

**In The
Supreme Court of The United States**

KENNETH BENBOW;
MARK PRAY;
ALONZO MARLOW,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Rule 701 of the Federal Rules of Evidence permits lay witness opinion testimony only if it's (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 (which governs expert opinion testimony).
 - (a) Is lay opinion testimony by a law enforcement officer in a criminal case admissible under Rule 701, where that officer either (i) interprets evidence for the jury that isn't based on her personal direct observations, or (ii) has been qualified to testify as an expert under Rule 702?
 - (b) If that testimony is inadmissible under Rule 701, is its admission at trial (over defense counsel's objections) harmless error?
- II. 18 U.S.C. § 924(c) provides for enhanced sentences for criminal defendants who are found to have used or carried a firearm "during and in relation to any crime of violence[.]" *Id.* § 924(c)(1)(A). A "crime of violence" is any felony that either:
 - (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
 - (B) that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3).

District of Columbia and Maryland law define second-degree murder to encompass conduct that does not require physical force, or the use, attempted use, or threatened use of physical force.

Has a defendant who has been convicted of second-degree murder under either D.C. or Maryland law committed a "crime of violence" under Section 924(c)?
- III. Are the U.S. Courts of Appeals required to address whether a district court's denial of a motion to suppress cell-site location information (CSLI) that was obtained in violation of the Fourth Amendment was harmless error beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

Petitioners are Kenneth Benbow, Alonzo Marlow, and Mark Pray.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kenneth Benbow, Alonzo Marlow, and Mark Pray respectfully petition for a writ of certiorari from the United States Court of Appeals to the District of Columbia Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at *United States v. Benbow et al.*, 709 F. App'x 25 (D.C. Cir. 2018). A copy of the opinion can be found in the Appendix to this Petition.

JURISDICTION

The court of appeals issued its decision on January 12, 2018. *See* Pet. App. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924(c)(1)(A)

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3)

For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

D.C. Code § 22-2103

“Whoever with malice aforethought. . .kills another, is guilty of murder in the second-degree.”

Title 2 Maryland Code, Section 2-204

“A murder that is not in the first degree . . . is in the second-degree.”

Rule 701 of the Federal Rules of Evidence

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

INTRODUCTION

This case presents important questions about (1) whether a law enforcement officer’s testimony that interprets evidence for the jury in a criminal case is (a) admissible lay opinion testimony under Rule 701 of the Federal Rules of Evidence; and (b) harmless error if it should not have been admitted but was; (2) whether

second-degree murder is a crime of violence; and (3) whether prejudice stemming from admission of cell-site location information (CSLI) evidence without a warrant is viewed under the “harmless beyond a reasonable doubt” standard for constitutional error.

I. This Case Presents Important Questions About the Distinction Between Lay and Expert Opinion Testimony Under the Federal Rules of Evidence.

The government calls law enforcement officers to testify about many different issues in criminal cases. Sometimes a prosecutor calls a case agent to testify as the case agent about the facts of a case – what that agent directly observed in her investigation. In those cases, Rule 701 of the Federal Rules of Evidence is supposed to govern that testimony. Rule 701 provides that lay witnesses may only provide opinion testimony that is:

- (a) Rationally based on the witness’s perception;
- (b) Helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.¹

A prosecutor may also call a law enforcement officer to testify as an expert witness. In those cases, Rule 702 governs that testimony, and the officer may offer opinion testimony based on his expertise. But “[t]he addition of subsection (c) [of Rule 701] was intended to preclude litigants from proffering an expert in lay witness’s

¹ Fed. R. Evid. 701.

clothing and thereby avoid the disclosure and other requirements for expert opinion testimony under FRE 702.”²

As it often happens, prosecutors use law enforcement officers to testify as both a lay and expert witness at the same time – as a lay witness to testify about firsthand observations from her work on the investigation, and as an expert to testify about words and phrases used in recorded conversations in an investigation. That muddies the waters for the jury whether the officer is testifying as an expert witness or a lay witness at any given point. And it invites the government to use law enforcement officers – who are already cloaked with an aura of expertise and authority – to tell the jury how to interpret evidence in a criminal case.

Numerous courts of appeals, including the United States Court of Appeals for the District of Columbia Circuit, have recognized that this is a problem.³ The D.C. Circuit has twice vacated criminal defendants’ convictions because (1) law enforcement officers had given improper lay opinion testimony at trial; and (2) the testimony was not harmless error.⁴

Since *Hampton*, and even *Williams*, were decided, the courts of appeals have interpreted this rule differently in deciding whether and to what extent a law

² *Williams v. United States*, 827 F.3d 1134, 1156 (D.C. Cir. 2016).

³ See, e.g., *id.* at 1157-60; *United States v. Fulton*, 837 F.3d 281, 293 (3d Cir. 2016); *United States v. Haines*, 803 F.3d 713, 730-33 (5th Cir. 2015); *United States v. Garcia*, 752 F.3d 382, 392-95 (4th Cir. 2014); *Hampton v. United States*, 718 F.3d 978, 981-84 (D.C. Cir. 2013); *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013); *United States v. Meises*, 645 F.3d 5, 18 (1st Cir. 2011); *United States v. Grinage*, 390 F.3d 746, 750-751 (2d Cir. 2004); *United States v. Peoples*, 250 F.3d 630, 642 (8th Cir. 2001).

⁴ *Williams*, 827 F.3d at 1157-62; *Hampton*, 718 F.3d at 981-84.

enforcement officer may offer lay opinion testimony in a criminal case.⁵ But the prevailing view has been that such testimony is not admissible if (1) an officer interpreted evidence for the jury that was not based on his own personal, direct observations of what happened; or (2) the officer had been separately qualified to testify as an expert witness, and it was unclear whether his testimony was based on his expertise or specialized knowledge of the case.⁶ And among those circuits that have found error, it has been the prevailing view that the error wasn't harmless.⁷

But recent decisions have suggested increasing tension in the circuits on this issue, and a shift away from the prevailing view.⁸ The D.C. Circuit's opinion in this case is the latest example of that shift. It issued a four-page *per curiam* opinion in a case that involved a six-week trial, 140 hours of testimony, testimony from over 50 witnesses, and hundreds of pages of briefing on appeal. In that appeal, Benbow *et al.* pointed out numerous portions of testimony by the government's case agent and star witness, Special Agent Catherina Hanna, that repeatedly crossed the line into

⁵ Compare *United States v. Jackson*, 849 F.3d 450 (3d Cir. 2017); *Fulton*, 837 F.3d at 293; *Haines*, 803 F.3d at 730-33; *Garcia*, 752 F.3d at 392-95; *Freeman*, 730 F.3d at 597; *United States v. Vera*, 770 F.3d 1232 (9th Cir. 2014); with *United States v. Edwards*, 707 F. App'x 332 (6th Cir. 2017); *United States v. Gadson*, 763 F.3d 1189 (9th Cir. 2014).

