

## APPENDIX D

1 UNITED STATES COURT OF APPEALS  
2 FOR THE THIRD CIRCUIT  
3 NO. 16-1448/16-1537/16-1644  
4

5 UNITED STATES OF AMERICA,

6 Appellants,

7 vs.

8 KEITH HARRIS, GREGORY HARRIS, JR.,

9 THOMAS HOPES, ET AL.,

10 Appellees.

11

12

13 Transcript from the audio recording of the  
14 oral argument held on Wednesday, November 28, 2018, at  
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19 United States District Court.

20

21 BEFORE:

22 THE HONORABLE THOMAS L. AMBRO

23 THE HONORABLE ANTHONY JOSEPH SCIRICA

24 THE HONORABLE MIDGE RENDELL

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1                   THE COURT: We have a case -- one now and one  
2 of three with a different panel. One we have now is  
3 United States vs. Harris and Hopes. There's a --  
4 Gregory Harris, Keith Harris numbers 16-1448, 1537, and  
5 1644. Mr. Epstein? One thing I should note -- I  
6 believe that we have some Judges here who are from the  
7 Republic of Georgia; is that correct?

8 UNIDENTIFIED MALE: Yes, Your Honor.

13 UNIDENTIFIED MALE: Thank you, Your Honor.

14 MR. EPSTEIN: Good afternoon. May it please  
15 the Court? My name is Robert Epstein. I'm here today  
16 on behalf of the Appellant Mr. Thomas Hopes with  
17 agreeing -- the agreement of my co-counsel, and the  
18 permission of the Court I'll be taking ten minutes of  
19 our fifteen minutes of argument time. Ms. Arkel will  
20 be taking the other five. And, if I may reserve two  
21 minutes of my time for rebuttal and I'll be taking the  
22 whole rebuttal.

23 THE COURT: That's fine.

24 MR. EPSTEIN: Thank you, Your Honor. -- this

1 Court has a -- granted argument on three issues. I'll  
2 be directing myself to the first two of those, Ms.  
3 Arkel, the third.

4 THE COURT: And -- and -- and I should note  
5 that I'm going to add a fourth issues, although if  
6 Counsel wishes to comment on it afterwards, you can  
7 each have an additional week to submit something. And,  
8 that's the question of the name Doe being affiliated  
9 with Keith Harris.

10 MR. EPSTEIN: Yes, Your Honor. -- if I may?  
11 I would actually like to begin with the second issue.  
12 Because, while I believe the first two issues are  
13 equally strong, second issue is a -- a bit simpler and  
14 I think it will be a little bit less time consuming.  
15 And, what we have here is a simple, blatant, egregious  
16 violation of rule 701, because what happened here was  
17 that Case Agent Francis (phonetic) gave an opinion of  
18 heroin quantity regarding three weeks of telephone  
19 conversations, Hopes's recorded conversations, three  
20 weeks the -- majority of those calls were not only not  
21 played for the jury, they weren't even admitted into  
22 evidence.

23 THE COURT: Wasn't it pretty clear from his  
24 cross examination that he was -- you know it was an

1 opinion. A -- I mean he was heavily cross examined and  
2 couldn't the jury realize that you know -- his saying  
3 well, of course four times sixty-three -- that that  
4 really wasn't an accurate representation?

5 MR. EPSTEIN: No, Your Honor, not at all.  
6 Because, that -- what the Courts have recognized is  
7 that the opinions of a case agent are particularly  
8 important and particularly dangerous, because jurors  
9 will tend to give great weight to those opinions.  
10 Which they will assume that the agents have tremendous  
11 amount of experience and have loads of information that  
12 they may not have. So, these kind of opinions --

13 THE COURT: Well, but that was a pretty  
14 specific statement --

15 MR. EPSTEIN: It -- it --

16 THE COURT: That would be tied to fact that  
17 if he said it was more opinion than fact -- the jury  
18 would have to credit that as well; wouldn't they?

19 MR. EPSTEIN: It was an incredibly important  
20 statement and opinion -- and it was an opinion that the  
21 jurors can not test for themselves, because those calls  
22 were not played for the jury. They weren't even  
23 admitted into evidence. They didn't have an  
24 opportunity even to go back into the jury room and

1 listen to them. -- so there is no Court that has ever  
2 held that an agent can give an opinion about phone  
3 calls that are not even admitted into evidence. This  
4 Court has put sharp limits as to how agents can  
5 interpret phone calls.

6 THE COURT: What about -- what about the  
7 stamp bag purchases -- are they sufficient to a -- make  
8 out the a -- required evidence in this case?

9 MR. EPSTEIN: -- assuming now that the  
10 admission of this opinion was error, then we get into  
11 the question of harmless error. And, the question of  
12 harmless error when we look at the stamp bag purchases  
13 this Court made clear a -- in many cases, United States  
14 vs. Price for example being one, 458 F.3d 202, harmless  
15 error analysis isn't a question of sufficiency. So, we  
16 don't subtract the erroneously admitted opinion and ask  
17 is there sufficient evidence remaining? We ask could  
18 this improperly admitted opinion have contributed to  
19 the verdict? And, the burden's on the government to  
20 show a high probability that it couldn't.

21 And, let me explain why I think it's very  
22 likely that this opinion would have contributed to the  
23 verdict despite the stamp bag evidence. The government  
24 now counts to twelve hundred seventy-two grams on the

1 -- on the basis of the stamp bags. Six hundred and  
2 seventy-two of those grams belong to Greg Harris from  
3 the other charged conspiracy. The District Court found  
4 at Greg Harris's sentencing that the government had not  
5 even proven by a preponderance of the evidence that  
6 Greg Harris was in a conspiracy with Thomas Hopes. So,  
7 if we subtract that six hundred seventy-two grams stamp  
8 bags of Greg Harris, we're left with well under a  
9 thousand. So, it's very likely -- or there's certainly  
10 a strong possibility that the jury in getting to a  
11 thousand grams for Thomas Hopes and not for Greg Harris  
12 by the way -- but for Thomas Hopes looked at Francis's  
13 testimony. It was the only evidence of Hopes's  
14 actual sales. Now, what they easily could have done  
15 here is to think all right, well -- a -- Francis  
16 testified to one week of calls. He came to sixty-three  
17 grams. He then told us that the other three weeks that  
18 we haven't heard a -- was the same. So, we could take  
19 that sixty-three grams, we can say that's two hundred  
20 fifty grams a month. And, then we can look and say all  
21 right there's ten other -- nine other months of this  
22 conspiracy, we only heard evidence about four of them.  
23 But, let's take four months and times two hundred fifty  
24 grams a month, and there's your thousand grams.

