

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EUGENE BANKS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

William D. Lunn
Oklahoma Bar Number 5566
Counsel of Record for Petitioner
320 S. Boston, Suite 1130
Tulsa, Oklahoma 74103
918/582-9977

QUESTION PRESENTED

May the government introduce a law enforcement agent representing an investigative team at the beginning of trial to provide overview testimony that includes an opinion, derived from information obtained from other team members, as to the culpability of a defendant, such as his participation as a high-ranking member of a gang involved in drug distribution, before any evidence to support such a conclusion has been presented for jury review?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Michael Eugene Banks, was a defendant in the district court and was the appellant in the Tenth Circuit. Mr. Banks is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

TABLE OF CONTENTS

Question Presented.....	i
Parties to the Proceeding and Rule 29.6 Statement.....	ii
Table of Authorities.....	iv
Appendix.....	v
Prayer.....	1
Opinions Below.....	1
Jurisdiction.....	1
Constitutional and Statutory Provisions Involved.....	1
Statement of the Case.....	4
<i>The Government’s Overview Witness</i>	5
<i>The Tenth Circuit Court’s Opinion</i>	16
Reason for Granting the Writ	
THE TENTH CIRCUIT COURT DECISION THAT A CASE AGENT CAN PROVIDE OVERVIEW TESTIMONY AS TO THE CULPABILITY OF A DEFENDANT BEFORE ANY EVIDENCE TO SUPPORT SUCH A CONCLUSION HAS BEEN PRESENTED FOR JURY REVIEW HAS BEEN REJECTED BY ALL FOUR CIRCUIT COURTS THAT HAVE CONSIDERED THE ISSUE, WHICH HAVE ALL “CONDEMNED” THE PRACTICE.....	18
Conclusion.....	26
Affidavit of Service.....	27
Affidavit of Mailing.....	29

TABLE OF AUTHORITIES

CASES

<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	1, 21
<i>United States v. Banks</i> , 2018 WL 1178412.....	1
<i>United States v. Brooks</i> , 736 F.3d 921 (10 th Cir. 2013).....	16
<i>United States v. Casas</i> , 356 F.3d 104 (1 st Cir. 2004).....	19, 23, 25
<i>United States v. Flores-de-Jesus</i> , 569 F.3d 8 (1 st Cir. 2009).....	22, 25
<i>United States v. Garcia</i> , 413 F.3d 201 (2 nd Cir. 2005).....	19, 20, 21, 22
<i>United States v. Griffin</i> , 324 F.3d 330 (5 th Cir. 2003).....	18, 21
<i>United States v. McSwain</i> , 197 F.3d 472 (10 th Cir. 1999).....	16
<i>United States v. Moore</i> , 651 F.3d 30 (D.C. Cir. 2011).....	20, 23
<i>United States v. Ray</i> , 370 F.3d 1039 (10 th Cir. 2004).....	16
<i>United States v. Taylor</i> , 210 F.3d 311 (5 th Cir. 2000).....	20, 21, 25

STATUTES AND RULES

18 U.S.C. 841.....	4
18 U.S.C. 922.....	4
18 U.S.C. 924.....	4
18 U.S.C. 1512.....	5
18 U.S.C. 1956.....	5
28 U.S.C. 1254(1).....	1
Fed.R.Evid. 403.....	2
Fed.R.Evid. 611.....	2, 17
Fed.R.Evid. 701.....	2, 22
Fed.R.Evid. 702.....	3, 17, 22
Fed.R.Evid. 704.....	3, 22
Sup. Ct. R. 29.6.....	3
<i>United States Constitution, amend. VI</i>	2

PUBLICATIONS

<i>Weinstein’s Federal Evidence</i> (2 nd ed., 2004).....	19, 22
--	--------

APPENDIX

Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit (March 6, 2018).....	30
--	----

PETITION FOR WRIT OF CERTIORARI

Michael Eugene Banks, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's controlling decision is reported at *United States v. Banks*, Appx. 1-55, at 2018 WL 1178412.

