

No. 17-9038

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

REPLY BRIEF FOR THE PETITIONER

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

TABLE OF CONTENTS

Reply Brief.....1

Conclusion.....14

Affidavit of Service.....15

Affidavit of Mailing.....17

TABLE OF AUTHORITIES

CASES

Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2200 (2018).....9, 10

Gates v. Illinois, 462 U.S. 213, 103 S. Ct. 107 (1983).....11

United States v. Brooks, 736 F.3d 921 (10th Cir. 2013).....2

United States v. Casas, 356 F.3d 104 (1st Cir. 2004).....1, 2, 3, 4, 6, 7, 8

United States v. Flores-de-Jesus, 569 F.3d 8 (1st Cir. 2009).....1, 2

United States v. Garcia, 413 F.3d 201 (2nd Cir. 2005).....1, 4

United States v. Griffin, 324 F.3d 330 (5th Cir. 2003).....1

United States v. Montas, 41 F.3d 775 (1st Cir. 1994).....7

United States v. Moore, 651 F.3d 30 (D.C. Cir. 2011).....1, 6

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1983).....11

REPLY BRIEF FOR THE PETITIONER

The First Circuit Court aptly summarized the problems created by “the government’s misguided use of a government agent as an overview witness” in *United States v. Flores-de-Jesus*, 569 F.3d 8, 16 (1st Cir. 2009). Citing its previous decision in *United States v. Casas*, 356 F.3d 104, 117 (1st Cir. 2004), the court found such overview testimony “inherently problematic” for three reasons. First, “such testimony raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessment...not in evidence.” *Id.*, quoting *Casas* at 119. Second, “there is...the possibility that later testimony might be different than what the overview witness assumed.” *Id.*, quoting *Casas* at 119-120. Finally, “overview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government.” *Id.*, at 17, quoting *Casas* at 120.

From the time United States circuit courts first identified the abuse inherent in the use of government agent overview witnesses, these same three factors have been recurrently cited to “condemn” the practice. *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003), *United States v. Garcia*, 413 F.3d 201, 214 (2nd Cir. 2005), *United States v. Moore*, 651 F.3d 30, 60 (D.C. Ci. 2011). Even though the Tenth Circuit Court has not joined these

other circuits by using the word “condemn,” the court in *United States v. Brooks*, 736 F.3d 921, 930 (10th Cir. 2013), undeniably tracked the concerns expressed by its sister circuits. “Other potential problems,” the court wrote in addressing the “abuse” often created by overview testimony, “include the government’s ability (1) to spin the evidence in its favor before it is admitted (assuming it is ever admitted), (2) to give its official imprimatur to certain evidence, and (3) to allow its witnesses (usually law enforcement) to testify on matters about which they have no personal knowledge or that are based on hearsay.”

Despite this near universal condemnation of the abuse created by the government’s use of law enforcement overview witnesses, particularly in drug conspiracy cases, *Fleur-de-Jesus* emphasizes that the problem simply has not gone away. “Unfortunately, prosecutors from the United States Attorneys Office for the District of Puerto Rico have not heeded our warnings in *Casas*,” the court wrote. *Id.*, at 17. “Since that opinion was issued, we have repeatedly been forced to chide the government for its continued improper use of overview witnesses despite our admonitions about this practice.” *Id.* The court noted, in fact, that the agent’s testimony in *Fleur-de-Jesus* was “precisely the type of testimony condemned by this Court in *United States v. Casas*.” *Id.*

This case illustrates that the same abuse continues to occur in circuits in other parts of the country as well, despite existing case law that condemns it. The facts of this case are identical to those covered in *Griffin, Casas, Garcia* and *Moore*. The government knew that its case against the Petitioner was weak. Unlike all the other co-defendants, he was never found in possession of drugs with any other member of the Rollin' 90's or Rollin's 60's gangs. The government had no witness from either gang who could either describe the gang as a hierarchical organization designed to deal illicit drugs or that Petitioner was a part of such a hierarchy. The only way to get such critical evidence before the jury was to have its overview witness, F.B.I. Agent Mark Schwerers, say as much. The "senior leadership" of the Rollin' 90's street gang were "drug dealers," Schwerers testified. 3 ROA 420-421. "I expect he will say Ingram was the head and Banks a lieutenant. It's pure hearsay," Petitioner's attorney objected. 3 ROA 405. "Mr. Banks and Mr. Cade...were trusted lieutenants or captains within the organization," Schwerers then testified. In *Casas*, the government's law enforcement overview witness did the very same thing. He told the jurors the defendant and others were "members of the organization" which he defined as the "drug-trafficking group that was associated with Israel Perez-Delgado..." that handled "massive quantities of cocaine and heroin." *Casas*, 356 F.3d at