1 THE COURT: But, isn't --

2 MR. EPSTEIN: All on the basis of this  
3 improper testimony by Francis.

4 THE COURT: But, the District Court's finding  
5 was not in conspiracy. That throws out the reasonably  
6 foreseeability -- reasonable foreseeability test, but it  
7 still would permit from a buyer seller relationship  
8 that there was distribution going on; wouldn't it?

9 MR. EPSTEIN: Well, the -- the -- this issues  
10 I'm raising with respect to the lay opinion testimony  
11 doesn't go to the question of conspiracy. We -- we are  
12 not disputing that there was sufficient evidence in  
13 this case that Hopes and Keith Harris were conspiring  
14 together to sell heroin, but as Case Agent Francis said  
15 they were small time dealers. The issue below the  
16 issue that all of this lay opinion testimony goes to is  
17 quantity. That's the essential issue here. Francis's  
18 testimony by which he testifies to three weeks that  
19 were not even played for the jury, and says you can  
20 take those three weeks and it's the same quantity as  
21 the one week that I played for you, that's incredibly  
22 prejudicial.

23 THE COURT: What about the Uptown Gang? --  
24 was -- you had Officer Caterino (phonetic) this was his

1 beat in Homestead --

2 MR. EPSTEIN: Mmm hmm.

3 THE COURT: Why could he have not testified  
4 that there was a group known as the Uptown Gang and  
5 that there were certain ways that they identified with  
6 each other, such as the U or the University of Miami  
7 shirts which have a U on it, et cetera?

8 MR. EPSTEIN: There -- there are several  
9 problems with his testimony in that regard. One he  
10 never gave a basis for it. He never gave a foundation.  
11 We have no idea -- how it is that he believed there to  
12 be a conspiracy a -- named Uptown where they made these  
13 different hand signals, where they were -- did he hear  
14 it from a -- a -- a confidential informant? Was it  
15 hearsay that wasn't before the jury?

16 THE COURT: But, he had known these --

17 MR. EPSTEIN: We -- we have no idea.

18 THE COURT: He had known these members since  
19 what -- 2006 or 2007? He -- he was the beat cop. He  
20 observed certain things. Didn't he speak from his  
21 personal knowledge?

22 MR. EPSTEIN: He didn't -- he never explained  
23 to the Court, to the jury where that knowledge was  
24 coming from. Even if he had it would still be -- the

1 Court's all say -- and if you look at the First Circuit  
2 in Meises, the Second Circuit in Garcia a -- this Court  
3 most recently in the unpublished decision of Wheeler --  
4 those kind of opinions, that's invading the province of  
5 the jury. It's up to the jury to determine whether or  
6 not the government has proven whether or not there's an  
7 Uptown organization. Francis went even further -- and  
8 really the most troublesome, where he said Uptown is  
9 composed of four different subgroups, two of them being  
10 the conspiracies on trial, and that they're all working  
11 together. That was --

12 THE COURT: Wasn't there -- wasn't there  
13 evidence though that they were sharing -- supplies and  
14 -- and customers, and helping one another out?

15 MR. EPSTEIN: -- there was some evidence in  
16 that regard -- minimal. But, again you have the  
17 District Court Judge a -- at sentencing finding they  
18 hadn't even proven by a preponderance that Greg Harris  
19 was conspiring with Hopes. And, it's Greg Harris  
20 that's critical here, because that's who the government  
21 is relying upon for Hopes and for Keith Harris to get  
22 to a thousand grams. The real problem here is that you  
23 have the case agents giving this testimony about  
24 Uptown, but it's never substantiated. We don't have

1 any of the -- they had ten witnesses come in -- non law  
2 enforcement witnesses and nine of them say nothing  
3 about Uptown. They're testifying pursuant to immunity  
4 agreement, pursuant to plea agreements, and they don't  
5 have anything to say about Uptown. This ends up being  
6 a trial by case agent, a trial by lay opinion  
7 testimony. And, what the Courts have said is that's  
8 entirely improper. It's invading the province of the  
9 jury, it's spoon feeding the prosecutor's theory of the  
10 case to the jury. We have -- the government has to  
11 present actual evidence of Uptown, all of the different  
12 groups a -- being sub groups of Uptown, and of working  
13 together. And, there was minimal evidence beyond the  
14 case agent's testimony.

15 THE COURT: Thank you. And, we'll hear from  
16 Ms. Arkel and then we'll get you back on the rebuttal.

17 MR. EPSTEIN: Thank you.

18 MS. ARKEL: Thank you. May it please the  
19 Court? My name is Louise Arkel. I represent Gregory  
20 Harris.

21 THE COURT: Sorry, I put the emphasis on the  
22 wrong syllable.

23 MS. ARKEL: I'm sorry.

24 THE COURT: I --

1 MS. ARKEL: Oh, no -- that -- I didn't  
2 notice. -- this -- this Circuit's Court -- this  
3 Circuit's case law has been absolutely clear with  
4 respect to lay opinion testimony. Lay opinion  
5 testimony is okay to interpret code or code like  
6 conversations. It is not okay to interpret clear  
7 conversations, and it is not okay to interpret even  
8 unclear conversations if that information is -- equally  
9 accessible to the jury.

10 THE COURT: Were objections lodged --

11 MS. ARKEL: There were --

12 THE COURT: To lay witness --

13 MS. ARKEL: I'm sorry.

14 THE COURT: A -- to testimony that was not  
15 coded that you think is objectionable?

16 MS. ARKEL: No, and we are clearly under  
17 plain error.

18 THE COURT: Okay. So --

19 MS. ARKEL: With respect to the -- the --

20 THE COURT: So, what is a District Court to  
21 do as this agent is testifying as to the meaning of the  
22 conversations? Is the District Court really supposed  
23 to say wait a minute here, I know there's been no  
24 objection, but I think that's a 701 violation?