JURISDICTION

The Tenth Circuit issued its decision on March 6, 2018, Appx. 1-55. Mandate was issued in the case on March 28, 2018. This Court has jurisdiction under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him.” U.S. Const. amend. VI. See *Crawford v. Washington*, 541 U.S. 36 (2004).

Various circuit courts have relied on the following rules, in pertinent part, under the Federal Rules of Evidence in considering whether evidence in overview or summary form should be admitted at trial:

Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

Rule 701. Opinion Testimony by Lay Witnesses

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

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

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an Ultimate Issue

(a) In General – Not Automatically Objectionable

An opinion is not objectionable just because it embraces an ultimate issue

STATEMENT OF THE CASE

Petitioner was charged with Daryl Ingram, Michael Brown, Anthony Anderson and Xavier Guerrero in a 24 count second superseding indictment in the Western District of Oklahoma. Eighteen of the counts charged Petitioner. Count one alleged the three men were co-conspirators under 21 U.S.C. 841(a)(1) by possession with intent to distribute 280 grams or more of cocaine base. Count two alleged Petitioner possessed 130 grams of cocaine base under 21 U.S.C. 841(a) and 841(b)(1)(B) found in the bottom of a laundry hamper in the bedroom closet of the home of a man Petitioner had gone to visit one morning. Counts three and four alleged Petitioner possessed firearms hidden from view in that same bedroom, but Petitioner was acquitted on those two counts. Count six alleged Petitioner possessed 496 grams of cocaine base hidden in the attic of another person's house known as the Spencer house, where he had spent the night with two other women, one of whom was a multi-convicted felon facing a life sentence who testified for the government. Count seven alleged Petitioner had manufactured cocaine base under 21 U.S.C. 841(a)(1) and (b)(1)(A) at the Spencer house based on the presence of common kitchen products and utensils found on the countertop and in the sink. Counts eight and nine alleged firearms violations under 922(a)(1) and 924(a)(2) for guns found

hidden in the attic of the Spencer house. Count thirteen alleged witness tampering under 18 U.S.C. 1512(b)(1) of a multi-convicted felon on a guarded bus on the way to his arraignment on new charges. Count fourteen alleged a money laundering conspiracy under 18 U.S.C. 1956(a)(1)(B)(i) with Ingram and Brown, while counts seventeen to twenty-four constituted individual money laundering counts under 18 U.S.C. 1956(a)(1)(B)(i). Prior to trial, Guerrero pled guilty pursuant to a plea agreement, where he was not required to testify. Anderson was never apprehended. A ten-day trial ensued involving Petitioner, Ingram and Brown.

The Government's Overview Witness

The government first called FBI Special Agent Mark Schweers to give jurors an “overview” of its case. Schweers told the jurors he had been with the FBI for almost seven years. For the last four of those years, he served “on our Safe Streets Task Force,” which investigates cases that “typically...involve violent gangs or cartel-connected individuals dealing drugs in Oklahoma City.” In this capacity, Schweers testified, he became “familiar with the investigation that led to the indictment of Daryl Ingram, Michael Banks and Michael Brown.” Schweers described it as “a joint investigation with the FBI, the Oklahoma City Police Department, the United States Postal Service and the IRS.” Over Petitioner’s objection,

Schweers testified the investigation started from “information obtained from a confidential informant...that the Rollin 90s Crips were involved in drug dealing.” Did the investigation ultimately result in the arrest of Daryl Ingram? Schweers answered, “It did.”

The government played a tape recording of Ingram made on the day of his arrest, where he described how he had manufactured and sold cocaine base in the Oklahoma City area and mentioned his affiliation with the Rollin 90s gang. Ingram mentioned Anderson in this tape was a trusted assistant. Neither Petitioner nor co-defendant Brown’s names were ever mentioned on the Ingram tape, however.

