

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL EUGENE BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not abuse its discretion in admitting into evidence a federal case agent's overview testimony in petitioner's case.

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No. 17-9038

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-55) is reported at 884 F.3d 998.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2018. The petition for a writ of certiorari was filed on April 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on

one count of conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. 846; two counts of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of manufacturing cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1); one count of witness tampering, in violation of 18 U.S.C. 1512(b)(1); one count of money-laundering conspiracy, in violation of 18 U.S.C. 1956(h); and eight counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 2. 1 C.A. ROA (ROA) 1618 (judgment). The district court sentenced petitioner to life imprisonment and a consecutive term of 60 months of imprisonment, to be followed by ten years of supervised release. Id. at 1619-1620. The court of appeals affirmed. Pet. App. 1-55.

1. In 2014, a joint federal-local investigation probed the Oklahoma City drug-trafficking activities of the Rollin' 90s Crips gang, an affiliate of the Los Angeles-based Crips. 3 ROA 399-400, 406. Petitioner was a member of the Rollin' 90s Crips in Oklahoma City, and he conspired with several co-defendants to sell crack cocaine. Pet. App. 1-5. The investigation resulted in petitioner's conviction on drug-trafficking, firearms, money-laundering and witness-tampering charges. Gov't C.A. Br. 3, 14. Four counts of conviction resulted in separate terms of life imprisonment:

petitioner's conspiracy to distribute more than 280 grams of crack cocaine (Count 1); petitioner's possession with intent to distribute approximately 130 grams of crack cocaine on July 24, 2014 (Count 2); petitioner's possession with intent to distribute approximately 496 grams of crack cocaine on November 29, 2014 (Count 6); and petitioner's possession of a firearm as a felon on November 29, 2014 (Count 9). See 1 ROA 1618-1619 (judgment); see also 1 ROA 324-325, 328, 331-333 (second superseding indictment). Petitioner's July and November 2014 offense conduct is relevant here.

a. On July 24, 2014, law-enforcement officers conducted a consent search of Willie Evans's bedroom in the home of his mother (Lillie Nelson), while petitioner, Evans, and another man stood just inside the bedroom door. Pet. App. 2-3; see Pet. 14. The search of the room uncovered 130 grams of crack cocaine in three baggies, one baggie of cocaine powder, and \$1500 cash in a bag that had been stashed in the bottom of a laundry hamper in the closet, along with two handguns and ammunition. Pet. App. 3; Gov't C.A. Br. 3-4. At the time, Evans told an officer, "Whatever you found in that room is all mine." 3 ROA 509. But in a subsequent recorded telephone call from jail, petitioner told his own mother that "the drugs were his." Pet. App. 25. At trial, the jury heard the recording of that conversation in which petitioner told his mother that Evans had claimed responsibility for "[a]ll that shit, my shit." 3 ROA 570 (emphasis added). And although his mother

initially feigned ignorance by testifying that she had "no idea" what petitioner meant, she corrected her testimony when confronted with her prior contrary statements to investigators, ibid., testifying to the jury that petitioner had, in fact, told her that the "[d]rugs" were his. Id. at 571.

b. Later, on November 28, 2014, law-enforcement officers received information that petitioner, who was then free on bail but was subject to a new arrest warrant, had recently threatened the life of a confidential source, who another Rollin' 90s member had accused of being a "snitch." Gov't C.A. Br. 5. Officers tracked petitioner to a home in Spencer, Oklahoma, and, by around 1 a.m. on November 29, arrived at that home, which had lights on throughout. Id. at 6-7.¹ A uniformed police sergeant knocked on the door and identified himself as the police, but the occupants refused to open the door. Id. at 7.