1 MS. ARKEL: I --

2 THE COURT: I mean is that what the District  
3 Court's supposed to say when there's hearsay when  
4 there's no objection? Is that really the kind of error  
5 that is clear, obvious error that the District Court  
6 should have one its own said this goes beyond the pale?

7 MS. ARKEL: I do think this Court has found  
8 clear and obvious error when there's been no objection,  
9 so that's certainly -- it has -- this Court has found  
10 that. I also think --

11 THE COURT: I thought we said there was no --

12 MS. ARKEL: No objection --

13 THE COURT: Well, no harm -- it was harmless,  
14 so there's no --

15 MS. ARKEL: Correct.

16 THE COURT: Substantial rights. We haven't  
17 had a situation a -- where we've just said it -- it's  
18 enough error, it goes back without that.

19 MS. ARKEL: I think -- I think this case is  
20 different, but I'd also think -- I think what the  
21 series of cases that this Court has been addressing  
22 recently shows -- it -- that there is sort of a lack of  
23 attention ahead of time to enforcing this. Numerous  
24 Courts have talked about the need for enforcing -- the

1 parameters of rule 701, and I think this string of  
2 cases screamed --

3 THE COURT: But, why couldn't Counsel object  
4 to it? I mean, Counsel may have had a strategic reason  
5 for letting this go on. Maybe have an ineffectiveness  
6 claim or some -- you know some kind of objection later  
7 on. But, is a District Court really supposed to -- to  
8 police this and get into the -- the strategy of defense  
9 counsel?

10 MS. ARKEL: I think when a -- when a agent  
11 is going -- is going on at this length, because for  
12 example in Jackson this Court talked about there not  
13 being any code in a particular conversation and no  
14 indication that the Court's test -- that the agent's  
15 testimony or that -- I'm sorry, that the conversation  
16 was as broad as that agent testified --

17 THE COURT: Well, there you could say that  
18 they were misleading the jury.

19 MS. ARKEL: I'm sorry?

20 THE COURT: Misleading the jury.

21 MS. ARKEL: Well, in -- in that case, it was  
22 also that -- I think it was also the breadth of his  
23 testimony. And, I think here when an agent is  
24 essentially taking over narration of these calls, I do

1 think there is a -- a place. There's a place for all  
2 parties. I'm not suggesting it's only the Judges --  
3 responsibility.

4 THE COURT: What specific ones are you  
5 pointing to that went beyond the pale, if you will?

6 MS. ARKEL: I think for example there was --  
7 one conversation where he -- Countryman (phonetic) is  
8 talking about -- he talks about where the -- something  
9 matches the price. I think the ice bize (sic)  
10 conversation for example. Where Countryman testifies  
11 that they are negotiating -- that -- that maybe they're  
12 negotiating putting Greg smack in the middle of the  
13 conspiracy, and -- and talking about conduct -- and  
14 providing a definitive interpretation of that call when  
15 a perfectly equal -- a -- a different and plausible  
16 interpretation is that it's two people talking about  
17 prices and how to negotiate, but not together  
18 negotiating.

19 I also think the stash house call is perhaps  
20 the most egregious place where Countryman added a  
21 definitive interpretation of the call. Where there is  
22 no code referencing a stash house, and he's supplies --  
23 excuse me. -- where he says it is a stash house, and  
24 there unlike -- unlike Jackson where -- or I should say

1 Fulton where the government did not refer to it in  
2 closing, the government here a -- referred to  
3 Countryman's testimony about it being a stash house, as  
4 in he said Countryman explained it was a stash house,  
5 and that --

6 THE COURT: But, don't you think the jury --

7 MS. ARKEL: I'm sorry.

8 THE COURT: Might have come to that  
9 conclusion on there own? I mean the discussion about  
10 the fact that there weren't going to be any utilities,  
11 and all they needed were the lights on, and they'd  
12 throw \$200.00 together and you know no one was going to  
13 live there. I mean two plus two is four.

14 MS. ARKEL: --

15 THE COURT: Wouldn't the jury have realized  
16 that on their own?

17 MS. ARKEL: The jury absolutely could have  
18 reached that on its own, but it shouldn't have been  
19 supplied -- that interpretation shouldn't have been  
20 supplied by the government. The jury might also have  
21 come to the conclusion that it was a bunch of friends  
22 establishing a man cave, or a crash pad, or whatever --  
23 something else. There were other plausible  
24 interpretations.

1                   THE COURT: But, don't you need utilities for  
2 -- for that kind of a residence?

3                   MS. ARKEL: It -- I believe there was  
4 discussion about a change of plan, about adding  
5 utilities if I'm remembering correctly. But, my point  
6 is there were other plausible interpretations. The  
7 government supplied a definitive interpretation of this  
8 one call. And, later in closing referred to it -- to  
9 Countryman's explanation of it as if it were fact, when  
10 it was really was just argument that the government  
11 should have supplied. Also, later saying is there any  
12 better evidence of conspiracy? That puts that  
13 government in -- at such an advantage. It's such an  
14 unlevel playing field, because the government agent,  
15 which this Court and many others have referred to the  
16 authority a government agent has, sort of almost  
17 inherently, even despite an instruction that they  
18 shouldn't weigh it separate -- you know differently.  
19 -- whereas the defense is left -- is left with that  
20 interpretation. It's very difficult to challenge that  
21 interpretation, especially in closing when the -- when  
22 the case agent has already supplied it.

23                   THE COURT: Let me go back to the -- to what  
24 was there an objection of the issues that we're talking

1 about under rule 701, and to what was there not an  
2 objection? First let's start off with the Uptown Gang.