The government then asked whether Schweers had “an understanding of how the Rollin 90s are structured here in Oklahoma City.” Over objection from Petitioner, Schweers answered, “They’re structured not unlike the military or police department, with various tiers, with a head at the top, then tiered layering system of trusted lieutenants, down to foot soldiers.” In response to Petitioner’s objections, the government insisted Schweers was “testifying based on his experience working on this case,” and that the agent’s testimony was “an effort to minimize and streamline.” The government said, “We are using it to explain relationships between individuals.” The government then promised, “I’m not going to ask

information about the violent tendency of the gang; I'm simply using it to explain how all the pieces fit together."

Petitioner then responded, "My objection is that I am anticipating that what he is going to say is that Daryl Ingram is the head and he has certain lieutenants, among those lieutenants being Michael Banks, Aundre Cade and others. Well, that is purely hearsay or speculation." Petitioner continued, "If you have somebody from the gang who comes in and says, hey, he was my boss and this is the guy that did it, I understand that. But other than that, it is pure hearsay for this person to say it." The government responded, "(M)y officers...have spent a number of months investigating (and should) be allowed to bring in their observations. To artificially limit it to hearsay, as (Petitioner) would say, of a gang member versus trained officers in the field seems like a very artificial capturing of information." Brown's attorney then stated, "(Petitioner) said, if he was a member of the gang, he could tell you, I'm a lieutenant, these people are lieutenants, he is a captain – whatever. He (Schweers) can't say that. He has to be basing it on hearsay." Petitioner then added, "As (the government) appropriately said, he is testifying to his belief. 'Belief' is the same thing as 'speculation.' It is not fact." The government replied, "(T)o the extent these gentlemen wish to ask questions of whatever gang members are willing to cooperate and come in

and testify to disprove that theory, they may do so.” The district court ultimately ruled: “I will let him proceed to question things that the officer has observed, or has observed, or knows, he can testify to those things.” Petitioner asked the district court for a continuing objection to the testimony that would follow, which the court granted.

“Based on your investigation, Agent Schweers, who is the head of the Rollin 90s in Oklahoma City?” he asked. “Mr. Ingram,” Schweers replied. “During the course of this investigation, did you come across others who are associated with the Rollin 90s gang?” the prosecutor then asked. “Mr. Banks, Mr. Anderson, Anthony Anderson, Aundre Cade, various other individuals,” Schweers responded. He then identified Petitioner in the courtroom. “Did the investigation conducted reveal where these individuals stood within the hierarchy of the Rollin 90s in Oklahoma City?” the prosecutor asked. “Yes, sir,” Schweers replied. “Mr. Banks and Mr. Cade would have – kind of the tier right below Mr. Ingram, they were trusted lieutenants or captains within the organization.”

“What are the Rollin 60s?” the prosecutor then asked. “Again, they’re an Oklahoma City sect or set of a Los Angeles-based street gang that is affiliated with the Crips,” Schweers replied. “What Rollin 60s members did you come across in this investigation?” the prosecutor asked. “Mr. Brown,”

Schweers answered, “as well as a gentleman by the name of Xavier Guerrero, who actually lives and resides in Los Angeles, California.” The prosecutor continued, “Were you surprised during the course of the investigation to find that members of the Rollin 90s and the Rollin 60s were associating with one another?” Schweers replied, “No, sir...They are allied gangs...In most cases, they would be working together to fight back against other gangs or to make money in some capacity.”

At this point, at Petitioner’s request, a limiting instruction was given by the district court: “You have heard evidence of the alleged affiliation of certain defendants and witnesses with a street gang. You may consider that evidence for the limited purposes of establishing guilt, knowledge, intent, plan, motive, lack of mistake or accident, if any, and evaluating the credibility of witnesses. Membership or affiliation in a gang is not a crime.”

