No. _____

IN THE
Supreme Court of the United States

OLEGARIO LARES-DE LA ROSA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Evidence 701 permits a law enforcement officer to provide a lay opinion about the meaning of ordinary language used in a recorded conversation the officer reviewed during case investigation but did not participate in or perceive contemporaneously, a question that has engendered an intractable circuit split.

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings:

United States v. Lares-De La Rosa, 4:22-cr-00974-JGZ-JR-1 (D. Ariz.)

United States v. Lares-De La Rosa, Ninth Circuit No. 23-1096

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Petitioner Olegario Lares-De La Rosa respectfully requests a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion (App. A 1a-3a) is unpublished but is reported at 2025 WL 927183.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 27, 2025. App. A 2a. The Court of Appeals denied Petitioner's petition for rehearing en banc on July 3, 2025. App. B 5a. On September 24, 2025, Justice Kagan extended the time for filing the petition for a writ of certiorari to November 7, 2025. No.25A332. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT RULES AND CONSTITUTIONAL PROVISIONS

Federal Rule of Evidence 701 provides:

> 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.

The Sixth Amendment provides, in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

INTRODUCTION

The Ninth Circuit permits law enforcement officers to provide lay opinions under Federal Rule of Evidence 701 about the meaning of ambiguous recorded conversations using ordinary language, even if officers did not participate in the conversation or perceive it contemporaneously, if the officers have knowledge of the conversation based on their case investigation. *See United States v. Barragan,* 871 F.3d 689, 703-04 (9th Cir. 2017); *United States v. Gadson*, 763 F.3d 1189, 1206-11 (9th Cir. 2014). The Fifth, Seventh, Tenth and Eleventh Circuits also follow this approach. *See United States v. Cheek*, 740 F.3d 440, 447-48 (7th Cir. 2014); *United States v. El-Mezain*, 664 F.3d 467, 513-14 & n.13 (5th Cir. 2011); *United States v. Jayyousi*, 657 F.3d 1085, 1097, 1102-04 (11th Cir. 2011); *United States v. Garcia*, 994 F.2d 1499, 1506-07 (10th Cir. 1993).

The Second, Sixth, Eighth, and D.C. circuits, on the other hand, do not permit officers to provide lay opinions about the meaning of ambiguous recorded conversations using ordinary language. *See United States v. Freeman*, 730 F.3d 590, 595-99 (6th Cir. 2013); *United States v. Hampton*, 718 F.3d 978, 981-84 (D.C. Cir. 2013); *United States v. Grinage*, 390 F.3d 746, 749-51 (2d Cir. 2004); *United States v. Peoples*, 250 F.3d 630, 639-42 (8th Cir. 2001). And the Second, Fourth, and Eighth circuits do not permit agents to provide lay opinions about the meaning of recorded conversations they did not participate in or perceive contemporaneously. *United States v. Walker*, 32 F.4th 377, 391-92 (4th Cir. 2022); *Grinage*, 390 F.3d at 750-51; *Peoples*, 250 F.3d at 640-42.

The latter approach better accords with the letter and spirit of Federal Rule of Evidence 701, which fortifies the Sixth Amendment right to trial by jury. Allowing a law enforcement officer to interpret ordinary words in recorded conversations—including when the officer merely reviewed the conversations after the fact—encroaches on the jury's core function of rendering a fair and impartial verdict after an independent evaluation of the evidence. This Court should grant certiorari to resolve the long-standing and intractable circuit split.

STATEMENT OF THE CASE

1. In April 2022, Homeland Security Investigations (HSI) began investigating a suspected kidnapping after an individual reported that someone in Tucson was demanding $16,000 for the release of his cousins ("the immigrants"), who had traveled from Veracruz, Mexico to the southern Arizona desert to await transport to New York City. *See* Opening Brief, Doc. 15 in Ninth Cir. No. 1096 (Op. Br.) at 3-7 (citing record). After further investigation and planning, agents conducted a sting in a local Home Depot parking lot on April 8. *See* Op. Br. at 10-12 (citing record). Petitioner picked up the immigrants from a house in Tucson and transported them to the Home Depot parking lot; he never displayed a gun or threatened or restrained them in any way. Op. Br. at 9-10, 12 (citing record). Codefendant Balboa (who arrived at the parking lot with codefendant Rodriguez) negotiated the ransom payment with HSI Agent Hernandez, who posed as the immigrants' family friend and traveled to the Home Depot parking lot in a blue Dodge Ram Op. Br. at 6-8, 10 (citing record). Balboa entered the Ram, and Agent

Hernandez gave him $16,000, at which point Balboa called Rodriguez, who in turn called Petitioner and told him to tell the immigrants to go to the blue Dodge Ram. Op. Br.at 10-12 (citing record).