118. In giving such testimony, the court held, the agent “went well beyond his personal knowledge.” *Id.* “Instead, using the word ‘organization’ rather than ‘conspiracy,’ he essentially testified that each of the defendants was guilty of the conspiracy charged.” *Id.* See also *Garcia*, 413 F.3d at 210 (“By stating that, in his opinion, Garcia was a partner with Francisco Valentin in receiving cocaine from Walter DeArmis, (Agent) Klemick was essentially telling the jury that he had concluded that Garcia was guilty of the crime charged.”).

Casas is also similar to this case because “there is no indication that Agent Stoothoff’s conclusions the defendants were members of the drug organization was ever based on testimony that was eventually presented at trial and could be evaluated by a jury.” *Casas*, 356 F.3d at 119. In this case, the government introduced three Rollin’ 90’s gang members at the trial: Johndra Osborne, Gilbert Jacobs and James Freeman. None of the three gang members described the gang as a drug-dealing organization and none testified Petitioner had any position of authority in the gang whatsoever. 3 ROA 609, 1329, 1625. At best, each gang member only identified Petitioner as a member of the gang. *Id.* The government wanted Jacobs to say Petitioner was a “long-term” member of the gang by asking, “Has he 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...” 3 ROA 1024.

An important facet of Respondent’s case was to establish some link between co-defendant Xavier Guerrero, who lived in California, and other member of the Rollin’ 90’s “drug-dealing” gang in Oklahoma City. During a period when co-defendant Ingram travelled to California, Petitioner gave his mother and a girlfriend money to send to Guerrero’s girlfriend, Shavon Howell, in California that was used to help pay for a hotel bill incurred by Ingram there. 3 ROA 1382, 1682. The government introduced no evidence of any illegal drug-dealing activity by Guerrero, Ingram or anyone associated with them in California. Instead, the government relied on its overview witness, Agent Schwerers, who testified Guerrero was the head of the Rollin’ 60’s gang and that the purpose of the Rollin’ 90’s and Rollin’ 60’s gangs was “to fight back against the other gangs and to make money in some capacity.” 3 ROA 414. Guerrero, just like the defendant Israel Perez-Delgado in *Casas*, made a deal with the government before trial. No one other than government agents like Agent Schwerers testified to support the claim that the Rollin’ 60’s was a drug-dealing gang headed by Xavier Guerrero. As *Casas* pointed out, it is improper for the agent to testify to

conclusions he made during his investigation, including his interrogation of one of the co-defendants. *Casas*, 356 F.3d at 118.

Finally, the government's overview witness in this case simply went too far, an all too common problem with such witnesses. Confidential informants are hard to come by, Agent Schwerers said, because "fear that their family members or themselves are going to be killed." 3 ROA 425. Although the district court struck the testimony and admonished the jurors to disregard it, the problems raised in similar testimony given by overview witnesses is well-known. "As the record here demonstrates," the court wrote in *Moore*, "a trained law enforcement officer is likely to go as far as the questions allow..." *Moore*, 652 F.3d at 60.

Respondent does little to address the dangers so many circuit courts have found arising from the government's abusive use of law enforcement overview witnesses. In this case, the government realized it was essential to tag Petitioner with "evidence" from a government law enforcement officer that he was a "lieutenant" in the "drug-dealing Rollin' 90's" gang. Petitioner's erstwhile efforts to prevent the tag-line's admission into evidence were thwarted. "These are observations made by trained investigators," the government claimed. 3 ROA 405. So long as this type of response works to gain admission of what other courts have condemned to

be nothing but a conclusion by the officer as to the defendant's guilt, the abuse will continue.