3 MS. ARKEL: If I may? I hate -- if I may  
4 refer back to my colleague, he was going to address the  
5 different --

6 THE COURT: That's fine. Well -- and we'll  
7 get him back on rebuttal --

8 MS. ARKEL: I'm sorry. I apologize.

9 THE COURT: That's fine. No problem.

10 MS. ARKEL: -- in -- with respect to the  
11 Countryman's aspects that I -- that I have been  
12 addressing there was no --

13 THE COURT: Fine. Okay.

14 MS. ARKEL: Sorry.

15 THE COURT: Thank you. Hear -- hear from Mr.  
16 Cucas, then.

17 MS. ARKEL: Thank you.

18 MR. COCAS: Good afternoon. May it please  
19 the Court? Donovan Cucas on behalf of the United  
20 States. I want to take the issues in reverse order,  
21 just as I heard them. But, first I wanted to make sure  
22 is the Court clear or in agreement I guess on the  
23 standard of review for everything? Because, ultimately  
24 it doesn't make a difference I think to the resolution

1 of the case, but my oral presentation presumes plain  
2 error for everything.

3 THE COURT: Well --

4 MR. COCAS: Okay. The only reason I had --  
5 so let me just add in --

6 THE COURT: Well, I mean there -- there were  
7 some blanket objections that a --

8 MR. COCAS: There were. A -- but, let me --  
9 so let me just say this about it and then I'll move on.

10 But, the Hearst case, which I understand Your Honor --

11 THE COURT: Well, let me back up. I have a  
12 problem with -- with plain error on the foundation for  
13 the Uptown Gang, and I have a problem with plain error  
14 on the four -- three times sixty-three. I think both  
15 of those would for a District Court raise the -- that  
16 there's a problem there.

17 MR. COCAS: -- so let me just address that if  
18 I can?

19 THE COURT: And -- and, if I can just add to  
20 that --

21 MR. COCAS: Yeah.

22 THE COURT: I mean there were a number of  
23 cases cited by your opponents, and -- you know  
24 Garcia --

1 MR. COCAS: Mmm hmm.

2 THE COURT: Grinage a -- the -- a host of  
3 cases, and you only cherry picked on one, which is  
4 Slade from DC Circuit back in 1980. There's many, many  
5 since then and you didn't even touch them -- Garcia for  
6 example.

7 MR. COCAS: Well, I was actually working on  
8 trying to get under a twenty-six thousand word -- I was  
9 trying to get a word limit low enough that I thought  
10 the Court would accept my brief --

11 THE COURT: --

12 MR. COCAS: There's a lot of stuff -- I  
13 didn't cite Wheeler, even though it's great for me.

14 THE COURT: I -- I'm -- I'm a -- I'm a  
15 pushover if somebody asks me for an extension of --

16 MR. COCAS: Yeah --

17 THE COURT: Words I -- I would normally vote  
18 in favor of it, so --

19 MR. COCAS: So, if I can --

20 THE COURT: But, there -- there was no --  
21 there were so many cases that they cited --

22 MR. COCAS: Right.

23 THE COURT: And, yet none of them did you  
24 address other than a case from --

1 MR. COCAS: And -- and --

2 THE COURT: Thirty-eight years ago.

3 MR. COCAS: So, I'm not sure when you say so  
4 many cases they cited, are you talking about a  
5 particular issue, or -- I'm just confused.

6 THE COURT: Well -- look --

7 THE COURT: That an objection is -- is  
8 sufficient of --

9 MR. COCAS: Yeah. Oh -- right -- right --  
10 oh, so then --

11 THE COURT: They -- they cited Grinage --

12 MR. COCAS: Right.

13 THE COURT: They cited Garcia, they cited  
14 Mejia, they cited Freeman from the 6th Circuit, they  
15 cited Hampton from the DC Circuit, and --

16 MR. COCAS: And, Hearst from here -- Hearst  
17 from here.

18 THE COURT: Exactly.

19 MR. COCAS: Right.

20 THE COURT: And -- and you know an  
21 experienced District Court Judge --

22 MR. COCAS: Right.

23 THE COURT: You don't need to do -- chapter  
24 in verse --

1 MR. COCAS: Right. Right.

2 THE COURT: A -- found no foundation a -- on  
3 the Uptown Gang, speculative --

4 MR. COCAS: Right.

5 THE COURT: Covers it on -- sixty-three.

6 MR. COCAS: So, the -- the only thing I'll  
7 say about that then, and I'll just say this through  
8 Hearst. Is Hearst to me is helpful to me because it  
9 involves -- that was like a hotel president who was  
10 testifying that a rape that occurred on the property  
11 was unpreventable, but he had no percipient knowledge  
12 whatsoever. So, everything that came out of his mouth  
13 was necessarily an opinion of some kind. So, when a  
14 Court hears objections foundation, speculation,  
15 hearsay, and it knows it's only hearing opinion, then I  
16 think it's pretty easy for the Court to understand lay  
17 opinion is what's being targeted. And, that's what  
18 happened in the District Court in Hearst.

19 But, in here the -- the two witnesses who  
20 offered the lion's share of the lay opinion testimony,  
21 Countryman and Francis, had significant percipient  
22 knowledge and interspersed with that were lay opinions.  
23 So, that's why Counsel had to make clear it was -- it  
24 was objecting to something as a lay opinion to alert

1 the Court and us. And, a perfect example of that is  
2 page two ninety-one of this record, because there you  
3 can see Keith's Counsel's cross examining a -- Francis  
4 about something Countryman did. While immediately the  
5 AUSA says objection, hearsay, thinking that this is  
6 going after percipient testimony. And, Keith's Counsel  
7 says no, no, no I want an opinion.

8 THE COURT: But, with hearsay do you have to  
9 say the rule?

10 MR. COCAS: No, I don't think --

11 THE COURT: In --

12 MR. COCAS: You have to say the rule, Your  
13 Honor. I just think it's --

14 THE COURT: Then why wasn't speculative good  
15 enough for the fact that you know he really doesn't  
16 have any personal knowledge that sixty-three times four  
17 -- why wasn't that enough?

18 MR. COCAS: Because, I -- well, I don't know  
19 if that's necessarily going to personal knowledge or to  
20 the opinion. It's -- so -- so for example --

21 THE COURT: Either way --

22 MR. COCAS: Well, so here's where I'm coming  
23 from on that, and -- and this maybe a good segway to  
24 the merits.