Balboa and Petitioner were arrested that same day. Rodriguez remained at large until he was arrested in late 2023. Op. Br. at 13-14 (citing record). During the investigation, agents learned of texts on April 7, 2022, between Rodriguez and Petitioner concerning the bank-account information of two individuals who expressed willingness to accept payments in their bank accounts.[1] (As the government's expert testified, it is common for relatives of immigrants to wire money to bank accounts provided by an alien-smuggling organization as payment for garden-variety smuggling and transportation of immigrants that do *not* involve kidnapping or hostage taking. *See* Op. Br. at 19-20 (citing record).) In other texts with Rodriguez, Petitioner apparently discussed his involvement in transporting undocumented immigrants.[2] In the midst of such a discussion on March 29, Rodriguez said "we're inviting ourselves."[3] (These messages were originally in Spanish. Prior to trial, a certified interpreter translated them into English. Agent Gomez later interpreted that ordinary English language when he testified at trial, as explained below.[4])

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[1] *See* Excerpts of Record (ER), Doc. 16 in Ninth Cir. No. 1096, in five volumes. (The citation begins with the volume of the Excerpts of Record and concludes with the page number(s).) 4-ER-568-71; 5-ER-898-902.
[2] 5-ER-892-94.
[3] 5-ER-893 (line 145).
[4] 4-ER-565-66.

2. At trial, Petitioner conceded his guilt on charges of transportation of noncitizens for profit but maintained his innocence on charges of conspiracy to hostage take and hostage-taking.[5] The text messages between Rodriguez and Petitioner were admitted at trial.[6]

Agent Gomez testified over defense objection that the discussions between Rodriguez and Petitioner on April 7 about account deposits in the amount of $7,000 to $8,000 appeared to be related to the Home Depot event.[7] And, when asked whether it appeared that Petitioner understood what Rodriguez was talking about in those messages, he said, "[Petitioner] knew very well what [Rodriguez] was talking about."[8] When defense counsel sought to clarify the matter on cross-examination, Agent Gomez reiterated that the monies appeared to be related "in context, time, and amount."[9] Defense counsel asked, "You're speculating on that?"[10] Agent Gomez merely repeated his answer.[11]

Defense counsel later asked, "In all of these messages between [Petitioner] and [Rodriguez], they never discussed, quote 'hostages,' correct?"[12] Agent Gomez did not answer that question, but instead gave the following opinion regarding what Rodriguez meant when he said "we're inviting ourselves":

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[5] 2-ER-166.
[6] 2-ER-201; 4-ER-563; 5-ER-890.
[7] 4-ER-586-87.
[8] 4-ER-569.
[9] 4-ER-594-96.
[10] 4-ER-598.
[11] 4-ER-598.
[12] 4-ER-608.

> So I feel that there is a discussion of stealing another load, a load of illegal aliens from another, another group. So essentially, they're saying they're inviting themselves to an area that is common for smuggling, that is a popular corridor. They speak of an area called the antenna. So the antenna, based on my consultations with agents in the Sells [Arizona] area, is a common term for a smuggling corridor there. And so they're familiar that alien loads go through the antenna, and they discuss inviting themselves to there to collect aliens.[13]

Defense counsel sought to rein in this nonresponsive answer by asking, "For the purpose of smuggling, correct?"[14] Agent Gomez testified:

> I would say not for the purposes of smuggling because they're already being smuggled. So they're inviting themselves there to take over the alien loads and profit from that by collecting ransom from the families.[15]

Defense counsel moved to strike Agent Gomez's interpretation on grounds that it was speculative and misleading, i.e., an improper opinion.[16] The district court denied the motion.[17] Petitioner was convicted of transportation of noncitizens for profit and conspiracy to hostage take, but he was acquitted of hostage-taking, including under an aiding and abetting theory.[18]

3. Petitioner challenged the district court's admission of this lay opinion testimony on direct appeal. Relying on *United States v. Barragan,* 871 F.3d 689 (9th Cir. 2017) and *United States v. Gadson*, 763 F.3d 1189 (9th Cir. 2014), which permit an agent's interpretation of text messages examined by the agent during an

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[13] 4-ER-608-09. *See also* 5-ER-893 (lines 142-145).
[14] 4-ER-609.
[15] 4-ER-609.
[16] 4-ER-612-15.
[17] 4-ER-617.
[18] 5-ER-884-85; 2-ER-108-09.

investigation, the Court of Appeals found no abuse of discretion and affirmed. App. A 3a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant the writ to resolve the circuit split on the appropriate scope of law enforcement lay opinion testimony.