Respondent argues this infraction should be dismissed as either harmless error, or even plain error. But Petitioner's attorney's objections were both timely and proper. "No foundation," he objected at trial, stating Agent Schwerers had no personal knowledge about the internal operation of the Rollin' 90's gang at all. 3 ROA 405. "If you have somebody from the gang who comes in and says he's the boss and this is the guy who did it, I understand that," the attorney said. *Id.* But, Petitioner's attorney argued, the government conducted no undercover operations, much less undercover operations conducted by Schwerers himself. *Id.* Petitioner on appeal argued the introduction of such evidence violated Fed. R. Evid. 403. Courts that have found reversible error based on the introduction of such overview testimony have agreed. "The risk of unfair prejudice is real," *Casas* held. "By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged." *Casas*, 356 at 120, quoting *United States v. Montas*, 41 F.3d 775, 784 (1st Cir. 1994).

Ultimately, in such overview witness cases, particularly where drug-dealing conspiracies are alleged, an appellate court must assess the evidence

otherwise admissible to determine whether any error was harmless. In cases like *Casas*, *Griffin* and *Moore*, substantial evidence often exists against many co-conspirators to find any error harmless. But where, as here, a defendant finds himself only peripherally connected to a group of drug dealers by association not arising from obvious participation in the underlying criminal scheme, courts have held the prejudicial overview witness testimony can make a difference that justifies reversal. “We cannot say that it is highly probable that the jury would have connected Cunningham in the absence of (Agent) Stoothoff’s improper testimony,” the court held in *Casas*, 356 F.3d at 123.

In this case, evidence purportedly linking Petitioner to drug activity dealt with three separate incidents. In the first, Petitioner had gone to Willie Evans’ house one morning to smoke marijuana with Evans and another friend, Kwane Sadler, neither of which were linked to the Rollin’ 90’s gang. 3 ROA 455. An officer was allowed entry to the house by Evans’ mother, smelled the marijuana smoke, and searched Evans’ bedroom, where he found cocaine in the bottom of a laundry basket in a closet. 3 ROA 491. Petitioner was never seen anywhere near the closet or the laundry basket. 3 ROA 515. Evans told police “Whatever you find in the room is mine.” 3 ROA 509. Petitioner was arrested, taken to jail, and subsequently called his

mother that night from the jail phone. Petitioner was worried about “my shit” left at Evans’ house. When asked what her son meant, his mother later testified that her son was referring to some marijuana he had left in his car, which was still parked in Evans’ driveway. 3 ROA 291-92. “Did you interpret those conversations in any way to be that Michael Banks was hiding crack cocaine or hiding guns?” the mother was asked. She answered, “No.” 3 ROA 293. The drug conspiracy in this case involved crack cocaine, not marijuana. Had the jury not heard from Agent Schwerers that Petitioner was a “lieutenant” in the drug-dealing, murderous Rollin’ 90’s street gang, it is not highly probable that the jury would have convicted him of the Evans house cocaine possession count.

The second instance where testimony about Petitioner was introduced involved the Spencer house, where, again cocaine and guns were found hidden out of sight in the attic of a house that belonged to someone else. 3 ROA 1823-24, 2019. Based on this Court’s recent ruling in *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2200 (2018), a case that had not been decided at the time Petitioner filed his petition for certiorari, it is doubtful police officers had any right to use cell-site location information (CSLI) data to find the Petitioner there at all. The issue was briefed in Petitioner’s opening brief before the Tenth Circuit. Appellant’s Opening Brief, pages 16-

29. The Tenth Circuit opinion was issued before the *Carpenter* decision, and the court did not rule on the CSLI issues raised. Opinion at pg. 13, n 3. The holding in *Carpenter* applies to officers finding Petitioner at the Spencer house. “Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains an expectation of privacy in the record of the physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search.” *Id.*, at 2217.

Some exceptions might apply. “While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.” *Id.*, at 2223. No such “ongoing emergency” existed in this case. Law enforcement had learned of Petitioner’s cell phone number from a cooperating witness on November 11, 2014. 2 ROA 24. They presented a bare-bones warrant to a magistrate on November 28, 2014 to obtain Petitioner’s CSLI data. *Id.* The warrant affidavit read: “On November 11, 2014 investigators received information from a reliable confidential informant that Michael Banks is in possession of a cellular telephone with the phone number (405) 414-5896. This informant has proven reliable by investigators and has provided reliable information in the past.” The

affidavit made no mention of any ongoing emergency. Simply saying an informant is reliable with nothing more has long been held insufficient to establish probable cause for a search under the Fourth Amendment. *Gates v. Illinois*, 462 U.S. 213, 239, 103 S.Ct. 107 (1983). Later, the agents filled out a form provided by the cell-phone company. 2 ROA 34. The CSLI data led detectives to the town of Spencer, where Petitioner had spent the night with Gabrielle Stephenson and Satin Watley in a friend's house. When the officers arrived to arrest Petitioner, they did so only as a result of their invalid CSLI search. Anything subsequently found in the house should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963). At a minimum, the Court should remand the case to consider the impact of *Carpenter* on Petitioner's convictions.