Schweers then described various investigative techniques used by the multi-agency team. “We used pole cameras, GPS tracking devices, controlled buys, surveillance, financial investigation, search warrants, developed confidential witnesses or cooperating defendants.” Liberally using the term ‘we,’ Schweers continued: “We became aware that Mr. Ingram certainly was aware of law enforcement use of GPS tracking and we believed, therefore, that the entire organization would be aware of law

enforcement use of GPS trackers, so we didn't use them because we didn't want them to be discovered." As to drive-by surveillance, Schweers said, "That will lead to, in many cases, the folks in the organization changing up where they are storing drugs or their methods of operation..." Were "the Defendants particularly surveillance conscious?" Schweers was asked. "They were a group that maintained very good operational security," he replied. When Petitioner objected to any insinuation that "they" referred to him, Schweers was allowed to clarify: "The Rollin 90s as a group, in particular, the senior leadership of the Rollin 90s." Schweers then testified, "(I)t is very common among drug dealers for them to have multiple phones or to change phones regularly." Petitioner objected: "I object to the extent he is suggesting my client is a drug dealer. That is left to the province of the jury." Schweers then clarified, "The group, again, I'm referring to the Rollin 90s, more specifically senior leadership of the Rollin 90s, maintained multiple phones at any one time and regularly switched phones, so it was difficult to, again obtain that global picture of their telephone transactions."

Schweers then addressed the use of confidential informants. "It is a very insular group, especially the senior leadership," he said. "They wouldn't be in a position to have contact with most people we develop as confidential informants or undercover officers." The prosecutor then asked, "Were a lot

of people very eager to talk with law enforcement?” Schweers replied, “No, not at all.” The prosecutor then asked, “Based on your understanding of this case, why might that be?” Schweers replied, “Fear of retribution, fear that their family members or themselves are going to be killed or injured because they have cooperated with law enforcement.” Petitioner objected, and the district court struck Schweers last statement. The prosecutor claimed he “did not think he (Schweers) was going to say that.” Petitioner pointed out the agent’s statement “expressly violated the limiting motion that said (reference to) violence was not going to be permissible.” The court agreed.

Schweers had to admit on cross-examination that most everything he had testified to was what someone else told him. “Most of my discussions about the investigative techniques used would have been information that I gleaned from speaking with other law enforcement officers involved or witnesses or that type of thing.” In fact, he had to admit he was not even the ‘lead case agent.’ “No,” he stated, “there was no hierarchy like that, where we divided amongst the joint group that one of us would be designated lead case agent.” Of course, Schweers had to admit he was not a member of the Rollin 90s or a member of the Rollin 60s. “I’m not,” he said. And Schweers also admitted the multi-agency investigation was not gathering information from inside either gang. “That’s a fair statement, yes,

sir,” he said. “You were obtaining information from other people and repeating that to the jury, that is not information that is firsthand to you, correct?” Petitioner asked. “Other members of the law enforcement team told me what they had done, yes.” Schweers replied.

When asked about all the investigative techniques he just described for the jury, Schweers had to admit that none of them had uncovered any evidence against the Petitioner. No controlled buys that involved Michael Banks? “Correct,” Schweers answered. No pole cameras that involved Michael Banks? “Correct.” No situations where you drove by a residence and did a trash pull or anything like that involving Mr. Banks? “That wouldn’t have been something I would have done,” Schweers replied, then added, “I’m unaware of any garbage seizures.” Nothing of evidentiary value obtained against Petitioner from GPS tracking? “Correct.” No Title III wiretaps conducted on Petitioner? “That’s correct.”

Although the government promised it would introduce witnesses to support Schweers overview testimony, it never did. The government introduced three Rollin 90s gang members, who discussed its structure, Joandra Osbourne, Gilbert Jacobs and James Freeman. Although Jacobs described Ingram as “near the top of the heap” of the gang, none of the three gang members testified Petitioner had any position of authority whatsoever,

and, at best, each only identified him simply as a member. The prosecutor wanted Jacobs to say Petitioner was a ‘long-time’ member of the gang by asking the leading question, “Has he (Petitioner) been a member of the gang for a long time.” Jacobs’ answer was not helpful: “Yea, I guess. I really don’t know him like that...” Osbourne described an incident where she, Ingram and Aundre Cade had cooked cocaine base together. The only people in Ingram’s manufacturing operation were her, Cade and Anthony Anderson, she testified, who she described as “the whole team.” She had no knowledge Petitioner had ever received crack cocaine from Ingram or participated in Ingram’s manufacturing or distribution activities.