1                   THE COURT: And, cause a -- when they say  
2 it's speculative, then the Judge is going to say  
3 please -- please lay the foundation to --

4                   MR. COCAS: Right.

5                   THE COURT: For the basis for this, which is  
6 the same as what's your personal knowledge.

7                   MR. COCAS: Right, right. But, so the 701a  
8 actually has two prongs to it. As this Court said in  
9 Willburn vs. Maritrans in ninety-eight, and then I  
10 think it said again in Eichhorn the first prong is just  
11 the rational basis, and that's experience. So --

12                  THE COURT: A personal knowledge.

13                  MR. COCAS: And, then personal knowledge is  
14 the second prong of that.

15                  THE COURT: Well, I mean if you look at what  
16 Judge Raggi wrote in Garcia it --

17                  MR. COCAS: Hmm --

18                  THE COURT: It's -- looks like it's somebody  
19 that's right there. Maybe somebody that's imbedded  
20 or -- you know the closest I think you can come is  
21 Officer Caterino --

22                  MR. COCAS: Mmm hmm.

23                  THE COURT: Was in the Homestead area for ten  
24 years, and he knew the area fairly well. But, he

1 didn't interact directly for the most part with the  
2 members of this so called Uptown Gang.

3 MR. COCAS: Well, he said he knew the Harris  
4 brother's since youth football -- that was in there --

5 THE COURT: But, did he -- well, youth  
6 football, did he say they're a -- it's a drug gang?

7 MR. COCAS: No, he didn't. He was not asked  
8 that question. In fact we never ever elicited that it  
9 was a gang, because that might have been prejudicial.

10 I mean we called it Uptown Crew or --

11 THE COURT: And, what's the basis for finding  
12 that there was a drug gang?

13 MR. COCAS: Well, that was through the --

14 THE COURT: That there was an Uptown Drug  
15 Gang?

16 MR. COCAS: So, he didn't -- Caterino's  
17 testimony is actually percipient on this point. He's  
18 saying here was the intersection where I saw the guys  
19 hanging out. Here was you know the -- the clothing,  
20 and the hand gestures, et cetera. A -- the opinions  
21 about the drug part comes in through -- Countryman and  
22 Francis.

23 THE COURT: But -- but --

24 MR. COCAS: And --

1                   THE COURT: But, we have -- we just have  
2 these three defendants here --

3                   MR. COCAS: Mmm hmm.

4                   THE COURT: -- and some of them never really  
5 talk -- I mean the brothers never really talked to each  
6 other. A -- the District Court found that Greg wasn't  
7 in a conspiracy with Hopes, so if we don't have Uptown  
8 Gang being shown to be a drug gang --

9                   THE COURT: An overarching conspiracy --

10                  THE COURT: What do we have?

11                  MR. COCAS: Well, the Court found -- made  
12 that statement at sentencing on the -- for the purpose  
13 of adjusting the drug quantity. But, it definitely did  
14 found that there was at least a sufficient evidence to  
15 convict them of all being in the same conspiracy. I  
16 mean if he hadn't really found that, why didn't it  
17 grant their motion for judgment of acquittal after we  
18 ended our presentation?

19                  And --

20                  THE COURT: Is there a sufficiency of the  
21 evidence challenge on appeal?

22                  MR. COCAS: Yeah, there is. I -- I -- don't  
23 -- didn't think we were arguing it today, but there is.

24                  THE COURT: No, no, no, no.

1 THE COURT: No, we're not.

2 MR. COCAS: Yeah.

3 THE COURT: What -- what is the factual basis  
4 for Agent Francis's and Officer Caterino's statements  
5 about the existence, the membership, the signals, and  
6 the objectives of this Uptown organization, which  
7 apparently don't -- you don't want to call a gang?

8 MR. COCAS: Right. A -- well, it -- we  
9 didn't call it a gang. Well, Caterino's it's -- so he  
10 offers the percipient piece where he's the beat cop, he  
11 sees this going on in the neighborhood, he basically  
12 takes us to everywhere but the drug part. Little Brent  
13 (phonetic) testifies very reluctantly, that Uptown  
14 exists, it sells drugs, this is it's signal.

15 THE COURT: He's not the world's best  
16 witness.

17 MR. COCAS: No, he's not, but on a  
18 sufficiency of evidence, I mean we get that at least.  
19 And, then the -- so the rest -- the opinions that come  
20 in through -- through a -- Countryman, he only mentions  
21 -- Uptown once, and that's when he's asked do you know  
22 how Uptown packaged its drugs at page 509. That's it.

23 THE COURT: I mean a -- what Harber -- it was  
24 a bunch of leading questions.

1                   What Harber stated was he's familiar with an  
2 organization known as Uptown --

3 MR. COCAS: Mmm hmm.

6 MR. COCAS: Yeah --

9 MR. COCAS: Right.

10 | THE COURT: That's -- that's it.

24 THE COURT: Well -- what was there to support

1 the --

2 THE COURT: If you're from Pitt (sic) you  
3 don't talk about that game last week.

4 MR. COCAS: Yeah, it was bad.

5 THE COURT: What was there to support an  
6 inference that while their photographs probably showed  
7 that they were a gang for purposes of rapping --

8 MR. COCAS: Mmm hmm.

9 THE COURT: That they were a gang for  
10 purposes of selling drugs; what was there to support  
11 that inference?

12 MR. COCAS: Well, it was -- then it was the  
13 phone calls. At that point it's the -- the coded  
14 language in the phone calls. And, that's why we needed  
15 the interpretation --

16 THE COURT: But, you don't have all of those  
17 people that were pictured in the -- in the photograph  
18 and the video on the calls, you've got the three here;  
19 right?