Even if the seizure of Petitioner at the Spencer house was proper, the evidence introduced confirms how Agent Schwerers' overview testimony contributed to the jury's verdict. No evidence was presented that either Stephenson or Watley had even the remotest connection to the Rollin' 90's gang or to Mark Ingram's drug-dealing activities. But Stephenson in particular had her back against a wall after officers found cocaine and guns hidden in the attic of the Spencer house. She had been convicted three times of drug distribution charges, 3 ROA 1990, and faced life without parole, 3

ROA 1999, unless she cooperated with the authorities. Among all the witnesses called by the government, Stephenson was the only person who claimed to have ever seen Petitioner near cocaine. 3 ROA 1624.

But neither Stephenson nor Watley testified they ever saw Petitioner in possession of cocaine or guns at the Spencer house. 3 ROA 2017, 1864. Stephenson testified she had just gotten out of prison, and with police officers beating on the door, she was afraid there *might* be guns or illegal drugs in the house. 3 ROA 1638. She wanted Petitioner to get rid of “any gun that was possibly there.” 3 ROA 1637. She testified Petitioner had a bag, but she never saw what was inside the bag. 3 ROA 1639. “I know it went into the attic, a big gray and black bag,” she testified. *Id.* Later, she identified this bag as an Oster mixer bag she had put money in earlier in the evening while sitting on the couch. 3 ROA 1737. The problem with Stephenson’s testimony was that no rational jury could believe it. The government presented no evidence that the Oster mixer bag, or any bag, was found in the attic. The Oster mixer bag, filled with \$17,440 in cash, was found in a bedroom closet. 3 ROA 944. Although a mixing bowl was found in the kitchen sink, no evidence similarly was presented to indicate the contour of the bowl matched the cocaine patties found in the attic. Just as with the Evans’ house, had the jurors not been told Petitioner was a

lieutenant in the murderous, drug-dealing Rollin' 90's gang, it is highly improbable they would have returned a verdict of guilty as to any of the Spencer house counts.

Finally, had Agent Schwerers not made the connection between the murderous, drug-dealing Rollin' 90's Oklahoma City gang and the drug-dealing California Rollin' 60's gang, and placed Xavier Guerrero as the leader of the California gang, it is highly improbable the jurors would have thought anything about Petitioner sending money to Guerrero's girlfriend, Shavon Howell, or convict him on any of the money laundering counts.

Without Agent Schwerers critical overview testimony, the government had no viable case against Petitioner. Its use of pole cameras, GPS tracking devices, trash pulls, drive-by surveillance, pen register information, and service of multiple search warrants had uncovered nothing against the Petitioner. 3 ROA, 415, 417, 419, 420, 427. The most the agents could find was an innocuous photo of Petitioner with Ingram during a vacation together in Las Vegas on some unknown date. 3 ROA 1347. Petitioner was no different from defendant Cunningham in the *Casas* case: a social friend of a drug dealer with no evidence but Agent Schwerers' overview conclusions that he was part of that friend's drug-dealing conspiracy.

This is an ideal case for the Court to address the ongoing abuse of government law enforcement overview witnesses.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. D. Lunn', with a stylized flourish at the end.

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 Reply Brief for the Petitioner 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:

United States mail on November 27, 2018.

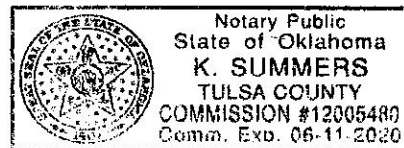

WILLIAM D. LUNN

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

This affidavit of mailing subscribed and sworn to before me this
Nov. 27, 2018.



Notary Public



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

Noel J. Francisco
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

William D. Lunn

Notary Public