Two search warrant executions at Ingram’s residences uncovered extensive telephone lists of names Ingram had been involved with in drug distribution. Neither the lists found at the residence Ingram shared with his girlfriend, Raven Barnes, or at an apartment Ingram used in Dallas contained either Petitioner’s name or any nickname used by him. A smartphone used by Michael Brown was left in a car he had shared with Ingram that also contained a baggie of seven ounces of crack cocaine. The smartphone contained photos and images of Ingram, Brown and others, but Petitioner’s image, contact information or phone number was not anywhere on the phone.

Aundre Cade and his girlfriend, Brittany Frazier, were caught at a motel manufacturing crack cocaine during another search warrant execution, one of seven conducted on the same day. Petitioner's name appeared in none of this evidence. Frazier testified Petitioner had not been involved in any aspect of the manufacturing conduct involving Cade and Ingram.

Petitioner's charges arose from his presence at the houses of other people, none of whom were Rollin 90s gang members, where illegal drugs were found in places hidden from view. The first arose when Petitioner stopped by Willie Evans' house one morning to smoke marijuana with him and another man in Evans' bedroom. Police were allowed to enter the house by Evans' mother and immediately smelled the marijuana emanating from Evans' bedroom. When they entered the room the three men were standing near the center of the room. Police searched the room and found crack cocaine in the bottom of a laundry basket in the bedroom closet. Evans admitted the cocaine was his, along with other similarly-packaged baggies of crack cocaine found in other parts of the house where Petitioner had not been at all that morning.

The second charge arose from Petitioner's visit to a house in Spencer, Oklahoma. One of the women staying at the house with him, Gabriel Stephenson, was a three-time convicted felon who faced a life sentence if

she received another conviction for drug distribution. During a protective sweep of the house, police found crack cocaine and guns in the attic.

Stephenson testified she never actually saw guns or drugs at the house, but insisted Petitioner had thrown a distinctive Oster mixer bag into the attic when police tried to enter the house. The Oster mixer bag actually was found by police in a downstairs closet, not in the attic.

Petitioner's connection to Ingram arose from a childhood friendship, where the two continued to socialize intermittently, including trips to Las Vegas or California, none of which were connected to illegal drug activity during the trial. After Petitioner was arrested at the Evans house, he called Ingram to ask if he could help bond him out of jail. Ingram agreed to pay half his bond. Several months later, Ingram travelled to California, where he associated with Xavier Guerrero and his girlfriend, Shavon Howell. In several structured transactions, Petitioner had his mother and Stephenson send money to Howell in California that she either gave to Guerrero or which were used to reimburse her for hotel expenses she advanced to pay for a hotel room for Ingram. Howell was unaware any of the money was used for illegal purposes and no evidence was introduced at trial otherwise.

The Tenth Circuit Ruling

The Tenth Circuit opinion found nothing at all improper about Agent Schweers overview testimony. “Courts generally allow overview testimony to the extent it concerns how an investigation began, the law enforcement agencies involved, or the investigative techniques used,” the court held, citing its previous decision in *United States v. Brooks*, 736 F. 3d 921, 931 (10th Cir. 2013). The court noted that such overview testimony is “susceptible to abuse.” *Id.* The court acknowledged Schweers opinion that the Rollin 90s was often a violent gang involved in “drug-dealing...to make money in some capacity,” and that Petitioner was “a trusted lieutenant or captain within the organization,” an opinion that was based “on second hand information.” Nevertheless, the court, relying again on *Brooks*, stated “we have previously allowed overview testimony to explain the individual roles in a criminal enterprise.”

Brooks itself had relied on another Tenth Circuit decision, *United States v. McSwain*, 197 F.3d 472 (10th Cir. 1999), which found such evidence “admissible under Fed.R.Evid. 702,” because the federal law enforcement officer in that case gave “expert testimony” that “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 482.