⁶ See *Williams*, 827 F.3d at 1157-62; *Jackson*, 849 F.3d at 553-55; *Fulton*, 837 F.3d at 293; *Haines*, 803 F.3d at 730-33; *Garcia*, 752 F.3d at 392-95; *Freeman*, 730 F.3d at 597; *Vera*, 770 F.3d at 1241-49; *Meises*, 645 F.3d at 18; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642.

⁷ See *Williams*, 827 F.3d at 1157-62; *Garcia*, 752 F.3d at 392-95; *Freeman*, 730 F.3d at 597; *Vera* 770 F.3d at 1243-49 (finding plain error); *Hampton*, 718 F.3d at 981-84; *Meises*, 645 F.3d at 23-25; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642.

⁸ See Pet. App.; *Edwards*, 707 F. App'x 332 (6th Cir. 2017); *Haines*, 803 F.3d at 730-33; *Gadson*, 763 F.3d at 1189.

improper testimony under Rule 701.⁹ The government admitted that “portions” of Hanna’s testimony crossed the line – but it didn’t respond to the arguments raised about which portions exactly crossed the line.¹⁰ The D.C. Circuit, in turn, also declined to address Benbow *et al.*’s arguments. Its four-page *per curiam* opinion held that, whatever the error in the testimony was, it wasn’t harmless – even though the error in Hanna’s testimony was exactly the kind that was harmless in *Hampton* and more recently in *Williams*.¹¹

The D.C. Circuit’s opinion in Benbow *et al.*’s case exacerbated the confusion that already exists about whether and when a law enforcement officer’s testimony crosses a line. And it suggested that, even when an officer’s testimony does cross a line, *Hampton* and *Williams* shouldn’t dictate whether that error was harmless.

The impact that this opinion has on due process, and will continue to have on due process, is real. Much of the testimony in criminal cases like Benbow *et al.*’s – and in cases like theirs happening all over the country – consists of an officer, cloaked in the expertise and authority of a law enforcement witness, telling the jury how to interpret ambiguous words or phrases on calls. That information may be

⁹ *United States v. Benbow et al.*, Case No. 12-3052, Dkt. No. 1682836 (filed July 6, 2017) (Appellants’ Final Brief) at 9-58.

¹⁰ *Benbow*, Case No. 12-3052, Dkt. No. 1682861 (filed July 6, 2017) (Appellee Final Brief) at 38.

¹¹ *See Williams*, 827 F.3d at 1161 (error not harmless where “[n]o witness testified to having bought cocaine from Williams; no surveillance video showed him handling anything that any witness identified as cocaine; no audio tape disclosed him discussing cocaine, or anything that any witness other than Agent Bevington identified as cocaine; no one testified to stopping or arresting Williams and finding cocaine in his car, his home, or otherwise in his possession.”); *Hampton*, 718 F.3d at 981-84 (error not harmless where agent’s interpretations of recordings “played a key role in the government’s presentation to the jury” and the only other major source of evidence was a cooperating witness). As Benbow pointed out on appeal, this was also the state of the evidence at trial in his case. *Benbow*, Case No. 12-3052, Dkt. No. 1682837 (filed July 6, 2017) (App. Reply Br.) at 14-15.

helpful or useful for prosecutors in securing guilty verdicts. But it guts Rule 701's restrictions on lay opinion testimony, especially Rule 701(c), which was designed to prevent expert witnesses testifying in lay witnesses' clothing. It guts the factfinding role of the jury. And in the cases discussed above, as well as the instant case, it results in individuals' being deprived of a fair trial and spending their lifetimes in prison as a result. The Court should grant *certiorari* and put an end to these injustices.

II. This Case Presents Important Questions About the Definition of “Crime of Violence” Under 18 U.S.C. § 924(c).

This Court should resolve a conflict in the Circuits as to whether *Castleman v. United States*,¹² and *Voisine v. United States*,¹³ are applicable in determining whether second-degree murder is a crime of violence under 18 U.S.C. § 924(c). Petitioners submit that neither case applies, and that second-degree murder under District of Columbia and Maryland laws, both of which allow for conviction based on reckless conduct and conduct that does not require use of force, does not qualify as a crime of violence under Section 924(c).

III. This Case Presents Important Questions About the Standard of Review for Admission of CSLI Obtained Without a Warrant.

This Court should clarify that when an appellate court finds (or assumes) error by the district court in allowing admission of cell-site location information obtained without a warrant, a Fourth Amendment violation, the correct legal

¹² 572 U.S. ___, 134 S.Ct. 1405 (2014).

¹³ 579 U.S. ___, 136 S.Ct. 2272 (2016).

standard for determining prejudice is whether the error was harmless beyond a reasonable doubt under *Chapman v. California*.¹⁴ The D.C. Circuit applied the wrong standard here.

STATEMENT OF THE CASE

A. Proceedings in the district court

Kenneth Benbow, Alonzo Marlow, and Mark Pray were charged with a large-scale conspiracy involving narcotics trafficking and multiple acts of violence. The government's case at trial centered on the testimony of (1) Special Agent Catherine Hanna, who interpreted more than 100 recorded phone calls; and (2) several, substantially impeached cooperating witnesses. Over the objections of defense counsel, Hanna was qualified as an expert under Rule 702 in "words and phrases" used by drug dealers. And numerous times, over the objections of defense counsel, she gave opinions without explaining whether she was basing those opinions on personal, direct observations, or expert opinion. The trial court acknowledged that Hanna's testimony, as elicited, was improper. The court admonished the government to keep its presentation within the bounds of the law, but the government did not heed the admonition, and the court failed to enforce its rulings.

Prior to trial, the district court had also denied a motion by Marlow to suppress cell-site location evidence showing Marlow's location during the time period of two murders, where the government obtained the CSLI from cell phone providers without a warrant supported by probable cause. In denying appellant's

¹⁴ 386 U.S. 18 (1967).

suppression motion, the court relied on the quantity of data the government intended to introduce at trial, rather than the actual data the government obtained. The district court also held that the Fourth Amendment does not apply unless the location tracking was for a longer time period than in the present case.