A. Law enforcement officers should not be allowed to provide lay opinions about the meaning of ordinary language in recorded conversations.

Federal Rule of Evidence 701 allows a nonexpert to testify in the form of an opinion only if the opinion is "(a) rationally based on a witness's perception" and "(b) helpful to clearly understanding the witness's testimony or a fact in issue. . . ." As the Sixth Circuit explained in *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013), when an agent interprets "ordinary English language" in recorded conversations, he "effectively spoon-[feeds] his interpretations . . . . and the government's theory of the case to the jury. . . ." This violates Rule 701's requirement that a lay opinion help the jury understand a fact in issue. *Id. See also* Fed. R. Evid. 701, Advisory Committee's Notes (1972) ("meaningless assertions which amount to little more than choosing up sides" should be excluded "for lack of helpfulness."). It is not proper "for an agent to divine what vague, plain English language means," because "these types of conclusions are the province of the jury." *Freeman*, 730 F.3d at 598 (citing *United States v. Hampton*, 718 F.3d 978, 985 (D.C. Cir. 2013) (Brown, J., concurring)). The D.C., Second, and Eighth circuits concur with the Sixth Circuit's view. *See Hampton*, 718 F.3d at 983 (adopting Second Circuit's position that such testimony improperly usurps jury's function); *United*

States v. Grinage, 390 F.3d 746, 748-51 (2d Cir. 2004) (improper for agents to interpret recorded calls that did not use coded language); *United States v. Peoples,* 250 F.3d 630, 640-41 (8th Cir. 2001) (finding that the agent's "testimony was not limited to coded, oblique language, but included plain English words and phrases," and was therefore inadmissible under Rule 701).

The Fifth, Seventh, Ninth, Tenth and Eleventh Circuits, however, allow such interpretation of ordinary, albeit vague, English language based on the notion that an agent who has investigated a case is in a better position than the jury to understand the meaning of vague messages. *United States v. Gadson*, 763 F.3d 1189, 1208-11 (9th Cir. 2014) (permissible for officer to opine on meaning of ordinary language, including "that time," in a recorded conversation);[19] *United States v. Cheek*, 740 F.3d 440, 447-48 (7th Cir. 2014) (finding no error in the district court's decision to allow the agent's testimony regarding his understanding of ordinary language used in recorded conversations, including "ol' girl," when it was based on "knowledge obtained from investigation of [] defendants"); *United States v. El-Mezain*, 664 F.3d 467, 513-14 & n.13 (5th Cir. 2011) (allowing lay opinion testimony interpreting telephone calls, including the ordinary term "sick," when "the agents' opinions were limited to their personal perceptions from their investigation of this case"); *United States v. Jayyousi*, 657 F.3d 1085, 1097, 1102-04

[19] *See also United States v. Barragan*, 871 F.3d 689, 703-04 (9th Cir. 2017) (citing *Gadson*, 763 at 1209-10, for circuit rule permitting agents to offer interpretations of language in recorded conversations based on knowledge learned during investigation).

(11th Cir. 2011) (holding that a lay witness's testimony was admissible even though "he did not personally observe or participate in the defendants' conversations," including the agent's interpretation of ordinary words including "dogs" and "sports equipment"); *United States v. Garcia*, 994 F.2d 1499, 1506-07 (10th Cir.1993) (admitting an officer's opinion that the moniker "your old man" in recorded conversation referred to defendant even though the opinion was based only "on listening to the conversations between coconspirators").

But, as other circuits have held, this rationale improperly usurps the role of the jury because it dispenses with the "need for the trial jury to review personally any evidence at all." *Freeman*, 730 F.3d at 598. To remain true to the principles of Rule 701 and the Sixth Amendment right to trial by jury, a case agent "may not explain to a jury what inferences to draw from recorded conversations using ordinary language." *Id.* (citing *Hampton*, 718 F.3d at 985 (Brown, J., concurring)). *Accord Peoples*, 250 F.3d at 640-41 (improper for agent to provide lay opinion about meaning of phrases including "lost and found situations" and "I done already gave my loot"). Such testimony is not really evidence, it is argument. *Freeman*, 730 F.3d at 598. And the only appropriate time to present argument to the jury is during counsel's closing remarks.

