Out Of Bounds: Why Federal Rule Of Evidence 701 Lay Opinion Testimony Needs To Be Restricted To Testimony Based On Personal First-Hand Perception*, 2014 U. Ill. L. Rev. 1999, 2012–34 (2014) (reviewing split and urging inadmissibility of lay opinion testimony "unless the witness personally participated in or contemporaneously observed the subject of the testimony");

[10] The Third Circuit's decisions on this issue have not been consistent. In *United States v. Diaz*, 951 F.3d 148 (3d Cir. 2020), decided five months after the instant case, the court held that lay opinion testimony that the "defendant worked as part of [the charged] conspiracy" was erroneously allowed. *Id* at 156–57 ("Such conclusory testimony undermines the goal of Rule 701 'to exclude lay opinion testimony that amounts to little more than choosing up sides, or that merely tells the jury what result to reach.'") (quoting *United States v. Fulton*. 837 F.3d 281, 291 (3d Cir. 2016)).

Joseph Richard Ward III, *The Interpretation of Context: How Some Federal Circuits Are Bypassing The Familiar Requirement of Firsthand Knowledge for Lay Witnesses*, 15 Loy. J. Pub. Int. L. 117, 139-49, 152 (Fall 2013) (reviewing circuit split and urging Supreme Court to "clarify and solidify" that "in order for a lay witness to offer an opinion, he must have contemporaneously experienced, participated firsthand, or have actual personal knowledge of the facts that constitute the basis of his opinion"); Kim Channick, *You Must Be This Qualified To Offer An Opinion: Permitting Law Enforcement Officers to Testify As Laypersons Under Federal Rule Of Evidence 701*, 81 Fordham L. Rev. 3439, 3458–69, 3477 (May, 2013) (reviewing split and urging adoption of approach of *Garcia* and require "that only those who possess specific, identifiable first-hand knowledge of an event are allowed to offer testimony about its significance, resulting in fairer trials with less prejudicial testimony").

B. The Approach Of The First, Second, Fourth, Sixth, And D.C. Circuits Correctly Applies The Foundational Requirements Of FRE 701 And, By Doing So, Protects The Province Of The Jury And Avoids Confusing The Scope Of Expert And Lay Testimony.

The approach of the First, Second, Fourth, Sixth, and D.C. Circuits faithfully enforces the personal perception and the helpfulness requirements of FRE 701. As the Second Circuit succinctly stated in *Garcia*, "Rule 701 requires lay opinion to be based on the witness's personal perceptions." 413 F.3d at 211 (citing FRE 701(a)). "The 'traditional objective' of the rule is, after all, to afford the trier of fact 'an accurate reproduction of the event at issue." *Id.* (citing FRE 701(a), Advisory Committee Notes on 1972 Proposed Rules). In other words, FRE 701 was not

intended as any kind of "departure from [FRE] 602," which precludes the testimony of a witness "until evidence is introduced sufficient to support a finding that the witness had *personal knowledge* of the matter." *Id*. (quoting FRE 602) (emphasis added). "Rather," the *Garcia* Court continued, "[FRE] 701 simply recognizes lay opinion as an acceptable 'shorthand' for the 'rendition of facts that the witness *personally perceived*.'" *Id.* (quoting 4 *Weinstein's Federal Evidence* § 701.03[1]) (emphasis added). Stated yet another way, FRE 701 pertains to *how* the testimony is delivered, but does not broaden the scope of *what* may be delivered.

The *Garcia* Court illustrated the contrast between testimony within the scope and beyond the scope of FRE 701. An undercover agent participating in a hand-to-hand drug transaction with a number of participants "may well testify that, in his opinion, a particular participant, 'X,' was the person directing the transaction." *Id.* An opinion such at that "is based on [the agent's] 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.'" *Id.* Rule 701 permits such opinion testimony because it "affords the jury an insight into an event that was uniquely available to an eyewitness." *Id.* at 712. "In this respect," the court summarized, "the rule recognizes the common sense behind the saying that, sometimes, 'you had to be there.'" *Id.*

By contrast, the *Garcia* Court looked to its previous decision in *United States v. Grinage*, in which it ruled an agent's opinion testimony beyond the scope of FRE 701. In that case, the court "recognized that when an agent relies on the 'entirety' or

'totality' of information gathered in an investigation to offer a 'lay opinion' as to a person's culpable role in a charged crime, he is not presenting the jury with the unique insights of an eyewitness's personal perceptions." *Garcia*, 413 F.3d at 212 (quoting *Grinage*, 390 at 750–51). "[I]n such circumstances, the investigatory results reviewed by the agent–if admissible–can only be presented to the jury for it to reach its own conclusion." *Id. See also Meises*, 645 F.3d at 16 (finding agent's testimony regarding defendant's role in conspiracy inadmissible where he "neither saw nor heard the critical episode in the investigation").

The approach of these circuits also faithfully enforces the helpfulness requirement, which, in turn, protects the province of the jury. As Judge Ambro noted in his dissent in the instant case, "[t]here is a good reason courts do not allow law enforcement to 'opine' on the essential elements of a charged criminal conspiracy: it undermines the jury's role as the factfinder in violation of FRE 701(b)." App'x B at 40 (dissent). The courts that follow this approach consistently raise this concern. *See*, *e.g.*, *Meises*, 645 F.3d at 16 (where case agent's inferences about defendants' roles were based not on personal knowledge but on same evidence before jury, testimony "effectively usurp[ed] the jury's role as fact-finder"); *Garcia*, 413 F.3d at 214 (noting helpfulness requirement designed to prevent admission of opinions "that merely tell the jury what result to reach"); *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013) (testimony improper where agent failed to explain the basis of his interpretations of recorded calls, but offered "many opinions and conclusions the jury was well equipped to drawn on their own").