The arrival of the police triggered a chain of events inside the house. One of petitioner's two girlfriends (Gabrielle Stevenson) inside the home, Pet. App. 4, later testified that she saw petitioner retrieving "'crack'" cocaine "from 'different spots of

¹ The evidence presented to the jury did not explain the full circumstances preceding the officers' November 29 arrival at the home. The confidential informant who had prompted the officers' search for petitioner was murdered before trial after Daryl Ingram, the leader of the Oklahoma City Rollin' 90s, had ordered his death and offered a \$20,000 bounty for the murder. 2 ROA 222-224, 315-317, 327-328. The district court thereafter excluded from trial the deceased informant's statements to officers about the threats on his life. See 1 ROA 1113 (order); id. at 884-886 (suppression motion).

the house,'" assumed that guns were present, and told petitioner to "'break the guns down and flush all the dope in the house.'" Id. at 26 (quoting 3 ROA 1939-1940). "When [petitioner] refused to flush the drugs, [she] advised him to hide them in the attic," which she then helped petitioner to access and into which she saw him throw the drugs. Ibid.; see 3 ROA 1940-1941.

Meanwhile, the police sergeant at the front door saw multiple figures through the door's opaque window moving back and forth between rooms before the house lights were extinguished and someone inside moved furniture against the front door to barricade it. Gov't C.A. Br. 7. Other officers located behind the house heard clattering from inside and saw the house's rain gutters starting to shake. Ibid. The officers retreated for safety. Id. at 8.

After negotiating with the occupants using a police vehicle's public-announcement system, officers persuaded petitioner to exit the house, where they arrested him. Gov't C.A. Br. 8. Officers then secured petitioner's two girlfriends, who exited the house, and conducted a protective sweep of the interior. Ibid. During the course of that sweep, officers saw in plain view various items of evidentiary value. Ibid. They discovered a glass mixing bowl with chrome beaters and a digital scale -- both with white residue -- next to baking soda and a box of sandwich baggies, all consistent with the manufacture of crack cocaine. Id. at 8-9 & n.4; see 3 ROA 954-957, 960-961. During the protective sweep of the attic, where the police had earlier noticed movement, an

officer saw within reaching distance of the access point two firearms next to five baggies containing approximately 496.4 grams of crack cocaine, including a crack "cookie," which forms at the bottom of a mixing bowl during manufacturing. Gov't C.A. Br. 9 & n.5; see 3 ROA 947-951, 1008-1010. Officers also recovered about \$17,440 in cash found inside a hand-mixer box. Gov't C.A. Br. 9. After petitioner was advised of his Miranda rights, an investigating officer asked him whether "the crack specifically and the guns were his." 3 ROA 1426. Petitioner initially told the officer that he took "responsibility for everything in the house," but he later recanted and denied that the crack and guns were his. Id. at 1427.

2. The court of appeals explained that "[t]he evidence at trial was compelling." Pet. App. 2. In addition to direct testimony about petitioner's July and November 2014 arrests, petitioner's own mother testified that petitioner was "[s]elling drugs," and she admitted to helping him launder money by purchasing money orders. 3 ROA 556; see Pet. App. 2, 33. Travel records and photographs linked petitioner to his co-defendant Daryl Ingram, who led the Oklahoma City gang, and other evidence confirmed petitioners' role in the drug-distribution conspiracy. See Pet. App. 2.

The petition for a writ of certiorari focuses on the government's first witness at trial, FBI Special Agent Mark Schweers. See Pet. 5-12, 24-25; cf. 3 ROA 391-449 (Schweers' complete testimony). Agent Schweers, an FBI case agent for the investigation,

testified both as a fact witness (about his interview of Ingram) as well as an "overview" witness, meaning that he testified about how the underlying investigation began, the law-enforcement agencies involved, and the investigative techniques used. Gov't C.A. Br. 55-56. The relevant portions of Agent Schweers' testimony, portions of which petitioner recounts without citation (Pet. 5-12), are reproduced at 3 ROA 398-430, 438-442.