20 MR. COCAS: Well, at -- at trial we presented  
21 what we had of the three. We had more, but those guys  
22 became kind of irrelevant as they pled out and -- and  
23 such. So, it's -- it -- to streamline the trial we  
24 were --

1                   THE COURT: They are irrelevant, you've got  
2 to find a conspiracy among these three don't you?

3                   MR. COCAS: Correct, yes. And, the verdict  
4 --

5                   THE COURT: What's your best evidence of  
6 that?

7                   MR. COCAS: Well, the verdict, Your Honor,  
8 because --

9                   THE COURT: The what?

10                  MR. COCAS: The verdict, and here's why. A  
11 -- the -- for Harris --

12                  THE COURT: --

13                  THE COURT: Start out by saying he's working  
14 backwards.

15                  THE COURT: Yeah, okay.

16                  MR. COCAS: Yeah, I'm sorry. I -- this is  
17 now going all over the place. But, so the verdict  
18 showed that the jury found Keith and Hopes to have  
19 conspired to -- distribute at least a thousand grams of  
20 -- of a -- heroin. The stamp bags that the two of them  
21 purchased amounted to four hundred and eighty grams,  
22 that's it. So, even if you add to that the sixty-three  
23 grams that a -- Francis testified to, and multiply that  
24 times four for two fifty-two you get something like

1 seven hundred and thirty-two grams. It's not enough.  
2 No one ever asked -- that witness to -- multiply it  
3 times four and then multiply it times four again, one  
4 for each. We were only up on Hopes' phone for a month.  
5 So, that's brand new. So, the math doesn't get you --  
6 doesn't get them there. And, as far as Keith and  
7 Germany (phonetic) -- Keith and Germany together had  
8 seven hundred and I want to say ninety-two grams worth  
9 of stamp bag purchases. -- if you had -- multiplied  
10 the heroin purchases times four and added those Greg's  
11 conviction, that's over a thousand. So, we know the  
12 jury didn't do that in that case, cause you -- if you  
13 just added Greg's and Germany's stamp bags, plus Hopes'  
14 heroin, multiply it times four, they would have  
15 convicted him of a thousand.

16 THE COURT: But -- but in your -- your --  
17 then you -- you have to show that somehow this is a --  
18 a group that is coordinating together --

19 MR. COCAS: Mmm hmm.

20 THE COURT: In order to get those -- those  
21 numbers. In your brief -- then I'm talking about the  
22 opposition to the a -- Hopes brief at page seventy-six,  
23 note twenty-nine, you say the law enforcement officers  
24 affixed the Uptown label in this case. What do you

1 mean by affixed?

2 MR. COCAS: I don't remember that. Honestly,  
3 it was a long brief, I don't remember that sentence.

4 He affixed the Uptown label --

5 THE COURT: A-F-F --

6 MR. COCAS: Yeah --

7 THE COURT: I-X-E-D.

8 MR. COCAS: Yeah, I just don't -- but the  
9 rest -- I don't know the rest of the sentence in that  
10 brief. I am sorry.

11 THE COURT: But, a -- I have it.

12 MR. COCAS: Yeah. I -- I will say, I mean  
13 the officers were able to say -- you know Caterino in  
14 particular was able to say this was the sign, here's  
15 the street corner where you could see -- you know  
16 members of Uptown doing this sign. That's right in the  
17 neighborhood where this investigation occurred, where  
18 he spent however many hours. And, then he has the  
19 stills and the -- the social media photographs showing  
20 these defendants doing that.

21 THE COURT: What you say on footnote twenty-  
22 nine is -- it's a long footnote. And, it says at the  
23 end that the calls show that Appellants brought,  
24 processed, and sold heroin together, affixing the name

1 Uptown in quotes --

2 MR. COCAS: A --

3 THE COURT: To this Cabal --

4 MR. COCAS: I remember.

5 THE COURT: While helpful conceptually --

6 MR. COCAS: Right.

7 THE COURT: Did not harm Appellants any more  
8 than their own statements and conduct did.

9 MR. COCAS: Right. That's right, because --  
10 so the Uptown is sort of a handy label for this  
11 association that you see happening among the defendants  
12 through the phone calls, through Saldana's testimony,  
13 cause remember she's seeing them come in in pairs and  
14 trios together to buy stamp bags -- through this social  
15 media footage. It's helpful to give a handy name to  
16 what you're --

17 THE COURT: Wasn't it a -- wasn't it Saldano  
18 (phonetic) -- Saldano or was it a -- Hernandez  
19 (phonetic) that said that they weren't really familiar  
20 with the Uptown label?

21 MR. COCAS: -- that -- I don't recall who --  
22 I -- Hernandez could have said that, but I mean her --

23 THE COURT: Oh -- Pookie (phonetic) is  
24 Hernandez, I guess.

1 MR. COCAS: Pookie -- I mean she wasn't that  
2 reliable, cause clearly she was testifying a --  
3 untruthfully about the amount -- the number of stamps  
4 bags or -- or --

5 THE COURT: Well --

6 MR. COCAS: Bricks she was processing, but --

7 THE COURT: A -- a -- possibly as was Harber.

8 MR. COCAS: Well, except he said he was  
9 familiar with Uptown. So, --

10 THE COURT: In -- in -- with --

11 MR. COCAS: I mean --

12 THE COURT: In -- in a host of other  
13 inconsistencies.

14 MR. COCAS: Right. Right. So, a -- but the  
15 bottom line is that is a handy label for the collection  
16 and the association and the relationships you see.  
17 But, if you take that away we still have the calls, we  
18 still have the conduct of the defendants, when -- you  
19 know we still have the -- the stamp bag numbers,  
20 everything else.

21 THE COURT: Let -- let me before I --

22 MR. COCAS: Yeah --

23 THE COURT: Go onto the -- the Doe issue --

24 MR. COCAS: Yeah --

1                   THE COURT: Which again, I'm -- I'm saying  
2 the Counsel can supply something within a week if they  
3 want to supplement. The stash house --

4                   MR. COCAS: Mmm hmm.

5                   THE COURT: Isn't Countryman's testimony  
6 about the stash house, the stamp bags, and the heroin  
7 packaging just like the testimony that was ruled  
8 inadmissible recently by our Court in the Jackson case?

