No. _____

IN THE
Supreme Court of the United States

KIFAH JAYYOUSI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 701 requires that lay opinion testimony be "rationally based on the witness's perception," and that it be "helpful" to the fact-finder's determination. Fed. R. Evid. 701(a)-(b). These requirements have long been understood to require the witness to have "first-hand knowledge" of the events in question. Fed. R. Evid. 701 advisory committee's note.

In this case, the central testimony supporting the petitioner's conviction came from an FBI agent who gave lay opinion testimony about what he believed was the secret meaning of conversations among petitioner and his co-defendants. These conversations had been recorded years before the agent began his investigation. The agent had not participated in the conversations; indeed he could not even understand the language in which the conversations were conducted. Nevertheless, after reviewing translated transcripts, the agent opined that they contained repeated coded references to "jihad." A divided Eleventh Circuit held that this testimony satisfied Rule 701 because the case agent had first-hand knowledge of the translated transcripts, even if he had no first-hand knowledge of the underlying conversations.

The question presented is whether, consistent with the ruling below and that of four other circuits, and contrary to the rule in five circuits, lay opinion testimony satisfies Rule 701(a) and (b) where the witness has no first-hand knowledge of the underlying events about which the witness opines.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all the parties to the proceeding before the United States Court of Appeals for the Eleventh Circuit:

Petitioner is Kifah Jayyousi, defendant-appellant below. Adham Amin Hassoun and Jose Padilla also were defendants-appellants below and are filing petitions for certiorari in this Court.

Respondent is the United States of America, plaintiff-appellee below.

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The opinion of the Court of Appeals is reported at 657 F.3d 1085 and is reprinted in the appendix at Pet. App. 1a. The District Court oral ruling admitting the testimony in question is reprinted at 127a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 2011. A timely petition for rehearing en banc was denied on November 15, 2011. Justice Thomas extended the time for filing this petition to April 13, 2012. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Evidence 701 provides as follows:[1]

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

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[1] A new version of Rule 701 became effective on December 11, 2011, after proceedings in the District Court and Court of Appeals had concluded. The 2011 amendments are "stylistic only" and not substantive. *See* Fed. R. Evid. 701 advisory committee's note. Because the amendments are immaterial to the question presented, Petitioner uses the current version of the Rule for the Court's convenience.

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

STATEMENT OF THE CASE

The Federal Rules of Evidence strictly limit the type of opinion testimony that a lay witness may present. Under Federal Rule of Evidence 701, lay opinion testimony must be "rationally based on the witness's perception," 701(a), which is the "familiar requirement of first-hand knowledge or observation," advisory committee's note, and must be "helpful to clearly understanding the witness's testimony or to determining a fact in issue," 701(b). The ruling of the Eleventh Circuit at issue here departs from this rule and is incorrect.

Petitioner Dr. Kifah Jayyousi, an American citizen, was a noted supporter of relief efforts for Muslims facing persecution in Kosovo, Bosnia, and elsewhere in the 1990s. Dr. Jayyousi was convicted of conspiring to murder, maim and kidnap outside the United States, and providing material support for that conspiracy. The government's theory was that some ostensibly humanitarian aid sent by Dr. Jayyousi in the 1990s was really intended to further unlawful killings by mujahideen in those areas. The core of the government's case was the lay opinion testimony of a FBI case agent. Over the course of nine trial days, the agent opined that on more than 100 occasions Dr. Jayyousi and his co-defendants had conversations in which they used innocuous

words like "tourism" or "sneakers" as a code for "jihad."

The FBI agent was not present during any of these conversations, all of which took place years before the government even opened a criminal investigation. Indeed, the agent could not understand the conversations in their original form at all because they were spoken in Arabic, a language he did not speak or read. Instead, the agent's stated basis for his opinion that Dr. Jayyousi was talking about "jihad" was his subsequent review of translated transcriptions of the calls. The government did not attempt to offer the agent as an expert witness, presumably because he had so little prior experience with terrorism cases (this was only his second terrorism case to reach the indictment stage). The government *did* present expert testimony from a different witness, but that witness conceded on cross-examination that "he discerned no code talk" in the calls involving Dr. Jayyousi. Pet. App. 28a.