Toward the beginning of his testimony, Agent Schweers testified that the Rollin' 90s Crips were "structured not unlike the military or police department, with various tiers, with a head at the top, then a tiered layering system of trusted lieutenants, down to foot soldiers." 3 ROA 406. Petitioner's counsel objected to that testimony on the theory that it was "hearsay." Ibid.; see id. at 406-409 (discussing hearsay objection); Pet. 6-7 (same). Counsel argued that he anticipated that the agent would testify that Ingram was the head of the Oklahoma City gang and that petitioner was among Ingram's lieutenants, which, counsel argued, would constitute "pure[] hearsay or speculation," because although a gang member might testify that "he was my boss," it would be "pure hearsay for [Agent Schweers] to say it." 3 ROA 407-408. The government responded that the agent was "testifying to his understanding based on the facts." Id. at 409. The district court ruled that it would let the government "proceed with the question," because the agent could testify to "things that the officer has observed * * * or knows." Ibid.

Agent Schweers testified that petitioner was associated with the Rollin' 90s. 3 ROA 411. Petitioner's counsel then requested, and the district court accepted, "a continuing objection" to the testimony. Ibid. Counsel did not, however, expand the objection beyond hearsay grounds. Counsel, for instance, did not claim that Agent Schweers' testimony constituted a lay "opinion" exceeding the limits on such opinions in Federal Rule of Evidence 701, or that the agent's testimony should have been proffered as an expert "opinion" governed by Federal Rule of Evidence 702.

When asked whether the investigation revealed where petitioner and others "stood within the hierarchy of the Rollin 90s in Oklahoma City," Agent Schweers answered affirmatively and stated that petitioner and another person were a "tier right below Mr. Ingram" and that they were "trusted lieutenants or captains." 3 ROA 412. The district court then instructed the jury that "[m]embership or affiliation in a gang is not a crime" and that evidence about such an affiliation could be considered only for the "limited purposes of establishing guilt, knowledge, intent, plan, motive, lack of mistake or accident" or evaluating "credibility." Id. at 414. Later, on cross-examination by petitioner's counsel about the basis for his gang-"hierarchy" testimony, Agent Schweers provided a partial answer, stating that his testimony reflected "information that [he] learned from speaking with 90s members or -- ," before petitioner's counsel interrupted. Id. at 441-442. Petitioner's counsel interjected, "Let me stop you," and

asked, "So it is based upon hearsay, based upon something that someone else told you?" Id. at 442. The agent responded that his answer was not based on his own experience "of being a Rollin 90s Crip," but the agent was not afforded the opportunity to complete his interrupted testimony. Ibid.

Agent Schweers also testified about investigative techniques used in the investigation, such as pole cameras, GPS tracking devices, drive-by surveillance, telephone call records, search warrants, and confidential witnesses. 3 ROA 415-429. The agent, for instance, stated that although telephone records can sometimes be used to identify who is associating with a group "in a drug investigation," the technique had limitations because "it is very common among drug dealers for them to have multiple phones or to change phones regularly." Id. at 420-421. Petitioner's counsel "object[ed] to the extent [the agent] is suggesting [petitioner] is a drug dealer." Id. at 421. The government explained, however, that the agent was "simply saying that, in his experience," "that is one of the processes by which drug dealers operate" and was "not saying specifically that [petitioner] is a drug dealer." Ibid. The court overruled petitioner's objection.²

² Petitioner incorrectly suggests (Pet. 10) that Agent Schweers "clarified" in response to petitioner's objection that he was referring to "'senior leadership of the Rollin 90s,'" who maintained multiple phones and regularly switched them. The testimony that petitioner quotes was in response to a different question about whether the investigation had "difficulties * * * in terms of telephone information." 3 ROA 422.

Agent Schweers also testified about the use of confidential informants, noting that the alleged conspiracy was "a very insular group, especially the senior leadership," and that they would not have been "in a position to have contact with most people we develop as confidential informants." 3 ROA 424. The agent also stated that not many people were eager to talk to law enforcement. Id. at 424-425. When asked why, the agent identified "[f]ear of retribution, fear that family members or themselves are going to be killed or injured" for cooperating. Id. at 425. Petitioner objected to that answer. Ibid. The district court sustained petitioner's objection, concluding that the answer about "killing" was "more prejudicial than probative," ibid., and accordingly instructed the jury "to disregard the latter statement of Agent Schweers," id. at 427.