9                   MR. COCAS: A -- the reason I think it's not,  
10 is I think there is some code in the stash house  
11 testimony. I -- I mean they refer to it as a spot,  
12 they -- a couple other pieces of code. It's not dense  
13 code by any means. -- but, I will say the thing to  
14 remember is before Countryman takes the stand we  
15 actually have an expert -- not -- not a lay opinion  
16 person, an expert named Herb Strobel (phonetic) get up  
17 and testify that -- to the practices of -- of bagging  
18 heroin in Western P. A. in stamp bags, to code, to even  
19 stash houses at one point. So, Countryman's  
20 testimony just plugs into that. -- we never argued  
21 that there actually was a stash house. We weren't able  
22 to find one. I mean that's --

23                   THE COURT: Wasn't that testimony  
24 particularly to damaging to for example Greg and

1 Germany?

2 MR. COCAS: I don't think it was any more  
3 damaging than the -- if you just -- look at the phone  
4 call you can tell --

5 THE COURT: Well --

6 MR. COCAS: Something -- is afoot. Maybe you  
7 don't --

8 THE COURT: You don't get over the hundred  
9 gram threshold as to Greg without that testimony --

10 MR. COCAS: Well -- I -- I --

11 THE COURT: About a stash house.

12 MR. COCAS: I don't know how we don't get  
13 over the -- that's not the only thing linking him to  
14 Hopes if that's what Your Honor is talking about. You  
15 get well over the hundred gram threshold if -- as long  
16 as he's linked to Hopes in any way. And, we have him  
17 -- saying he's like making sure Pookie is processing  
18 heroin for Hopes in at least one other call. So, that  
19 one call is not the only thing linking him to Hopes.

20 THE COURT: What about the -- the Doe  
21 identification?

22 MR. COCAS: So, that -- Your Honor, you  
23 brought that up and I'm not sure what that issue is,  
24 because this is the first time I'm hearing it.

1 THE COURT: Who -- I -- how do you have Keith  
2 Harris identified with Doe other than the statement of  
3 one of the agents? Who else said that Mr. Harris had a  
4 nickname by -- by -- people called him as Doe -- D-O-E.

5 MR. COCAS: Well, I have to -- so I have to  
6 check. I know some of the calls were -- the calls --  
7 the actual call transcripts, you can see in them they  
8 refer to Doe or Keydo (phonetic) or --

1 can add that in as --

2 MR. COCAS: I -- I might to have --

3 THE COURT: If you can find it -- record.

4 MR. COCAS: Yeah I mean I'm sure there was --  
5 it --

6 THE COURT: I couldn't find anything

7 MR. COCAS: Yeah, okay. Doe -- I'm sure that  
8 there was, because you know again if you look at the --  
9 even if you just look at the calls you can see people  
10 talking to Doe or about Doe and then you can tell from  
11 neighboring calls who Doe is. And, then the -- that  
12 voice is later identified as Keith Harris.

13 THE COURT: If there was no direct testimony  
14 with respect to that -- then how do we treat the  
15 statement that was made?

16 MR. COCAS: No direct testimony? I'm not  
17 sure -- do you mean like --

18 THE COURT: Somebody -- some -- yeah, some --

19 MR. COCAS: Percipient testimony -- well I  
20 mean I think you'd treat it like the rest of the -- I  
21 don't know that it's even circumstantial evidence. If  
22 I have someone who recognizes my voice on the phone and  
23 they can hear other people referring to me by my  
24 nickname, and maybe then me answering to that nickname

1 -- I mean I think that's -- that's pretty direct.  
2 That's not as direct as one of my buddies saying I used  
3 to call him this, but you know I -- I think it should  
4 suffice. -- the last piece I guess is the  
5 extrapolation testimony. I -- I'm out of time. I  
6 don't know if you -- Your Honors want to hear --

7 THE COURT: If -- add three more minutes,  
8 please.

9 MR. COCAS: Okay.

10 THE COURT: Thanks everyone.

11 MR. COCAS: -- the extrapolation testimony I  
12 -- I agree -- I actually think something's wrong with  
13 it. I don't think it's a 701 problem per se, because  
14 to me when I looked at this it seems like the issue is  
15 you have somebody giving a lay opinion based in part on  
16 a summary that's not coming in. So, as we know from  
17 Eichhorn when that happens the lay -- the -- the  
18 testimony has to satisfy both 701 and 1006. And, I  
19 think the issue here is that -- as we know from the  
20 Lynch case, which I think Your Honors were on that  
21 panel this year -- the -- a summary is fine even if the  
22 underlying evidence that it's based on doesn't come in,  
23 but it can't refer to information in the original --  
24 that's not in the original evidence. And, that's what

1 I think the problem is with a -- with asking that  
2 question of Francis and getting that answer -- as it's  
3 a 1006 problem.

4 But, in the Wheeler case that -- that Counsel  
5 cited, same kind of situation. There was opinion  
6 testimony that was arguably -- arguably based in part  
7 upon a summary that shouldn't have come into evidence  
8 that violated 1006 (sic). But, there's not a proper  
9 objection on that a -- not under 1006, and there's no  
10 cross examination on that issue. And, we have kind of  
11 a similar situation here. They cross examined him  
12 heavily, but not on any extrapolation. And, we never  
13 -- we never advanced the extrapolation, so that's  
14 another reason that that makes all of this harmless.  
15 -- all right. So, I've only used about a minute and  
16 ten seconds --

17 THE COURT: All right.

18 MR. COCAS: Are there -- are there more  
19 questions from the Court?

20 THE COURT: No -- no, thank you.

21 MR. COCAS: Okay. A --

22 THE COURT: Thank you very much.

23 MR. COCAS: With that the United States would  
24 ask the Court to affirm.

1 THE COURT: Thank you, sir. Mr. Epstein? Do  
2 you want to begin addressing the -- the issue to what  
3 -- to what there were objections? Were there blanket  
4 objections to anything in particular? Were there  
5 specific objections as to any of the 701 evidence, or  
6 --

7 MR. EPSTEIN: -- yes, Your Honor, the -- the  
8 first two issues were preserved in this case. So, if  
9 we start with Francis testifying to three weeks of  
10 calls that weren't admitted into evidence a -- there  
11 was an objection right at that moment. And, the  
12 objection was it assumes facts not in evidence and  
13 without putting those calls in that's an improper  
14 opinion to speculate on. A -- that perfectly preserves  
15 that issue. As far as the Uptown testimony, right at  
16 the beginning of a -- Francis's testimony on Uptown  
17 there was an objection. I'm going to object, he hasn't  
18 made a foundation as to how he came to know this  
19 conclusion and what these conclusions were based on.