Allowing law enforcement agents to provide their interpretations of ordinary language used in recorded conversations is particularly concerning. Agents typically possess an "aura of expertise and authority," which "increases the risk that the jury will be swayed improperly by the agent's testimony, rather than rely on its own

interpretation of the evidence." *Id.* at 599 (citing *Hampton*, 718 F.3d at 981-82; *Grinage*. 390 F.3 at 750). "[E]nforcement of Rule 701's criteria [is] uniquely important under these circumstances." *Id.*

B. Law enforcement officers should not be allowed to provide lay opinions about recorded conversations they did not participate in or contemporaneously perceive.

The Fifth, Seventh, Ninth, Tenth and Eleventh Circuits likewise allow law enforcement agents to provide lay opinions about recorded conversations when they did not participate in the conversations or perceive them as they were occurring. *See Gadson*, 763 F.3d at 1208-09; *Barragan,* 871 F.3d at 703-04; *Cheek*, 740 F.3d at 447-48; *El-Mezain*, 664 F.3d 467, 513-14 & n.13; *Jayyousi*, 657 F.3d at 1095, 1097, 1102; *Garcia*, 994 F.2d at 1506-07. That approach violates Rule 701's limitation of lay opinions to matters "rationally based on the witness's perception," as recognized by the Second, Fourth, and Eighth Circuits.

As the Fourth Circuit observed, when an agent "did not participate in [a] conversation or listen to it while it was happening, the danger is great that the interpretations he offered at trial were not based on his contemporaneous understanding of the language used but instead the result of his putting the pieces together based on what he discovered during his investigation." *United States v. Walker*, 32 F.4th 377, 391-92 (4th Cir. 2022). Such "post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701." *Id.* (quoting *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010)). The Second and Eighth circuits likewise enforce this limitation on lay opinion

testimony. *See Grinage*, 390 F.3d at 750-51; *Peoples*, 250 F.3d at 640-42. "To permit a law enforcement officer to testify" about the meaning of conversations about which he has no first-hand knowledge improperly allows the government to "bolster [its] theory of the case with the imprimatur of law enforcement." *Walker*, 32 F.4th at 392.

Under such circumstances, if the government wishes to elicit an agent's opinion based on his post-hoc assessment of recorded conversations, it must offer the agent as an expert witness. *Id.* And any such testimony must qualify as *expert* testimony, "such as defining slang words used in conversations that the jury would not be able to decipher on its own." *Id.* (citing *Johnson*, 617 F.3d at 294).

II. This case is an excellent vehicle for resolving the circuit split on this recurring issue.

Law enforcement officers regularly testify in criminal trials about recorded conversations reviewed during case investigation, as Agent Gomez did in this case. The facts relevant to this petition are straightforward and undisputed. Agent Gomez did not participate in or contemporaneously perceive the text messages about which he opined at trial. And the messages—which spanned all of 15 pages—were admitted into evidence.[20] The jurors could easily read the entirety of the communications and draw their own conclusions about the significance of the ordinary language that Rodriguez and Petitioner used.

[20] *See* 5-ER-890-905; 2-ER-201; 4-ER-563.

These circumstances underscore that Agent Gomez was in no better position than the jury to form an opinion about the messages and, in particular, what Petitioner would have understood Rodriguez to mean when he said "we're inviting ourselves" to an area known for immigrant crossings into the United States. When Agent Gomez opined that this ordinary language meant that Rodriguez and Petitioner were engaged in hostage-taking, he did nothing more than spoon-feed the government's theory of the case to the jury with the authority of an experienced HSI agent.

This evidence went to the heart of Petitioner's defense that he engaged in the transportation of noncitizens for profit but did *not* conspire to take anyone hostage. In the absence of Agent Gomez's inherently biased spin on the messages, the jury may well have declined to convict Petitioner of conspiracy to hostage take. The jury's acquittal of Petitioner on substantive hostage-taking offenses, even under an aiding and abetting theory, indicates that it harbored some doubt, suggesting that Petitioner was prejudiced by the erroneous admission of this testimony.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant a writ of certiorari.