Agent Schweers' testimony took part of the first day of trial, see 3 ROA 305, 308, which ultimately included ten days of testimony, id. at 305-2160, from various law-enforcement officers who participated in the investigation, former gang members, petitioner's mother, both of petitioner's girlfriends, and some of the individuals who received his money orders and deposits. Pet. App. 4-5. The jury found petitioner guilty of 16 of 18 counts. See 1 ROA 1618.

3. On appeal, petitioner did not develop his hearsay-based challenge to Agent Schweers' testimony. See Pet. C.A. Br. 49-55. Petitioner instead argued (ibid.) that the district court failed

to perform its gatekeeping function and thus abused its discretion under Federal Rule of Evidence 403 by admitting the agent's testimony, which, petitioner argued, "was overwhelmingly prejudicial" such that the danger of unfair prejudice "far outweighed any [of the testimony's] probative value." Pet. C.A. Br. 50, 55.

The court of appeals affirmed. Pet. App. 1-55. As relevant here, the court rejected petitioner's challenge to Agent Schweers' testimony. Id. at 38-41.³

The court of appeals determined that the district court did not "abuse its discretion in admitting Schweers' overview testimony." Pet. App. 41. The court observed that "[c]ourts generally allow overview testimony to the extent it concerns how an investigation began, the law enforcement agencies involved, or the investigative technique used." Id. at 39 (citation omitted). The court stated that such testimony can be "'susceptible to abuse,'" such as when a witness testifies about a defendant's "likelihood of being involved in a crime." Ibid. (citation omitted). But the court found that petitioner failed to "point[] to anything in Schweers' testimony that went beyond the scope of permissible overview testimony." Id. at 40.

The court of appeals observed that Agent Schweers' testimony that petitioner was a trusted lieutenant or captain within the Rollin' 90s Crips was followed by a "limiting instruction"

³ Judge Phillips dissented in part on grounds not relevant here. See Pet. App. 47-55.

instructing the jury that "membership in a gang isn't a crime." Pet. App. 39. The court also found that petitioner was incorrect in his contention that the government was allowed to "'make its case through'" Agent Schweers' testimony and that the testimony was not supported "by the remaining evidence presented at trial." Id. at 40 (quoting Pet. C.A. Br. 54). The court stated that "other evidence supported Schweers' overview testimony": "Several former gang members testified that [petitioner] was a member of the Rollin 90s"; "there was plenty of evidence that [petitioner] sold drugs"; and that although Schweers may have "implied at one point, perhaps improperly, that [petitioner] was a drug dealer," that implication was "immaterial" "because [petitioner's] own mother likewise testified that [he] was '[s]elling drugs.'" Ibid. (quoting 3 ROA 556) (last set of brackets in original).

Finally, the court of appeals noted that petitioner had relied on judicial decisions "involving officer-expert testimony rather than summary or overview testimony." Pet. App. 38 n.8. The court explained that those expert-opinion decisions were "inapposite," because this case did not involve "challenged officer-expert testimony" implicating Federal Rule of Evidence 702. Id. at 39 n.8.

ARGUMENT

Petitioner contends (Pet. 18-26) that the court of appeals erred in affirming the district court's admission of Agent Schweers' overview testimony. Petitioner further contends (Pet. 18-23) that the decision of the court of appeals in this case

conflicts with the decisions of four other courts of appeals, Pet. 25. The court of appeals correctly determined that petitioner failed to “point[] to anything in Schweers’ testimony that went beyond the scope of permissible overview testimony,” Pet. App. 40, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. As the court of appeals recognized, overview testimony by a government agent may properly be admitted at the beginning of trial to explain “how an investigation began, the law enforcement agencies involved, or the investigative techniques used.” Pet. App. 39 (citation omitted). Such testimony is generally permissible when the testifying agent has personal knowledge of such matters concerning the investigation. See United States v. Brooks, 736 F.3d 921, 930 (10th Cir. 2013), cert. denied, 572 U.S. 1007, and 134 S. Ct. 2157 (2014); United States v. Moore, 651 F.3d 30, 60-61 (D.C. Cir. 2011) (per curiam), cert. denied, 567 U.S. 918 (2012), and aff’d on other grounds sub nom. Smith v. United States, 568 U.S. 106 (2013); United States v. Flores-de-Jesús, 569 F.3d 8, 19 (1st Cir.), cert. denied, 558 U.S. 974 (2009).