The opinion referenced another Tenth Circuit decision, *United States v. Ray*, 370 F.3d 1039 (10th Cir. 2004), a case involving summary testimony – similar to overview testimony, except given by a law enforcement officer at the conclusion of a case – which held Fed. R. Evid. 702 does not apply in such a situation at all. Nor do other evidence rules such as Fed. R. Evid. 703 or 1006 commonly cited. *Id.* at 1046. Looking to Fed. R. Evid. 611(a), *Ray* held that the only factors that should govern the admissibility of such summary (or presumably overview) evidence was (1) “whether the summary chart (or testimony) aids the jury in ascertaining the truth,” considering “the length of the trial, the complexity of the case, and the accompanying confusion that a large number of witnesses and exhibits may generate for the jury,” and (2) whether the district “court considered the possible prejudice that may result to the defendant in allowing such evidence, looking specifically to whether the preparer of the chart was available for cross-examination and whether the district court gave appropriate limiting instructions.” The Tenth Circuit opinion in this case noted the district court read a limiting instruction “telling (the jury) that membership in a gang isn’t a crime.” The opinion did not comment, just as the district court did not, on the use of second hand information by Agent Schweers throughout his testimony.

Ultimately, the Tenth Circuit noted several additional factors that justified its decision. “Several former gang members testified that Banks was a member of the Rollin 90s.” Petitioner never disputed his membership in the gang. The district court expressly told the jury such membership alone “was not a crime.” Second, the court noted “there was plenty of evidence that Banks sold drugs.” The evidence Petitioner may have sold drugs, however, did not link him to drug-dealing conducted by his alleged co-conspirators Ingram or Brown, or to his membership in the Rollin 90s.

REASON FOR GRANTING THE WRIT

THE TENTH CIRCUIT COURT DECISION THAT A CASE AGENT CAN PROVIDE OVERVIEW TESTIMONY AS TO THE CULPABILITY OF A DEFENDANT BEFORE ANY EVIDENCE TO SUPPORT SUCH A CONCLUSION HAS BEEN PRESENTED FOR JURY REVIEW HAS BEEN REJECTED BY ALL FOUR CIRCUIT COURTS THAT HAVE CONSIDERED THE ISSUE, WHICH HAVE ALL “CONDEMNED” THE PRACTICE

“This court has never had the opportunity to address the use of an overview witness,” the Fifth Circuit wrote in 2003 as the first of the circuit courts to address the issue. “We unequivocally condemn this practice as a tool employed by the government to paint a picture of guilt before the evidence has been introduced.” *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003).

The next year, noting that the Fifth Circuit had condemned the practice, the First Circuit stated, “We agree with the Fifth Circuit that this initial witness “overview testimony” is inherently problematic: such testimony raises the specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in the evidence. There is also the possibility that later testimony might be different than what the overview witness assumed; objections could be sustained or the witness could change his or her story.” *United States v. Casas*, 356 F.3d 104, 119-120 (1st Cir. 2004). In addition, the First Circuit pointed out, “Overview testimony by government agents is especially problematic because the juries may place greater weight on evidence perceived to have the imprimatur of the government.” *Id.*

The following year, the Second Circuit joined these first two. “It is generally viewed as ‘improper...for a party to open its case with an overview witness who summarizes evidence that has not yet been presented to the jury.’” *United States v. Garcia*, 413 F.3d 201, 214 (2nd Cir. 2005)(quoting *Weinsteins’ Federal Evidence*, Sect. 1006.04(3)). Noting the decisions from the Fifth and First Circuits in *Griffin* and *Casas*, and stating “this practice is particularly problematic in criminal cases,” *id.*, *Garcia* held, “We share this concern and similarly condemn the practice of having a case

agent offer a summary opinion as to culpability before any evidence to support such a conclusion has been presented for jury review.” *Id.* Six years later, the District of Columbia Circuit used the same identical language: “(W)e join the circuits that have addressed the issue in condemning the practice.” *United States v. Moore*, 651 F.3d 30, 60 (D.C. Cir. 2011).