Respectfully submitted,

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November 7, 2025

APPENDIX A:

Memorandum Opinion of the Ninth Circuit Court of Appeals, dated March 27, 2025

2025 WL 927183
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Olegario LARES-DE LA ROSA, Defendant - Appellant.

No. 23-1096
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Submitted March 25, 2025* Phoenix, Arizona
|
FILED MARCH 27, 2025

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appeal from the United States District Court for the District of Arizona, Jennifer G. Zipps, Chief District Judge, Presiding, D.C. No. 4:22-cr-00974-JGZ-JR-1

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Before: GRABER and BENNETT, Circuit Judges, and TUNHEIM, Senior District Judge.**

** The Honorable John R. Tunheim, United States Senior District Judge for the District of Minnesota, sitting by designation.

MEMORANDUM***

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

***1** Defendant Olegario Lares-De La Rosa participated in a conspiracy to kidnap migrants for the purpose of collecting ransom money from their relatives. Before trial, Defendant pleaded guilty to knowing possession of a firearm as a convicted felon. For his role in the scheme, a jury convicted Defendant of conspiracy to take hostages, conspiracy to transport aliens for profit, and transportation of aliens for profit. But the jury acquitted him of two counts of hostage-taking. The court imposed a sentence of 216 months. Defendant timely appeals his conviction and sentence, and we affirm.

1. Defendant first argues that the district court improperly instructed the jury on the charge of conspiracy to hostage-take. He asserts that the instructions did not clearly require the jury to find that Defendant knew that the object of the conspiracy was to take hostages, as distinct from transporting aliens for profit. We review for plain error because Defendant did not object to the instructions at trial. United States v. Franklin, 321 F.3d 1231, 1240 (9th Cir. 2003). The court did not err, plainly or otherwise. The court used the Ninth Circuit's model instruction on conspiracy and made clear that the jury could not convict Defendant unless he knew that the purpose of the conspiracy was to take hostages. Moreover, the court gave a separate instruction for conspiracy to transport aliens for profit, making confusion even less likely.

In addition, Defendant speculates that the jury was confused because it acquitted him of the substantive hostage-taking charges. But Defendant's role was to drive hostages to a meeting place; he was not the actual kidnapper. So the jury's decision to acquit him of hostage-taking on the government's aiding-and-abetting theory is not necessarily inconsistent with its decision to convict on the conspiracy charge. See United States v. Powell, 469 U.S. 57, 66–67 (1984) (stating that courts resist inquiring into a jury's thought process and do not assess a jury's rationale for potentially inconsistent verdicts).

We also are unpersuaded by Defendant's assertion that the government's closing heightened the risk of juror confusion. The government's closing argument did not misstate the elements of conspiracy to take hostages and, indeed,

highlighted the difference between alien-smuggling and hostage-taking.

2. Next, Defendant argues that the district court erred by admitting Agent Gomez's lay opinion testimony and by failing to give a multiple-role instruction. We review for "clear abuse of discretion" the admissibility of lay opinion testimony under Federal Rule of Evidence 701, United States v. Gadson, 763 F.3d 1189, 1209 (9th Cir. 2014) (citation omitted), and find no abuse of discretion. Testimony based on a witness's perception—including the witness's interpretation of the meaning of a defendant's text messages examined by the witness during an investigation—is lay opinion testimony. United States v. Barragan, 871 F.3d 689, 703–04 (9th Cir. 2017). That precisely describes Agent Gomez's testimony in this case.

***2** On appeal, Defendant challenges Gomez's testimony under Federal Rule of Evidence 403. Reviewing this unpreserved claim for plain error, we find none. The record does not reveal undue prejudice.

Lastly, reviewing for plain error, we reject Defendant's argument that the district court should have given a multiple-role instruction. Gomez did not give expert testimony, so no such instruction was needed.

3. The district court did not plainly err by failing to hold that 18 U.S.C. § 922(g)(1) is unconstitutional. Defendant expressly concedes this issue and raises it only for the purpose of preservation.

4. Finally, Defendant argues that the district court improperly imposed sentencing enhancements based on acquitted conduct. Again, Defendant expressly acknowledges that we have rejected this argument and that he raises it only to preserve it.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2025 WL 927183

APPENDIX B:

Order of the Ninth Circuit Court of Appeal, denying petition for rehearing *en banc*, dated July 3, 2025

FILED

JUL 3 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. OLEGARIO LARES-DE LA ROSA, Defendant - Appellant.	No. 23-1096 D.C. No. 4:22-cr-00974-JGZ-JR-1 District of Arizona, Tucson ORDER

Before: GRABER and BENNETT, Circuit Judges, and TUNHEIM, District Judge.*

Judge Bennett has voted to deny Appellant's petition for rehearing en banc, and Judges Graber and Tunheim have so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing en banc, Docket No. 57, is DENIED.

* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.