A divided appellate panel affirmed the District Court's conclusion that the agent's testimony satisfied the requirements of Rule 701. It held that the rule's requirements were satisfied because the agent had a personal perception of the transcripts in question and because his testimony was helpful to the jury in that his knowledge of facts not in evidence "enabled him to draw inferences about the meaning of code words that the jury could not have readily drawn." Pet. App. 35a.

The Eleventh Circuit's opinion joins one side of a deep split of authority among the courts of appeals.

Five circuits have held that lay opinion testimony is admissible only if it is based on first-hand knowledge. Under the rule established by these circuits, opinions based on post-hoc review of materials are inadmissible. Other courts, including the Eleventh Circuit in this case, have held admissible lay opinion testimony that was based solely on information the witness perceived second-hand.

Only this Court can resolve this split, and it should reaffirm the proper limits on lay opinion testimony. Lay opinion testimony requires that a witness have first-hand perception of the events in question. It makes a mockery of that requirement to allow after-the-fact review to suffice. Reading the journals of Lewis & Clark does not give one first-hand knowledge of the events they describe. The Eleventh Circuit's approach poses a particular threat to the safeguards surrounding the use of expert testimony. In effect, the Eleventh Circuit has endorsed a new type of witness – the purportedly diligent witness who has neither first-hand knowledge nor expertise to bring to bear. Who would go to the trouble, for example, of qualifying an expert to opine that a defendant corporation intended to discriminate, when a lay witness who had reviewed company communications could opine on what the company executives really "meant"? And of course in the context of criminal prosecutions, allowing case officers to opine about events they did not experience first-hand poses the risk – realized here – that the jury will be swayed by faith in the instincts and judgment of a law enforcement officer.

This was a highly-charged and publicized case in which the government pressed hard to obtain a conviction. Yet the government in this case had no first-hand opinions to offer the jury about the central evidence in the case, nor could it find an expert witness who would agree with its agent's lay conclusions. The result was days of lay testimony shorn of the restrictions the law places on lay and expert opinion testimony. That ruling now threatens the integrity of lay testimony in civil and criminal cases alike, and this Court should grant review.

A. Petitioner's Background

1. Dr. Kifah Jayyousi was born in Jordan in 1961. As a child, he lived as a refugee in Jordan, Egypt, Gaza, and Syria before legally immigrating to the United States in 1979 to attend college. DE1371 at 114-115.[2] After obtaining his degree and moving to New York to work in business, he enlisted in the United States Navy in 1985. *Id.* at 116.

Dr. Jayyousi became a citizen of the United States in 1988, and received secret clearance status from the government in connection with his military work. DE1373 at 9; DE1204 at 32-34. He obtained a Ph.D. from Wayne State University and previously worked as a superintendent for facilities for the school systems in Detroit and Washington, D.C., as an adjunct professor at Wayne State University, and as a consultant for United States military contrac-

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[2] References to record material not included in the petition appendix are denoted by their docket entry (DE) number in the district court record.

tors. *Id.*; DE1121 at 26-27. He is married and has five children. DE1371 at 122.

2. Dr. Jayyousi was a public and prominent supporter of humanitarian Islamic causes in the United States and around the world. DE 1373 at 9-10. Dr. Jayyousi became a leader of a registered nonprofit organization called American Worldwide Relief ("AWR"), formerly known as Save Bosnia Now. DE1114 at 59-60, 69-72; DE1115 at 59. Through AWR, Dr. Jayyousi raised funds to pay for the medical care of Bosnian refugees who had come to San Diego for treatment. *Id.* at 58-59. Dr. Jayyousi also arranged for tens of thousands of pounds of humanitarian aid, including food, medicine, and clothing, to be sent, via Turkey and Azerbaijan, to Muslims facing persecution in Chechnya. DE1114 at 72; DE1115 at 45-46; DE1205 at 78-100.