In this case, as the court of appeals explained, Agent Schweers’s testimony about methods of investigation and how the investigation began was proper overview testimony. Pet. App. 40. The court of appeals also correctly observed that the agent’s testimony did not impermissibly address either “the trustworthi-

ness of [petitioner] or any upcoming witnesses" or whether petitioner was, in fact, guilty of the charged crimes. Id. at 40-41. To the extent that testimony of that nature might run afoul of Federal Rule of Evidence 403 -- the only evidentiary rule that petitioner invoked to challenge the admission of the agent's testimony on appeal, see pp. 10-11, supra -- because the "probative value" of such testimony by a federal agent could have been "substantially outweighed by a danger of * * * unfair prejudice," Fed. R. Evid. 403, no such issue is presented on the record here.

Although the petition contends as a general matter that Agent Schweers' testimony was improper, it does not identify any particular legal theory in support of that contention. Petitioner does not discuss Rule 403, which was the basis for his position in the court of appeals. See Pet. 18-25. Nor does petitioner invoke (ibid.) in his argument the rules governing hearsay and hearsay exceptions, see Fed. R. Evid. 801-807, which were the only bases for his objection in district court but which he did not raise on appeal. See Pet. C.A. Br. 49-55. And although petitioner appears to suggest (Pet. 22-23) that Agent Schweers' testimony would not have been admissible as an expert opinion under Rule 702, the court of appeals expressly declined to address Rule 702, because the case did not involve any "challenged officer-expert testimony." Pet. App. 39 n.8 (emphasis added). Petitioner never raised any objection during trial based on rules governing lay or expert opinion testimony. See p. 8, supra.

b. Without specifying a legal theory for why they might be improper, petitioner appears (Pet. 24-25) to focus on three purportedly prejudicial aspects of Schweers' testimony: Schweers' statement that petitioner was a "trusted lieutenant[]" in the Rollin' 90s, 3 ROA 412; his purported statement that the Rollin 90s was a "sophisticated 'drug-dealing' gang," Pet. 24; cf. 3 ROA 421; and his testimony arguably implying that the gang would use "kill[ing]" to evade law enforcement, 3 ROA 425. None of those purported statements provide a sound basis for this Court's review.

First, although Agent Schweers did state that petitioner was a "trusted lieutenant[]" in the Rollin' 90s, 3 ROA 412, petitioner has not sufficiently developed a record for this Court to evaluate the underlying basis for that testimony. The agent stated during cross-examination by petitioner's counsel that his testimony reflected "information that [he] learned from speaking with 90s members or -- ." 3 ROA 442 (emphasis added). But before the agent could complete his answer, petitioner's counsel interrupted, preventing the agent from providing the remaining bases for his testimony and thereafter ended the cross-examination. Ibid.; see pp. 8-9, supra. If the agent's testimony had been based on the agent's own observations of the interaction of Rollin' 90s members, the testimony would not have been hearsay. The trial record is insufficient, however, to permit this Court's plenary review of that issue.

Moreover, the district court, as the court of appeals explained (Pet. App. 39), provided a limiting instruction that instructed the jury that "[m]embership or affiliation in a gang is not a crime." 3 ROA 414. Substantial independent evidence from multiple sources -- including petitioner's own recorded admission and eyewitness testimony by others -- demonstrated petitioner's role in the charged offenses. See, e.g., pp. 3-6, supra. Given the evidentiary context of this case and the district court's limiting instruction, it was not an abuse of discretion to admit the agent's testimony under Rule 403. Indeed, petitioner identifies no basis for concluding that the testimony was unduly prejudicial in the context of this case.