Benbow *et al.* were convicted on a number of charges and all were sentenced to life in prison. These convictions included ones for several counts of possession of a firearm during a crime of violence under 18 U.S.C. § 924(c). The “crime of violence” alleged in the present case was second-degree murder under D.C. Code § 22-2103 (for Marlow and Pray) and second-degree murder under Maryland law (for Benbow and Pray).¹⁵

B. Appeal

Benbow *et al.* appealed their convictions to the D.C. Circuit. Their leading argument on appeal was that Hanna’s testimony was identical to the lay opinion testimony that was reversible error in *Hampton* and *Williams*. Benbow, Pray, and Marlow described, in hundreds of pages’ worth of briefs:

- The extensive testimony Hanna gave over the course of a six-week trial, in which she repeatedly told the jury how they should interpret words and phrases used on over 100 wiretapped calls; and
- Why Hanna’s interpretations of those words and phrases were essential to the government’s case against all three of these men, and therefore could not be harmless error – especially since the D.C. Circuit’s holdings in *Hampton*

¹⁵ See Pet. App. C.

and *Williams* had recently held that exactly that kind of testimony was not harmless.¹⁶

Benbow and Marlow also argued on appeal that their convictions under Section 924(c) should be vacated because their underlying convictions for second-degree murder were not “crimes of violence” as defined by the statute.¹⁷ And Marlow argued that the district court had erred in denying his motion to suppress the CSLI evidence.¹⁸

The government conceded on appeal that “portions of Agent Hanna’s testimony were improper.”¹⁹ But it didn’t specify which portions were improper.²⁰ The government argued that a few specific portions of Hanna’s testimony were proper, but it was silent as to the rest, and instead focused almost exclusively on the harmless error argument.²¹

On January 12, 2018, following oral argument, the D.C. Circuit issued a 4-page *per curiam* opinion that declined to address any of the errors that Benbow *et al.* had identified in large portions of Hanna’s testimony. And despite the government’s apparent waiver of objection to Benbow *et al.*’s arguments about much

¹⁶ Appellants’ Br. at 9-58.

¹⁷ *Id.* at 63-69.

¹⁸ *Id.* at 75-82.

¹⁹ Appellee Br. at 38.

²⁰ *Id.*

²¹ *Id.* at 41-78. The government acknowledged that the error was not harmless as to Counts 42-49 and 56-62 of the indictment.

of that testimony, the D.C. Circuit held that any error in those portions of testimony was harmless.²² The D.C. Circuit also summarily held that Benbow and Marlow's second-degree murder convictions were "crimes of violence" under Section 924(c), and affirmed the district court's denial of Marlow's motion to suppress.²³

This petition follows.

²² Pet. App.-A. The D.C. Circuit did vacate Counts 42-49 and 56-62 of the indictment, based on the government's concession, and summarily concluded that error was also not harmless as to Counts 51, 53, 54, and 55. All of these counts were based on charges that Benbow *et al.* used a telecommunications facility to facilitate a drug conspiracy in violation of 21 U.S.C. § 846.

²³ *Id.*

REASONS FOR GRANTING THE WRIT

- I. **Tension among the circuits, an incorrect shift away from the prevailing view among the circuits, and the widespread and substantial impact on both due process for criminal defendants, all provide compelling reasons for the Court to grant certiorari to correct the erroneous interpretation of Rule 701 of the Federal Rules of Evidence by some of the circuits, and to clarify the application of the harmless error standard in cases where improper lay opinion testimony that violated Rule 701 is admitted in error.**
 - A. *Circuit judges disagree, with some shifting away from the prevailing view, about (1) the proper interpretation of Rule 701's restrictions on lay opinion testimony, as they apply to law enforcement officers' testimony interpreting recorded conversations in criminal cases; and (2) under what circumstances admitting that testimony is harmless error.*
 1. *The prevailing view among the circuits has been that law enforcement officers' testimony interpreting recorded conversations violates Rule 701, where the foundation for their testimony was unclear or not based on their personal, direct observations; but some circuits are shifting away from this view and finding this kind of testimony admissible.*

The First, Second, Third, Fourth, Fifth, Eighth, and D.C. Circuits have held that law enforcement officers' testimony violates Rule 701 where (1) the officer interprets evidence in the form of recorded conversations for the jury without basing it on his personal, direct observations of what happened; or (2) the officer was qualified as an expert witness under Rule 702, and it was unclear whether she was opining as an expert or a lay witness when she gave her opinions.²⁴ These courts

²⁴ See, e.g., *Williams*, 827 F.3d at 1157-62; *Fulton*, 837 F.3d at 293; *Haines*, 803 F.3d at 730-33; *Garcia*, 752 F.3d at 392-95; *Hampton*, 718 F.3d at 981-84 ; *Freeman*, 730 F.3d at 597; *Meises*, 645 F.3d at 18; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642; but see *United States v. Albertelli*, 687 F.3d 439, 446-50 (1st Cir. 2012) (distinguishing *Meises* and *Grinage*)).

have all recognized the elevated risk of prejudice and unfairness to criminal defendants that any other interpretation of Rule 701 would cause. If a jury is asked to weigh vague words or ambiguous conduct (on a recorded call or surveillance video, for example) as evidence of a defendant's guilt, there's an undeniable risk that a jury will decide those words and conduct mean whatever the law enforcement witness told them they mean.²⁵

Although this is the prevailing view, a substantial number of circuit judges have disagreed with it. The Ninth Circuit held in *United States v. Gadson* that lay opinion testimony about these topics is permitted where the officer's involvement in

An open and related question is whether knowledge of "words" or "phrases" in a drug investigation is even a proper subject of expert testimony under Rule 702. *See Garcia*, 752 F.3d at 393-98; *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008). Benbow *et al.* raised on appeal the argument that Agent Hanna's testimony also was not properly within the scope of Rule 702 because (1) it was not grounded on generally accepted, reliable methodology; (2) there was no foundation for Hanna's opinions; (3) the opinions went beyond interpreting "words and phrases" and summarized entire conversations; (4) the opinions were not beyond the ken of the average juror; (5) the opinions invaded the province of the jury; and (6) the opinions were improperly phrased in terms of the Hanna's "understanding." Appellant Br. at 5.