This concern is entirely consistent with the purpose of Rule 701, as the Advisory Notes make abundantly clear. The Advisory Notes are plain: "The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event." Fed.R.Evid. 701 Advisory Committee Notes on 1972 Proposed Rules. Subsection (a), in particular, embodies "the familiar requirement of first-hand knowledge or observation." *Id.* The jury's view is a foremost concern, and the Rule is written to require first-hand knowledge. The Ninth Circuit's view, therefore, that "the application of Rule 701 should not be influenced by concern that opinion testimony usurps the role of the jury or that factual testimony is more reliable than opinion testimony," is inexplicable and inconsistent with the purpose of the Rule. *Gadson*, 763 F.3d at 1209 (quoting 29 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6252, at 112 (1997)).

The concerns addressed by FRE 701 are particularly acute when the witness is a law enforcement officer because jurors may give undue weight to an officer's conclusions. This risk prompted the Eighth Circuit to reverse the conviction in *Peoples*. The agent in that case was allowed to testify regarding matters about which she "lacked first-hand knowledge" and "based on her investigation after the fact, not on her perception of the facts." 250 F.3d at 642. Although she was not testifying as an expert witness, the *Peoples* Court recognized that her status as a law enforcement officer might have led the jury to "substitute her conclusions on the ultimate issue of the defendants' guilt for their own." *Id.* Her testimony, the court

concluded, "so invaded the province of the jury that [it could not] with confidence say there was no significant possibility that it had substantial impact on the jury." *Id.*

In short, the approach of the First, Second, Fourth, Sixth, and D.C. Circuits enforces the foundational requirements of FRE 701 while the approach of Fifth, Seventh, Ninth, and Eleventh Circuits does not. This conflict is particularly problematic in cases such as this one, involving case agents and law enforcement officers whose testimony is critical to the government's presentation of this case. *See* App'x B at 44 (dissent) ("The glue holding together its broad theory of conspiracy in this case was the idea of the Uptown Crew that it emphasized in opening arguments, reinforced through law enforcement testimony, and hammered again in closing."). Weak enforcement of the foundational requirements of FRE 701 easily leads to trials that are improperly dominated by the lay opinion testimony of law enforcement witnesses.

C. This Case Is An Ideal Vehicle For Resolving The Circuit Split On An Important, Recurring Issue.

Three reasons make this an ideal vehicle for this Court to resolve the conflict among the circuits on this important, recurring issue.

First, the issue was preserved during trial, fully briefed on appeal, and addressed by both the panel majority and the dissenting opinions. *See* App'x B at 43 (dissent) (noting preservation of issue at trial and presentation of issue on appeal); *see also* App'x B at 24–30 (majority) and 35–44 (dissent). In addition, the panel majority opinion and the dissenting opinion perfectly reflect the wider circuit split

on the issue. Indeed, the majority opinion deepened that split by forgiving lay opinion testimony that was admitted without the proper foundation, yet spoke directly to the essential elements of the charged offense, including the existence and membership of the alleged conspiracy. As Judge Ambro recognized, "neither the Government nor the majority points to a case in which a law enforcement officer was permitted to give 'lay opinion' testimony under FRE 701 on the existence, objectives, and membership of an alleged conspiracy based generally on his overall 'investigation' of the very defendants on trial." App'x B at 40 (dissent). The majority opinion is a dangerous extension of precedent typically involving officers' "interpretation" of wiretapped conversations.

Second, the issue was central to the government's presentation of its case, and the improper admission of the testimony was not harmless, as Judge Ambro's dissent explains. The agents' testimony "'opin[ed]' to the jury on the essential facts of the very criminal conspiracy the Government must prove to convict the defendants." App'x B at 36 (dissent). As Judge Ambro recognized, the notion of the "Uptown" crew, which the government belatedly admitted was concocted as "a helpful concept," was central to the government's presentation of its case. App'x B at 44 (dissent). Without that invented concept, he concluded, "[t]he jury may not have reached the same convictions (Hopes for 1 kilogram, Keith Harris for 1 kilogram, Greg Harris for 100 grams)." *Id.*

Third, and finally, the circuit split is longstanding and regularly recurring, often in cases precisely like the one at bar, namely, those involving drug trafficking

conspiracy charges. The cases cited to demonstrate the circuit split in section A, *supra*, illustrate this point. Eight of the eleven cases involve drug conspiracy or trafficking charges. Moreover, drug trafficking and conspiracy cases constitute a significant portion of the federal criminal docket nationally. Data published by the United States Sentencing Commission reveal that in the past five years alone, there were more than 96,000 guilty pleas and trials for drug trafficking offenses.[11] As the cases in this petition demonstrate, law enforcement witness testimony is often the "glue" the government uses to connect the pieces of its case, and the scope of that testimony is frequently in dispute. Where the issue implicates the preservation of the jury's central role, this Court's resolution of the conflict is necessary.

Through the grant of certiorari in this case, the Court can resolve the Circuit split over the correct interpretation of Rule 701 of the Federal Rules of Evidence.

Conclusion

Based on the foregoing, Petitioner Gregory Harris, Jr., respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit Court of Appeals.

Respectfully submitted,

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[11] The United States Sentencing Commission produces an annual report of sentencing statistics, which is available on the Commission's website. This figure is compiled from the tables reporting "Guilty Pleas and Trials in Each Primary Offense Category" for fiscal years 2015 through 2019. In fiscal years 2015, 2016, and 2017, the table is Table 11; in fiscal years 2018 and 2019, the table is Table 12. Available at https://www.ussc.gov/research/sourcebook/archive.

Dated: May 7, 2020 By: /s *Louise Arkel*

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