These four circuit courts all focused in particular on the very type of testimony the Tenth Circuit found acceptable. “More fundamentally, though, Agent Stoothoff’s testimony that particular persons were members of the conspiracy was not an appropriate subject for expert testimony,” *Casas* held. 356 F.3d at 120. “It was not in any way linked to ‘specialized knowledge’ that Rule 702 requires. The testimony threatened to usurp the role of the jury.” *Id.*

Garcia echoed this concern: “By stating that, in his opinion, Garcia was a partner with Francisco Valentin in receiving cocaine from Walter DeArmas, (DEA Agent) Klemick was essentially telling the jury that he concluded that Garcia was guilty of the crimes charged.” 413 F.3d at 210. *Garcia* explained why this was improper. “With the benefit of such an overview, a jury receives no further meaningful assistance in the performance of its fact-finding role from hearing a case agent state *as evidence* that, in his opinion,

based on the totality of the investigation, defendant was a culpable member of the charged conspiracy.” *Id.* at 215.

Griffin cited another Fifth Circuit case, *United States v. Taylor*, 210 F.3d 311 (5th Cir. 2000), with facts similar to Petitioner’s case, where government agents were allowed to present an organization chart by its overview witness that placed Taylor’s picture directly below the leader of the conspiracy. “(T)he chart gave Taylor a more central role in the conspiracy than the testimony supported,” the Fifth Circuit held, “and stretched the bounds of permissible government assumptions well beyond the breaking point.” *See Taylor*, 210 F.3d at 316 and *Griffin*, 324 F.3d at 350.

These circuit courts point to particular characteristics of such overview testimony that make it objectionable. These characteristics are strikingly similar to Agent Schweers’ testimony. In *Garcia*, for instance, the court noted, “(Agent) Klemick’s response indicates that his opinion was not limited to his personal perceptions but drew on the total information developed by all the officials who participated in the investigation leading to Garcia’s arrest: As far as *our* investigation determined, (Garcia) was a partner with Francisco Valentin in receiving cocaine... *We* used wiretaps. *We* did surveillance. *We* researched law enforcement databases. *We* interviewed cooperators. *We* wanted to identify members of the drug

conspiracy.” *Garcia*, 413 F.3d at 212. “This process tends to more resemble the grand jury practice, improper at trial.” *Id.* at 213. The First Circuit in *United States v. Flores-de-Jesus*, 569 F.3d 8, 19 (1st Cir. 2009), held, “(S)uch overview testimony may have serious *Crawford*/Confrontation Clause implications.”

Similarly, these same circuit court decisions question whether there is any road under the Federal Rules of Evidence that justifies the introduction of such overview testimony. *Garcia* held: “Although opinion testimony, whether offered by a lay witness pursuant to Fed. R. Evid. 701, or by an expert pursuant to Fed. R. Evid. 702, is not inadmissible simply ‘because it embraces an ultimate issue to be decided by the trier of fact,’ Fed.R.Evid. 704. It is not properly received ‘merely (to) tell the jury what result to reach.’” *Garcia*, 413 F.3d at 210, citing *Advisory Comm. Notes on 1972 Proposed Rules and Weinstein’s Federal Evidence* Sect. 701.05 (2nd ed. 2004)(noting that courts should be wary of opinion testimony whose “sole function is to answer the same question that the trier of fact is to consider in its deliberations”). “Indeed, the purpose of the foundation requirement of the federal rules governing opinion evidence is to ensure that such testimony does not so usurp the fact-finding function of the jury. See Fed.R.Evid. 704, *Advisory Comm. Notes on 1972 Proposed Rules.*” *Id.* This analysis is at

odds with the Tenth Circuit's analysis relying either on *McSwain*'s use of Fed.R.Evid. 702, or *Ray*'s recognition that Rule 702 might not apply but that an ad hoc approach would work for the admission of such evidence.