Hanna's testimony was improper for all of these reasons. The D.C. Circuit did not address these arguments directly in its *per curiam* opinion. But it's not a question that's strictly necessary for the Court to reach here, because the courts in the cases described here generally find the error as one that stems from violations of Rule 701, less so Rule 702. *See, e.g., Williams*, 827 F.3d at 1157-62; *Hampton*, 718 F.3d at 981-84. But Rule 702 violations often arise in these cases as well, because the core problem in the cases is a failure to respect the distinction between lay and expert opinion testimony. It only adds to the urgent need for the Court to address the Rule 701 questions presented in this Petition.

The D.C. Circuit's failure to find prejudicial error in agent Hanna's testimony abdicates the role federal courts have taken in regulating expert witness testimony. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993). Uncontrolled opinion/expert testimony takes away the right to have material facts decided by a jury and places that responsibility into the hands of an "expert" who renders conclusory opinions on an ultimate fact.

²⁵ *See Williams*, 827 F.3d at 1157-60; *Fulton*, 837 F.3d at 293; *Haines*, 803 F.3d at 730-33; *Garcia*, 752 F.3d at 392-95; *Hampton*, 718 F.3d at 981-84; *Freeman*, 730 F.3d at 597; *Meises*, 645 F.3d at 18; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642.

the investigation was extensive, and the information is helpful to the jury.²⁶ The Eleventh Circuit reached a similar holding in *United States v. Jayyousi*, with one of the judges sharply dissenting from that holding.²⁷ And the Fifth Circuit adopted similar reasoning in *United States v. Akins*, even though, as noted above, it subsequently found such testimony improper where the witness was testifying as a dual lay and expert witness and failed to clarify the basis for his testimony.²⁸ Finally, the Seventh Circuit held in *United States v. Rollins* that “[w]e . . . disagree with the Second Circuit’s view of what is and what is not impermissible lay opinion testimony.”²⁹

Other decisions from the other circuits suggest that they may also be moving in that direction. Although the Sixth Circuit held in *United States v. Freeman* that an officer’s lay opinion testimony violates Rule 701, it more recently decided *United States v. Edwards*, which suggests it favors the *Gadson* approach.³⁰ In *United States v. Fulton*, in which the Third Circuit found that an agent’s testimony was improperly admitted but that the error was harmless, a judge wrote a separate

²⁶ 763 F.3d at 1209-10. *But see Vera*, 770 F.3d at 1249 (distinguishing *Gadson* because it “did not involve a qualified expert slipping into lay opinion without a proper jury instruction, nor did it involve such obvious flaws in the foundation for the officer’s conclusions on specific drug quantities.”).

²⁷ 657 F.3d 1035 (11th Cir. 2011); *see id.* at 1119 (Barkett, J., concurring in part and dissenting in part).

²⁸ 746 F.3d 590, 597-600 (5th Cir. 2014).

²⁹ 544 F.3d 820, 832 (7th Cir. 2008).

³⁰ *Compare Freeman*, 730 F.3d at 597; *with Edwards*, 707 F. App’x at 337 (finding testimony admissible where agent “interpreted words unique to the investigation and deciphered ambiguous statements in a way that was useful to the jury”).

concurrence arguing that the testimony was proper under Rule 701.³¹ And the D.C. Circuit’s four-page *per curiam* opinion in the instant case – a case that was squarely on all fours with *Williams*, and yet produced a different result – sends a troubling signal that the D.C. Circuit may be moving in the same direction.

2. *The prevailing view among circuit judges who agree that law enforcement officers’ lay opinion testimony violates Rule 701 has been that such testimony is not harmless error, but some of those same circuits are now shifting away from that view and finding any error in the testimony harmless.*

The prevailing view is still that law enforcement officers’ lay opinion testimony violates Rule 701 when the basis for the opinion is unclear, or otherwise not based on their personal, direct observations of what happened. And until recently, among the circuits that have adopted that view, those violations generally weren’t considered harmless error.³² But some of these circuits are now signaling a departure from that prevailing view. They’re applying an increasingly high bar for criminal defendants to prove the error wasn’t harmless, with little or no explanation for the shift.³³

The First, Second, Fourth, Sixth, Eighth, and D.C. Circuits have all found that improper lay opinion testimony by law enforcement officers in criminal cases

³¹ 837 F.3d at 313 (Smith, J., concurring).

³² See, e.g., *Williams*, 827 F.3d at 1157-62; *Fulton*, 837 F.3d at 293; *Garcia*, 752 F.3d at 392-95; *Hampton*, 718 F.3d at 981-84; *Freeman*, 730 F.3d at 597; *Meises*, 645 F.3d at 18, 23-25; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642; see also *Vera*, 770 F.3d at 1243-49 (finding plain error).

³³ See Pet. App.; *Edwards*, 707 F. App’x 332 (6th Cir. 2017); *Haines*, 803 F.3d at 730-33; *Gadson*, 763 F.3d at 1189.

was not harmless because it was “highly probable” it affected the jury’s verdict, or even where “we cannot say ‘with fair assurance’ that the error did not substantially affect the jury’s verdict.”³⁴ In finding prejudicial error, the circuit judges in these cases undertook intensive analyses of the evidence at trial to determine whether this standard had been met.³⁵

But the Fifth Circuit has more recently applied a sufficiency of the evidence review in deciding whether improper lay opinion testimony was harmless.³⁶ In *United States v. Haines*, the Fifth Circuit stated that testimony was harmless because the record was “replete with evidence” of the defendants’ guilt.³⁷ But that finding was based only on the circuit’s separate conclusion that the defendants couldn’t prevail on their challenges to the sufficiency of the evidence.³⁸ As the circuit itself acknowledged, sufficiency of the evidence review is “very deferential to the jury verdict.”³⁹ That’s not the harmless error standard. This Court has made that clear since *Kotteakos*: “The inquiry cannot be merely whether there was enough to

³⁴ See *Williams*, 827 F.3d at 1157-62; *Garcia*, 752 F.3d at 392-95; *Freeman*, 730 F.3d at 597; *Meises*, 645 F.3d at 18; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642; see also *Vera*, 770 F.3d at 1241-49 (finding plain error).

³⁵ See *Williams*, 827 F.3d at 1157-62; *Garcia*, 752 F.3d at 392-95; *Freeman*, 730 F.3d at 597; *Meises*, 645 F.3d at 18; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642; see also *Vera*, 770 F.3d at 1241-49 (finding plain error).

