

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
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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.

9 THE COURT: Okay. Great. Thank you.
10 Welcome. It's -- it is a privilege to have you with --
11 with us today. And, if we speak too fast or anything,
12 just raise your hand and we'll try to slow it down.

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: It 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 bizel (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 Cocas, then.

17 MS. ARKEL: Thank you.

18 MR. COCAS: Good afternoon. May it please
19 the Court? Donovan Cocas 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.

4 THE COURT: That Uptown sells drugs, I don't
5 know --

6 MR. COCAS: Yeah --

7 THE COURT: It's -- quote. And, that the U
8 symbol he believes is associated with Uptown.

9 MR. COCAS: Right.

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

11 MR. COCAS: And -- and that's consistent with
12 -- and then Caterino builds upon that some more, cause
13 he has the clothes, then he's got the photographs of
14 the defendants wearing the clothes, the stills from the
15 videos where they're making the sign. And, he said you
16 could hear audible references to Uptown, even though we
17 weren't allowed to play the videos. So, all of that's
18 foundation for that. A -- as far as the usefulness of
19 it -- I mean I -- you know last week Pitt (sic) played
20 Miami, so it -- had that game occurred in Pittsburgh
21 you might see people wearing University of Miami gear,
22 walking around in Pittsburgh. It happens once every
23 two years.

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 --

9 THE COURT: But, they -- they based them in
10 their general investigation, and it drew a link between
11 Doe and Keith Harris. But, who -- said -- who gave the
12 foundation that said that Keith Harris has a nickname
13 of Doe?

14 MR. COCAS: I'm try -- I think it might have
15 been Countryman. And, it's -- the way the foundation
16 was laid was it was somebody who listened to the calls
17 and knew what their voices sounded like, and you can
18 tell by looking at neighboring calls -- you know or
19 even that call itself whose voices are on the phone.

20 THE COURT: Well, in your opposition brief
21 you say there was sufficient evidence at trial to
22 conclude that Doe was the nickname of Keith, but was
23 that -- evidence ever presented to the jury to make the
24 determination? And, you can -- when you get back you

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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CERTIFICATION

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

/s/Andrea Semanovich

December 06, 2018

Andrea Semanovich, AAERT Cert. No. 704

Certified Court Transcriptionist

For Advanced Depositions

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