These circuit court decisions similarly address the dangers inherent in placing a trained law enforcement officer on the stand at the beginning of the case “to poison the jury’s mind against the defendant or to recite items of highly questionable evidence.” *Moore*, 651 F.3d at 60. “Avoidance of these dangers is largely beyond the ability of the district court, much less the defense, to prevent. A trained law enforcement officer is likely to go as far as the questions allow, presenting a picture for the jury of a solid prosecution case based on his opinion of the strength and credibility of the witnesses the government plans to call to testify at trial for reasons made persuasive in view of the officer’s training and experience.” *Id.* “After-the-fact limiting instructions can, at best, mitigate prejudice, rather than eliminate its effects completely.” *Id.*

Casas describes “the government’s use of such preliminary government agent witnesses is a troubling development.” *See Casas*, 556 F.3d at 120. While such witnesses may be able to provide relevant background information as to the investigations based on personal knowledge, *see Flores-de-Jesus*, 569 F.3d at 19, Petitioner’s case is one of many that

illustrate how the practice more commonly addresses questions of fact and invades the province of the jury. Had Agent Schweers not told the jurors at the beginning of the case that Petitioner was “a trusted lieutenant” in a sophisticated “drug-dealing” gang that used “killing” as a method to evade law enforcement, would jurors have so readily found Petitioner guilty of possession of cocaine hidden in the bottom of a laundry basket he was never seen near in his friend’s bedroom closet? Would jurors have been so ready to believe a woman like Gabrielle Stephenson, three times convicted of drug distribution, that Petitioner had thrown an Oster bag that might have contained guns and illegal drugs into the Spencer house attic, a story she first told months after the incident? Would jurors have believed Petitioner was manufacturing crack cocaine at the Spencer house just because there was a box of baking soda on the counter and a Pyrex dish in the sink, after a police officer at the scene, using a field test kit with no scientific reliability, claimed to have found crack dust on a nearby kitchen scale after his first test had been negative? Would the jurors have believed another multi-convicted felon, Gilbert Jacobs, who also came forward months after the incident to claim Petitioner had threatened him from testifying as a witness as Jacobs was taken by armed guards to a new felony arraignment? All the other circuit courts have said the testimony of such questionable witnesses is

unfairly enhanced by use of an overview witness. “The overview testimony of a law enforcement official is not simply a repetition (at best) of other evidence,” the First Circuit held. “It is also, in effect, an endorsement of the testimony that will follow.” *Flores-de-Jesus*, 569 F.3d at 18.

If Agent Schweers had not told the jurors that Xavaier Guerrero was a member of the Rollin 60s drug-dealing gang in California that interacted with the Rollin 90s drug-dealing gang in Oklahoma City, something no other witness disclosed, would the fact that Petitioner sent money orders to Guerrero’s girlfriend in California have meant anything? And if Agent Schweers had not told the jurors Petitioner was a “trusted lieutenant” in Daryl Ingram’s drug-dealing organization, how would they have known otherwise since all the actual Rollin 90s gang members who testified for the government failed to support Schweers’ opinion? Agent Schweers’ testimony, derived from unnamed, secondhand sources, was the very ‘glue’ necessary to make the government’s case.

The other circuit courts that have dealt with such overview testimony like that given by Agent Schweers have reversed convictions for defendants like Petitioner charged in drug distribution cases because the testimony violated those defendants’ substantial rights. *See Casas*, 356 F3d. at 121 and *Taylor*, 210 F.3d at 316.

CONCLUSION

Because Petitioner's case represents an excellent example of the abuses inherent in the use of law enforcement overview witnesses, and because the Tenth Circuit's decision in Petitioner's case is in such stark contrast to the approach taken by every other circuit court that has considered the issue, this Court should grant certiorari to establish proper boundaries of the use of such evidence.

Respectfully submitted,

William D. Lunn
Oklahoma Bar Association #5566
320 S. Boston, Suite 1130
Tulsa, Oklahoma 74103
918/582-9977

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EUGENE BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AFFIDAVIT OF SERVICE

William D. Lunn, attorney for Petitioner Michael Eugene Banks, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class prepaid and addressed to:

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EUGENE BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

AFFIDAVIT OF MAILING

WILLIAM D. LUNN, counsel for Michael Eugene Banks, and a member
of the bar of the State of Oklahoma and the United States Supreme Court
bar, attests that he placed the foregoing petition for a writ of certiorari in the

United States mail on April 2, 2018.

WILLIAM D. LUNN

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

This affidavit of mailing subscribed and sworn to before me this
April 2, 2018.

Notary Public