³⁶ 803 F.3d at 730-33.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 734.

support the result.”⁴⁰ All that the court need find is the possibility that the error may have had a “substantial influence’ on the outcome.”⁴¹ The Fifth Circuit never applied that standard to the erroneous testimony in *Haines*. It held the defendants to a much higher standard than this Court and other circuit precedent require.

Even in *Haines*, the Fifth Circuit’s opinion at least discussed what the evidence in the case was, and why that evidence satisfied the incorrect standard the Fifth Circuit was applying. The D.C. Circuit’s one-page finding that the case agent’s testimony at Benbow *et al.*’s trial was harmless error also appeared to apply a higher legal standard – but it didn’t even undertake that level of factual analysis. The D.C. Circuit’s analysis relied solely on an “overwhelming evidence” inquiry, rather than considering the effect of the error on the verdict.⁴² It ignored both substantially impeached, conflicting, and ambiguous testimony; and the lack of actual evidence in the case.⁴³

⁴⁰ 328 U.S. 750, 765 (1946).

⁴¹ *Id.*

⁴² *United States v. Cunningham*, 145 F.3d 1385, 1396 (D.C. Cir. 1998).

⁴³ In Marlow’s case, for example, no witnesses identified Marlow as the shooter in either of two charged murders; there were conflicting descriptions of the shooters in each murder; inadmissible cell-site location evidence (see Part III *infra*) bolstered the credibility of two substantially impeached government witnesses; the government’s expert admitted that accuracy of GPS, which allegedly placed Marlow at both murder scenes, is degraded by trees, estimates are manufacturers’ estimates only, signals can be dropped, and a person is not necessarily in a specific space indicated by the GPS signal; the government’s expert admitted that cell-site location records place a phone in a general geographic area that could be a square mile or more; there was no forensic evidence linking Marlow to either murder; and substantial evidence showed that others had motives to murder each of the victims.

As to the charged drug conspiracy, there was no evidence of controlled buys of drugs from Marlow, no surveillance tapes, no evidence of a connection to stash houses, no bank accounts or large sums of

The D.C. Circuit opinion is also a sharp departure from the in-depth harmless error analyses that the D.C. Circuit undertook in both *Hampton* and *Williams*. It doesn't address the enormous amount of evidence that was introduced over the course of a six-week trial. It doesn't address the many erroneous portions of Hanna's testimony that were discussed in painstaking detail in hundreds' of pages' worth of briefs submitted by Benbow *et al.* The D.C. Circuit gave no explanation for why the evidence in Benbow *et al.*'s case wasn't entitled to the same level of scrutiny that the evidence in *Hampton* and *Williams* received when the D.C. Circuit reviewed for harmless error in those cases.

The D.C. Circuit's recent *per curiam* opinion in this case, and the Fifth Circuit's recent opinion in *Haines*, coupled with the decisions from the Ninth, Sixth, Seventh, and Eleventh Circuits, are troubling signs of a backlash against the

money owned by or in Marlow's possession. The government's evidence consisted of a seizure of approximately nine ounces of marijuana and a small ½ ounce vial of PCP recovered from Marlow a search of his home where several others resided and during a traffic stop, respectively. Police found no crack, no PCP, no scales, no vials and no cash at his residence.

Similarly, in Benbow's case, there was also no surveillance footage showing exchanges of drugs, nor evidence tying him to any stash houses. The government's case against him depended upon the testimony of impeached cooperating witnesses and Hanna's interpreting entire calls for the jury. It is difficult to see how the admission of this testimony could have been any more prejudicial. See *generally* Appellants' Brief at 29-40.

It also ignored how the jury was instructed. Jurors were instructed: "In determining whether the conspiracy existed, *you may consider the acts and statements of any member or members of the conspiracy as evidence against all of the defendants whether done in or out of their presence while the conspiracy existed. . . [E]verything which is said or done by one of them in furtherance of that purpose is deemed to be the act or statements or all of them who have joined in the conspiracy and is evidence against all of the conspirators.*" Trial Tr. 3/22/12: 99-100 (emphasis added). See also *U.S. v. Smart*, 98 F.3d 1379, 1390-91 (D.C. Cir. 1997) (where "the evidence presented at trial is ambiguous, even a relatively minor error requires reversal").

prevailing circuit view that improper lay opinion testimony from law enforcement witnesses in criminal cases is prejudicial error.

B. *The backlash against what has been the prevailing view among the circuits on Rule 701 and the harmless error standard is wrong.*

The Ninth Circuit's approach to Rule 701, which other circuits are increasingly adopting, erodes Rule 701's restrictions on lay opinion testimony and the distinction between lay and expert testimony. The level of an officer's involvement or experience in a case should have no bearing on whether he can provide lay opinion testimony about that case. Experience is required in qualifying witnesses as experts under Rule 702, not Rule 701. In fact, Rule 701 requires the opposite of expert witness opinion testimony, i.e., that it *not* be based on technical or specialized knowledge. But these recent decisions allow law enforcement agents to give opinion testimony under Rule 701, while saving the government the actual work of having to qualify its agents as expert witnesses.⁴⁴ They allow the government to have its cake and eat it, too.

Other circuits' recent holdings finding harmless error with this kind of testimony are also wrong. Until recently, the prevailing view among the circuits that weighed in on this issue was that, while this testimony may not always be

⁴⁴ In many of these cases, including *Benbow et al.*'s, the government may still seek to qualify law enforcement officers as experts under Rule 702. But that only exacerbates juror confusion, and also raises questions whether the scope of the officer's testimony is actually proper expert subject matter under Rule 702. Courts have acknowledged these problems as well, and it was clearly a problem at *Benbow et al.*'s trial. See n.24 *supra*.

plain error, it was almost always prejudicial under a harmless error inquiry.⁴⁵ But recent decisions appear to ignore that view. For all the reasons described above, the most recent Fifth Circuit decision in *Haines* wrongly applied a much higher standard than what this Court and other circuit precedent have required for finding prejudicial error. And the D.C. Circuit's *per curiam* opinion in this case purported to apply a harmless error standard, but it departed from clear precedent – *Hampton* and *Williams* – that had found prejudicial error with virtually identical testimony.⁴⁶

Applying *Hampton* and *Williams*, the prejudice that this erroneous testimony caused Benbow, Marlow, and Pray is clear. It substantially affected their ability to obtain a fair trial. They received sentences of life without parole, based on convictions of conspiracy to distribute narcotics in violation of 18 U.S.C. § 846 and conspiracy to participate in a racketeer influence corrupt organization (RICO) in violation of 18 U.S.C. § 1962(d). Those convictions wouldn't have been possible without Hanna's testimony, which the government introduced to prove the numerous overt acts that it alleged each of the men had committed in furtherance of the conspiracy. Hanna testified at numerous points during the six-week trial and interpreted over 100 recorded calls at trial, often without clarifying the basis for her

⁴⁵ See *Williams*, 827 F.3d at 1157-62; *Garcia*, 752 F.3d at 392-95; *Freeman*, 730 F.3d at 597; *Meises*, 645 F.3d at 18; *Grinage*, 390 F.3d at 750-751; *Peoples*, 250 F.3d at 642; see also *Vera*, 770 F.3d at 1241-49 (finding plain error).