20 THE COURT: Caterino?

21 MR. EPSTEIN: -- same thing. A -- as soon as  
22 he started testifying to -- the fact that individuals  
23 make this kind of a sign when they're a member of  
24 Uptown a -- there was an objection -- foundation, no

1 foundation that connects this hand sign to this  
2 reference he's making to Uptown. And, he never ended  
3 up providing one. So, first two issues are perfectly  
4 preserved. -- you know this case is very factually  
5 dense, it's a very long trial. It's easy to get lost  
6 in the weeds. And, I want to try to pull back for a  
7 second, because I think the legal issues are actually  
8 fairly simple. Just the facts that are somewhat  
9 complex.

10 So, Government Counsel made a very important  
11 concession when he was up here. And, the concession is  
12 that when you look just at Hopes and Keith Harris,  
13 conspiracy fifty-seven, they didn't come close to  
14 proving a kilogram. Okay. He admitted that. -- and  
15 what they need to do then is to -- to get to a kilogram  
16 they have to count Greg Harris's stamp bags from the  
17 other conspiracy. So, it's -- that's the key fact  
18 here, and they're not in dispute. And, when we look at  
19 the two -- the first two legal issues, and really the  
20 third as well, the issue for Hopes is if there's error,  
21 and we submit there clearly is on these issues, then  
22 when looking at the harmless error analysis the  
23 government has to show that there's a high probability  
24 that those errors did not contribute to the jurors

1 coming to a thousand grams, to the jurors not counting  
2 Greg Harris against Hopes, or coming to a thousand  
3 grams in some other improper way. So, when we look at  
4 the Uptown issue for example the District Court finds  
5 there's not actually evidence connecting Hopes to Greg  
6 Harris, but the government connects Hopes to Greg  
7 Harris through this Uptown argument by arguing through  
8 the case agents and only through the case agents that  
9 there's a bridge between these conspiracies, and the  
10 bridge is Uptown. They all belong to Uptown. These  
11 groups all work together, and that's why you can count  
12 Greg Harris against Hopes. The problem is the agents  
13 testimony on that point -- that lay opinion testimony  
14 was completely improper and there was never any  
15 evidence to support it. And yes, Judge Scirica, there  
16 is some evidence of them working together, but again  
17 the issue for a harmless error purposes is not  
18 sufficiency. The issue is could the error have  
19 contributed to the verdict? And, we have such minimal  
20 evidence of them working together, in fact the District  
21 Court Judge says as to Greg Harris -- doesn't even  
22 prove it by a preponderance here.

23 When you come to Francis's testimony -- and  
24 we think well could this improper testimony about three

1 weeks that all the Courts are agreed on, you can't have  
2 an agent testifying, giving opinions about phone calls  
3 that aren't even admitted to the jury. A lot of the  
4 Courts say you can't have an agent testifying about  
5 phone calls that are admitted, but aren't played. All  
6 right. Here we go even beyond that. They're not even  
7 --

8 THE COURT: And, yet there are cases where  
9 they -- they -- convictions have been affirmed where  
10 they weren't played.

11 MR. EPSTEIN: -- actually, when we look at  
12 Freeman for example that's reversed. Where the agent  
13 relied upon conversations that were not played for the  
14 jury -- weren't admitted. And, the agents  
15 interpretation of the phone call in Freeman, the Court  
16 found was plausible, but they said the -- the agent's  
17 improper testimony could have contributed a -- to the  
18 verdict here.

19 Same here. I mean, when we look at this --  
20 again, the issue is -- for the government's point of  
21 view, they have to have Greg Harris's drugs being  
22 attached to Hopes. District Court says there's not  
23 even a preponderance of the evidence, and then you have  
24 Francis. Well, how did they get to a thousand in this

1 case against Hopes? They didn't get to a thousand for  
2 Greg Harris, which seems to indicate they didn't count  
3 Hopes against Greg Harris. So, there's certainly a  
4 possibility that when it came to Hopes they didn't  
5 count Greg Harris against Hopes either. So, how did  
6 they get to a thousand? Well, they take Francis's  
7 testimony as I explained before, where he goes from  
8 sixty-five to two fifty over the course of one month,  
9 and they improperly start speculating as to other  
10 months all on the basis of this improper testimony that  
11 never should have been allowed over objection.

12 THE COURT: Thank you very much. Thank you  
13 to all Counsel for a very well presented argument. I  
14 would ask if Counsel could get together with the clerks  
15 office and have a transcript prepared of this oral  
16 argument and just a -- split the cost evenly. And, as  
17 to the identification of Keith Harris as Doe, if each  
18 side could submit, if you wish, -- by 4 p.m. a week  
19 from today a five double spaced pages as to a -- if  
20 there's any other evidence in the record beyond the  
21 agents testifying that Keith Harris was nicknamed Doe.

22 THE COURT: Is Harris represented here today?

23 MR. EPSTEIN: Yes, he is --

24 THE COURT: Here? Okay.

1 MR. COGAN: Yes, Your Honor, I was trial  
2 counsel --

3 THE COURT: Okay. All right. Just wanted to  
4 make sure you were aware.

5 THE COURT: All right. Thank you, and --

6 MR. COCAS: Thank you, Your Honor. I  
7 appreciate the opportunity, and we will.

8 THE COURT: And, then finally we want to a --  
9 a -- thank our colleagues from the Republic of Georgia  
10 for being --

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THIRD CIRCUIT, 11/28/2018

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1 CERTIFICATION  
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4

5 I certify that the foregoing is a correct transcript  
6 from the electronic sound recording of the proceedings in  
7 the above-entitled matter to the best of our knowledge  
8 and ability.

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16 /s/Andrea Semanovich December 06, 2018

17 Andrea Semanovich, AAERT Cert. No. 704

18 Certified Court Transcriptionist

19 For Advanced Depositions

20

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**CERTIFICATE OF ACCURACY**

I hereby certify that, on behalf of all counsel, the attached transcript is accurate.

/s/ Donovan Cocas  
DONOVAN COCAS  
Assistant U.S. Attorney

Dated: December 7, 2018