Second, petitioner appears to base his contention (Pet. 24) that Agent Schweers testified that the Rollin 90s was a "sophisticated 'drug-dealing' gang," ibid., on the agent's testimony that the investigatory technique of acquiring telephone records has limitations because "it is very common among drug dealers for them to have multiple phones or to change phones regularly," 3 ROA 421. See Pet. 10. But as the government explained when petitioner objected, the agent was "simply saying that, in his experience," "that is one of the processes by which drug dealers operate" and was "not saying specifically that [petitioner] is a drug dealer." Id. at 421.

Petitioner appears to assert (Pet. 10) that Agent Schweers "clarified" in response to petitioner's objection that his statement about drug dealers specifically referred to "'senior leadership of the Rollin 90s.'" The transcript, however, does not support that assertion. The agent's testimony that petitioner quotes (3 ROA 422) was a response to a different question. Agent Schweers merely stated that the "senior leadership of the Rollin 90s" maintained multiple phones and switched phones, which made it difficult to "obtain [a] global picture of their telephone transactions." Ibid.; see p. 9 n.2, supra. The agent did not improperly testify that the gang or such individuals were, in fact, engaged in drug dealing.

Even if the agent had "implied" that petitioner was a drug dealer, however, the court of appeals correctly determined that any such testimony was "immaterial" to the case. Pet. App. 40. As the court explained, petitioner's "own mother * * * testified that [he] was '[s]elling drugs,'" ibid. (quoting 3 ROA 556) (second set of brackets in original), and the other trial evidence convincingly established petitioner's drug-dealing activities underlying the counts of conviction. See, e.g., pp. 3-6, supra. Any implication of drug dealing in Agent Schweers' testimony was thus harmless. See Pet. App. 40; Fed. R. Crim. P. 52(a).

Finally, petitioner incorrectly suggests (Pet. 24) that the district court erred by admitting Agent Schweers' testimony that individuals were not eager to speak to law-enforcement out of fear

that they or their family members would be “killed” or injured for such cooperation. 3 ROA 425. The court sustained petitioner’s objection, concluded that government “counsel [did not] intend[] for [the agent] to say that,” ibid., and instructed the jury to “disregard” the statement, id. at 427. The court thus did not even admit the testimony that petitioner contends was prejudicial, and petitioner provides no basis for concluding that the court’s instruction to the jury to disregard the agent’s statement was insufficient.

2. Petitioner asserts (Pet. 18-23) that the decision below conflicts with decisions from the D.C., First, Second, and Fifth Circuits. In petitioner’s view (Pet. 25), those “other circuit courts” considered similar “overview testimony” and, unlike the court of appeals here, “reversed convictions for defendants like Petitioner.” That is incorrect. The decisions that petitioner cites involved very different forms of overview testimony and are consistent with the court of appeals’ decision in this case.

Petitioner relies (Pet. 19-20) on the D.C. Circuit’s decision in Moore, supra, and the First Circuit’s decision in United States v. Casas, 356 F.3d 104, cert. denied, 541 U.S. 1069 (2004). But like the court of appeals here, both of those courts of appeals recognize that courts may permissibly admit certain overview testimony that describes an investigation by explaining, for instance, how it began, the agencies involved, and the investigative techniques used. See Moore, 651 F.3d at 60-61; Flores-de-Jesús, 569

F.3d at 19 (interpreting Casas). Moore, which confronted “overview testimony” through the lens of a claim alleging prosecutorial misconduct, 651 F.3d at 50, 54-61, concluded that the “non-expert opinions” of a testifying agent were improperly admitted (apparently in light of Rule 701), where the agent, unlike Agent Schweers, “gave his personal opinion as to guilt or innocence,” “commented on the strength of the government’s yet-to-be introduced evidence,” “vouched for the credibility of [the government’s] witnesses,” and opined that the government’s “cooperating witnesses would present truthful evidence,” id. at 58-60. Even then, however, Moore ultimately found the testimony insufficiently prejudicial to warrant reversal. See id. at 61.