⁴⁶ See n.11 *supra*.

opinion. Much of that testimony was erroneous and very well “may have had ‘substantial influence’ on the outcome of the proceeding.”⁴⁷

C. *This has a widespread and substantial impact on due process in criminal cases.*

The reasons for this shift are unclear. But the shift is real, and its impact on due process is both real and harmful.

The emerging approach that favors admitting law enforcement officers’ lay opinion testimony – or finding the admission error, but harmless error – presents serious due process concerns. It allows the government to circumvent Rule 701’s restrictions by allowing that testimony to be given under the banner of being “helpful” or “useful” to the jury.⁴⁸ But Rule 701 doesn’t allow evidence that is helpful or useful to the point where the witness is just telling the jury what to think.⁴⁹ Nor should a law enforcement officer’s “extensive” or “substantial” involvement in a particular case have any bearing on whether the lay opinion testimony is permissible.⁵⁰ Rule 701 has no exception for lay opinion testimony where the witness was extensively or substantially familiar with the subject matter of a case.

⁴⁷ *Williams*, 827 F.3d at 1161 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (D.C. Cir. 1988) (quoting *Kotteakos*, 328 U.S. at 765)).

⁴⁸ See *Edwards*, 707 F. App’x at 337-39; *Gadson*, 763 F.3d at 1205-10.

⁴⁹ *Jayyousi*, 657 F.3d at 1125 (“Although testimony is certainly ‘helpful’ when a witness simply agrees with the contentions of one side, that is not the meaning of ‘helpful’ under Rule 701. Lay opinion testimony is not ‘helpful’ for purposes of admissibility under Rule 701 when it does nothing more than give one side’s understanding of the evidence.”) (Barkett, J., dissenting).

⁵⁰ See *Edwards*, 707 F. App’x at 337-39; *Gadson*, 763 F.3d at 1205-10.

And even when courts are willing to find error in these cases, the most recent opinions on these issues signal a troubling trend in favor of finding that any error caused by this kind of testimony is harmless. The D.C. Circuit’s four-page, *per curiam* opinion in a complex drug conspiracy case, along with the Fifth Circuit’s opinion in *Haines*, show the circuits are taking an increasingly dim view of the prejudice that this kind of testimony causes criminal defendants. But the influence it has on juries is real – especially when the testimony comes from law enforcement officers, whom a jury is inclined to trust and defer to in these cases.⁵¹

Until recently, the prevailing view among the circuits acknowledged this reality. Circuit opinions made clear that this was not an acceptable trial tactic for the government to use.⁵² They made clear that district courts had a responsibility to make that clear to prosecutors, by exercising their gatekeeping function and disallowing improper lay opinion testimony from law enforcement officers.⁵³ But recent decisions suggest the circuits may be willing to look the other way, without real consideration of the harm this testimony causes criminal defendants like Benbow *et al.* at trial. This is an alarming trend. The Court should intervene and put an end to it.

⁵¹ See Introduction and n.3, *supra*.

⁵² See *id.*

⁵³ See *id.*

II. There Is a Conflict in the Circuits as to Whether *Castleman v. United States*, 134 S.Ct. 1405 (2014), and *Voisine v. United States*, 136 S.Ct. 2272 (2016), Upon Which the D.C. Circuit Relied in Finding That Second-degree Murder Is a “Crime of Violence,” Apply to 18 U.S.C. § 924(c)(3)(A).

A. *Castleman* Does Not Apply.

To determine whether a predicate offense qualifies as a “crime of violence” under 18 U.S.C. § 924(c), courts use the categorical approach.⁵⁴ This approach requires that courts “look only to the statutory definitions – *i.e.*, the elements—of a defendant’s [offense] and not to the particular facts underlying [the offense]” in determining whether the offense qualifies as a “crime of violence.”⁵⁵ An offense qualifies as a “crime of violence” only if all of the criminal conduct covered by a statute, including the most innocent conduct, matches or is narrower than the “crime of violence” definition.⁵⁶ In order to qualify as a “crime of violence” under Section 924(c)(3)(A)’s “force” clause the offense must have an element of “physical force.” “Physical force” means “*violent* force”—that is “strong physical force,” which is “capable of causing physical pain or injury to another person.”⁵⁷

D.C. Code § 22-2103 provides: “Whoever with malice aforethought. . .kills another, is guilty of murder in the second-degree.” In *Comber v. United States*, the

⁵⁴ *Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013).

⁵⁵ *Id.* (citation omitted).

⁵⁶ *Descamps*, 133 S.Ct. at 2283; *see also*, *Moncreiffe v. Holder*, 133 S.Ct. 1678, 1684 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010) (courts “must presume that the conviction `rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense”)).

⁵⁷ *Johnson*, 559 U.S. at 140.

D.C. Court of Appeals defined malice as comprising four mental states: intent to kill, intent to injure, conscious disregard of an extreme risk of death or serious bodily injury, and implied malice in felony murder.⁵⁸ *Comber* elaborated:

Examples of conduct rising to the level of depraved heart malice include: firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into...a moving automobile, necessarily occupied by human beings...; playing a game of “Russian roulette” with another person....; [and] selling “pure” (i.e., undiluted) heroin.⁵⁹

By statute, a second-degree murder in Maryland is a catch all: “[a] murder that is not in the first degree . . . is in the second-degree.”⁶⁰ It can be satisfied by a “depraved heart” murder— a killing resulting from ‘the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.’”⁶¹ The elements of this form of second-degree murder in Maryland are: “(1) that the conduct of the defendant caused the death of [victim]; (2) that the defendant's conduct created a very high degree of risk to the life of [victim]; and (3) that *the defendant, conscious of such risk, acted with extreme disregard of the life-endangering consequences.*”⁶²

Therefore, because second-degree murder under either statute can be

⁵⁸ 584 A.2d 26 (D.C. 1990).

⁵⁹ *Comber* at 39, n. 13 (quoting W. LaFare & A. Scott, Substantive Criminal Law § 7.4, at 202-203 (1986)).

⁶⁰ Title 2 Maryland Code, Section 2-204.

⁶¹ *Thornton v. State*, 919 A.2d 678, 688 (Md. 2007) (quoting *Burch v. State*, 696 A.2d 443, 454 (Md. 1997)).

⁶² *Williams v. State*, 641 A.2d 990, 998 (Md. 1994) (internal quotation omitted) (emphasis added).

accomplished by conduct that does not require “the use, attempted use or threatened use of physical force against the person or property of another,” second-degree murder is not a “crime of violence” as defined by § 924(c)(3)(A).⁶³

In rejecting Petitioners’ arguments, the D.C. Circuit relied on *Castleman*’s language that use of force includes “indirect applications of force.”⁶⁴ However, *Castleman* was defining “use of physical force” under 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence (“MCDV”). Section 921(a)(33)(A) defines MCDV as an offense that has “as an element, the use or attempted use of physical force.” While some circuits have adopted and extended their application of *Castleman* to determining whether certain crimes are crimes of violence under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1), 18 U.S.C. § 924(c)(3)(A) and the U.S. Sentencing Guidelines,⁶⁵ there is a conflict in the circuits.

⁶³ As this Court cautioned, “focus on the minimum conduct criminalized by the state statute is not an invitation to apply ‘legal imagination’ to the state offense; there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’” *Moncreiffe v. Holder*, 569 U.S. 184, 133 S.Ct. 1684-85 (2013) (quoting *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Lest there be any doubt that the “minimum conduct criminalized” as second-degree murder in the DC and Maryland statutes is not a legal fiction, consider: *Powell v. U.S.*, 485 A.2d 596 (D.C. 1984) (reckless driving); *State v. McKinney*, 890 So.2d 737 (La. 2004) (firing a bullet into the air); *State v. Robinson*, 286 P.3d 239 (Kan. App., 2012) (setting a fire in hallway of apartment building); *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993) (playing Russian roulette); *State v. Reed*, 120 P.3d 447 (N.M. 2005) (same); *State v. Boyce*, 718 A.2d 1097 (Me.1998) (same); *People v. Roe*, 542 N.E.2d 610 (N.Y.1989) (same); *Commonwealth v. Malone*, 47 A.2d 445 (Pa. 1946) (same); *Neitzel v. State*, 655 P.2d 325, 338 (Alaska Ct. App. 1982) (same).

⁶⁴ Pet. App-A.

⁶⁵ See *United States v. Edwards*, 857 F.3d 420, 426 (1st Cir. 2017) (armed assault with intent to kill is a violent felony under ACCA even if weapon is poison); *United States v. Hill*, 832 F.3d 135, 143 (2d Cir. 2016)(Hobbs Act Robbery is crime of violence under § 924(c)(3)); *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017) (mailing threatening letter falls within the ACCA’s elements clause); *In re Irbby*, 858 F.3d 231 (4th Cir. 2017) (second-degree retaliatory murder is a crime of violence under §

The Fifth Circuit found that “[b]y its express terms, *Castleman*’s analysis is not applicable to the physical force requirement for a crime of violence [under the Sentencing Guidelines], which ‘suggests a category of violent active crimes’ that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context.”⁶⁶ The Sixth Circuit also limited *Castleman* to the context of misdemeanor domestic violence.⁶⁷

And while the Fourth Circuit in *In re Irby*, *supra*, applied *Castleman*’s reasoning to second-degree retaliatory murder, finding it is a crime of violence under the ACCA and the Sentencing Guidelines even though the statute can be satisfied with indirect uses of force such as poisoning,⁶⁸ the Fourth Circuit has more recently found that “*Castleman*’s discussion of force does not control this case” because “the force discussed in *Castleman* [] differs from the force required in the ACCA: Section 921(a)(33)(A) accepts *de minimis* force, but the ACCA, by contrast, requires violent force.”⁶⁹ Therefore, *Middleton* found that “the Government’s attempt to extend

924(c)(3)(A)); *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017) (felony domestic assault is crime of violence under ACCA and USSG § 4B1.4 even if it could be based on withholding food from child); *United States v. Winson*, 845 F.3d 876, 878 (8th Cir. 2017) (second-degree battery and terroristic threats are crimes of violence under ACCA, relying on *Castleman* in rejecting argument that physical injury is not the equivalent of physical force); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1288 (9th Cir. 2017) (Texas aggravated assault conviction a crime of violence under USSG § 2L1.2(b)(1)(A)(ii)).

⁶⁶ *United States v. Rico-Mejia*, 859 F.3d 318, 322 (5th Cir. 2017) (quoting *Castleman*, 134 S.Ct. at 1141 n.4).

⁶⁷ See, *United States v. Gatson*, 776 F.3d 405, 411 (6th Cir. 2015) (rejecting argument that *Castleman* applies to felony domestic assault, which court found is violent felony under ACCA).

⁶⁸ See *In re Irby*, 858 F.3d 231 (4th Cir. 2017).

⁶⁹ *United States v. Middleton*, 2018 WL 1056944 (4th Cir. 2018).

Castleman's holding to the ACCA's violent force provision fails.”⁷⁰ *Middleton* also rejected the argument that “causing injury categorically means violent force was used,” because it “conflates the use of violent force with the causation of injury.”⁷¹

Petitioners submit that the Fourth, Fifth and Sixth Circuits employ the better reasoning that *Castleman* is limited to misdemeanor domestic violence and, therefore, this Court should grant their petition to resolve the conflict in the Circuits.

B. *Voisine* Does Not Apply.

Voisine decided that “[18 U.S.C.] § 922(g)(9) [barring individuals convicted of MCDV from possessing guns] applies to reckless conduct.”⁷² *Voisine* explicitly noted, however, that its ruling did not extend beyond the MCDV context.⁷³ As even the government acknowledged below in the present case, Section 16’s definition of “crime of violence” is identical to § 924(c)(3)’s definition of “crime of violence.”⁷⁴

⁷⁰ *Id.* at 5, 9.

⁷¹ *Id.* at 9-10.

⁷² *Voisine*, 136 S.Ct. at 2278.