Like the agent witness in Moore -- and unlike Agent Schweers -- the agent witness in Casas similarly “map[ped] out [the government’s] case” and “describe[d] the role played by individual defendants,” 356 F.3d at 117, by specifically testifying that “all four of the defendants were members” of a particular “drug trafficking organization” that “handled specific massive quantities of cocaine and heroin.” Id. at 118-119. The court in Casas rejected the government’s argument that the witness was a “summary witness” (because the witness testified before other evidence was presented), and appears to have concluded that testimony was ultimately inadmissible because evidence “based on inadmissible hearsay is itself inadmissible.” Id. at 119; see id. at 118 (noting hearsay objection). Similarly, the same court in Flores-de-Jesús

agreed with the government's concession that testimony by an agent linking specific people to specific roles and establishing particular drug quantities, when based on out-of-court "police reports" and witness interviews was improper -- although ultimately harmless. 569 F.3d at 26, 32. The court distinguished such testimony from proper overview testimony "describing the course of investigation and events in which [the agent] participated," including description of the drug-sale locations "and the course of his unit's investigation of the drug point." Id. at 26. Those decisions, like Moore, are consistent with the decision in this case.

Petitioner also cites (Pet. 18) United States v. Griffin, 324 F.3d 330 (5th Cir. 2003), but Griffin involved a hearsay challenge to witness testimony that not only identified individuals "involved in the alleged conspiracy" but also established the defendant's role as a 25% owner of an entity involved in a fraudulent scheme. Id. at 348. In light of the witness's admission that his testimony about such ownership was based only "on what someone told him," ibid., Griffin concluded that the trial court abused its discretion in admitting the testimony. Id. at 349.⁴ Griffin also recognized that it is permissible to allow a witness to describe, for instance, "a complicated government program in terms that do not address witness credibility." Ibid. As the

⁴ Griffin noted that the defendant additionally argued that the testimony could not be justified as expert opinion testimony under Rule 702 or lay opinion testimony under Rule 701, 324 F.3d at 349, but the court did not analyze those contentions and does not appear to have rested its holding on them. See ibid.

D.C. Circuit explained in Moore, that recognition is simply “another way” of expressing the view articulated by the court of appeals here that an overview witness may properly “provide relevant background information as to the investigation’s duration and scope or the methods of surveillance, based on personal knowledge.” See Moore, 651 F.3d at 60-61 (discussing Griffin).

Finally, as petitioner recognizes (Pet. 19-21), the Second Circuit in United States v. Garcia, 413 F.3d 201 (2005), addressed an agent’s testimony in the form of an opinion that the defendant “was a ‘partner with [another individual] in receiving cocaine’” from a named source and thus “essentially t[old] the jury that [the agent] had concluded that [the defendant] was guilty of the crimes charged.” Id. at 210 (citation omitted). Garcia held that such testimony was inadmissible as “a lay opinion providing a summary overview of anticipated evidence” under Rule 701. Id. at 210-211. Petitioner, by contrast, has never challenged on Rule 701 grounds Agent Schweers’ testimony in this case, which bears no significant relationship to the testimony in Garcia.

3. Finally, to the extent that petitioner -- who has presented no consistent theory supporting his claims -- seeks to challenge the admission of Agent Schweers’ testimony on grounds that he has not properly preserved, any such claim would not be appropriate for this Court’s review, see United States v. Williams, 504 U.S. 36, 41 (1992), and, in any event, would be reviewable only for plain error. To establish a reversible plain error,

petitioner must demonstrate that: (1) the district court erred; (2) its error is plain; (3) it affected petitioner's "substantial rights," which generally means that the error "affected the outcome of the district court proceedings"; and (4) it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)); see United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004) (defendant has "the burden of establishing entitlement to relief for plain error"). Petitioner has not satisfied that standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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