⁷³ *Id.* at 2280 n.4 (“Like *Leocal* [*v. Ashcroft*, 543 U.S. 1 (2004)], our decision today concerning § 921(a)(33)(A)’s scope does not resolve whether [18 U.S.C.] § 16 [defining “crime of violence”] includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes and we do not foreclose that possibility with respect to their required mental states.”) (citing *Castleman*, 134 S.Ct. at 1411 n.6)).

⁷⁴ The Immigration and Nationality Act permits deportation for an “aggravated felony” which includes a “crime of violence,” defined in § 16(a) as “an offense that has as an element the use . . . of physical force against the person or property of another,” and in § 16(b) as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

Moreover, the First, Sixth and Eighth Circuits understand that *Voisine* does not apply outside the context of MCDV. In *United States v. Fields*, the court held that because Missouri’s second-degree assault statute encompasses reckless driving, it is not a crime of violence under the U.S. Sentencing Guidelines.⁷⁵ In *United States v. Windley*, the court agreed with what a previous panel reasoned.⁷⁶ In *Bennett v. United States*, the court noted that *Voisine* “did not have occasion to construe the [“against the person of another”] phrase that appears in ACCA’s force clause” but does not appear in § 921(a)(33)(A)’s definition of “crime of violence.”⁷⁷ *Windley* agreed, concluding that ACCA’s definition of “violent felony” contains a “grievous ambiguity” as to whether that definition encompasses reckless aggravated assault in Maine.⁷⁸

The Sixth Circuit also has concerns about applying *Voisine* outside the context of MCDV. Though acknowledging that it was bound by *United States v. Verwiebe*,⁷⁹ in *United States v. Harper*,⁸⁰ the court opined that *Verwiebe* had wrongly applied *Voisine* to the ACCA.⁸¹ According to *Harper*, the ACCA’s force clause requires force

⁷⁵ 863 F.3d 1012, 1015-1016 (8th Cir. 2017).

⁷⁶ 864 F.3d 36 (1st Cir. 2017).

⁷⁷ 868 F.3d 1, 8 (1st Cir. 2017), withdrawn as moot by 870 F.3d 34 (1st Cir. 2017).

⁷⁸ *Id.* at 36-39.

⁷⁹ 874 F.3d 258 (6th Cir. 2017)

⁸⁰ 875 F.3d 329 (6th Cir. 2017)

⁸¹ *Id.*

“against the person of another” and, therefore, the application of force must be volitional or deliberate.⁸² [It] requires a *mens rea*— not only as to the employment of force, but also as to its *consequences*, which the provision in *Voisine* did not.⁸³ The phrase “against the person of another” “narrows the scope of the phrase ‘use of force’ to require not merely recklessness as to the consequences of one’s force, but knowledge or intent that the force apply to another person.”⁸⁴ *Voisine*, the *Harper* court continued, satisfies the MCDV force clause but not the ACCA force clause because in *Voisine*, a defendant who throws a plate against the wall is “only reckless [and] he is indifferent as to whether the plate hits [his wife].”⁸⁵

Therefore, the D.C. Circuit’s ruling that reckless conduct qualifies second-degree murder as a crime of violence under Section 924(c)(3) is not supported by *Voisine* and conflicts with other circuits.

III. The D.C. Circuit’s Analysis of Prejudice Stemming from Admission of Marlow’s Cell-Site Location Information Obtained Without a Warrant Conflicts with This Court’s Precedent That Review Is for Whether the Error Was Harmless Beyond a Reasonable Doubt.

Petitioner Marlow appealed the district court’s denial of his motion to suppress cell-site location evidence obtained without a warrant, thus violating Petitioner’s Fourth Amendment rights. *United States v. Carpenter*, 819 F.3d 880

⁸² *Id.*

⁸³ *Harper*, 875 F.3d at 331.

⁸⁴ *Id.*

⁸⁵ *Id.*

(6th Cir. 2016), is currently pending before this Court in Docket No. 16-402, and is directly related to Petitioner’s claim, that is, whether warrantless search and seizure of CSLI violates the Fourth Amendment. The D.C. Circuit ruled that “even if the District Court erred in admitting Marlow’s cell-site data, the error was harmless.”⁸⁶ According to the court, “Marlow’s cell-site data was largely duplicative of the GPS location evidence obtained from the logs monitoring Marlow’s ankle bracelet,” both of which “place Marlow near” two murder scenes (the murders of Crystal Washington and Jerhyl Hodge).⁸⁷ It further found that “GPS data was more precise and accurate than the cell-site data.”⁸⁸ The appellate court erred.

First, the appellate court applied the wrong legal standard. Because Marlow’s claim was constitutional, the appellate court was required to consider whether the error was harmless *beyond a reasonable doubt*.⁸⁹ Under *Chapman*, the government was required to demonstrate, and the D.C. Circuit was required to determine whether, despite “a reasonably strong web of circumstantial evidence,” “absent the constitutionally forbidden [evidence], honest, fair-minded jurors might very well have brought in not-guilty verdicts.”⁹⁰

Second, the court ignored that: no witnesses identified Marlow as the

⁸⁶ *Judgment* at 2.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Chapman v California*, 386 U.S. 18, 24 (1967).

⁹⁰ *Id.* at 25-26.

shooter in either of two murders; the sole description of the shooter in the Crystal Washington murder did not match Marlow's height and described the shooter as right-handed when Marlow is left-handed; the inadmissible CSLI bolstered the credibility of two substantially impeached government witnesses; the admission by the government's expert that GPS accuracy is degraded by trees, estimates are manufacturers' estimates—not what has actually been tested on Marlow's unit—signals can be dropped, and a person is not necessarily in a specific space indicated by the GPS signal; the government expert's admission that cell-site location records place a phone in a general geographic area that could be a square mile or more; the lack of any forensic evidence linking Marlow to the two charged murders; evidence showing that others had motives to murder each of the victims; conflicting descriptions of person seen fatally shooting Jerhyl Hodge; and the government's heavy reliance upon CSLI in its closing arguments, urging jurors to infer that Marlow's location near the murders proved he was the shooter.

Given the appellate court's failure to apply the correct legal standard in determining whether Marlow was prejudiced by admission of CSLI, its focus on GPS alone when even the government's experts acknowledged the inaccuracies of GPS, and its failure to consider the ample record supporting Marlow's prejudice claim, Petitioner Marlow requests that this Court grant his petition.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,



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