Dr. Jayyousi also founded the American Islamic Group ("AIG"), a registered nonprofit organization through which he published a newsletter called Islam Report from late 1993 to early 1996. DE1114 at 56-58; DE1115 at 19, 27, 29. Islam Report included, among other things, solicitations for mosques and news about persecution of Muslims overseas. DE1115 at 32-33.

B. Government Investigation

During the 1990s, the government secretly monitored Dr. Jayyousi's telephone calls and faxes as part of an intelligence operation. DE1110 at 73, 123-24. The government also monitored communications made by Adman Hassoun and Jose Padilla. Some of the communications were between Dr. Jayyousi and

Hassoun. There were no communications between Dr. Jayyousi and Padilla. The vast majority of the monitored communications were in Arabic. Pet. App. 10a, 85a. After Dr. Jayyousi moved to Detroit in 1998, law enforcement officials interviewed Dr. Jayyousi on several occasions. DE1121 at 27-29. Dr. Jayyousi gave the government advance notice when he traveled abroad. *Id.* at 29.

C. Criminal Prosecution

Later in 2002, the FBI opened a criminal investigation, and Special Agent John Kavanaugh began reviewing English translations of the phone calls, summaries of the calls, financial records, interview summations, faxes and other documents. Pet. App. 12a. Agent Kavanaugh did not speak Arabic. *Id.* at 85a.

Dr. Jayyousi was indicted in April 2005. He was then indicted on a superseding indictment with Jose Padilla in November 2005. The indictment alleged that Dr. Jayyousi's newsletter, the Islam Report, "promoted violent jihad as a religious obligation, delivered information on violence committed by mujahideen, and solicited donations to support mujahideen operations and mujahideen families." DE141 at 3. The Indictment further alleged that Dr. Jayyousi "actively recruited mujahideen fighters and raised funds for violent jihad." *Id.* The Indictment alleged 78 Overt Acts (only 9 of which concerned Dr. Jayyousi), which primarily concerned participating in "coded" telephone calls allegedly describing terrorist activities. *Id.* at 7-17. Based on these allegations, the Indictment charged three different offenses

against Dr. Jayyousi, all of which concerned conspiring to commit, or providing material support for, acts of murder, maiming, or kidnapping abroad.[3]

The central witness the government presented against Dr. Jayyousi was Agent Kavanaugh, Pet. App. 38a, whose opinion testimony the government stressed would be "very important to the government's case." DE1115 at 152:20-21. Agent Kavanaugh testified for nine trial days during the government's case in chief. This was the first terrorism case in which Agent Kavanaugh had presented testimony, and only his second such case to reach the indictment stage. DE1116 at 19-20. Accordingly, the government offered Agent Kavanaugh as a lay witness rather than as an expert. DE1116 at 20-21, 27-28, 40-41.

The thrust of Agent Kavanaugh's testimony was that he had reviewed the translated transcripts of the monitored communications and developed the opinion that otherwise innocuous terms used in the phone calls had secret meanings. Pet. App. 12a-13a. His testimony was that these terms meant "jihad." In the end, Agent Kavanaugh opined that more than 100 different terms or phrases sometimes (but not

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[3] Count One of the Indictment charged a violation of 18 U.S.C. § 956(a)(1) by conspiring within the United States to commit acts of murder, maiming, or kidnapping abroad. Count Two charged a violation of 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. § 2339A(a) by providing material support to carry out a conspiracy to murder, maim, or kidnap abroad. Count Three charged a violation of 18 U.S.C. §2339A(a) by providing material support knowing and intending that it be used to carry out a conspiracy to murder, maim, or kidnap abroad.

always) secretly referred to "jihad" or similar concepts. These terms included "tourism," "football," "soccer," "trade," "sneakers," "picnic," "branch," "joint venture," and "open the door."[4] *Id.*; *see also id.* at 19 ("Hassoun and Jayyousi used similar phrases when they discussed charitable relief work").

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[4] A sampling of Agent Kavanaugh's testimony includes the following excerpts from his direct examination by the government. E.g., DE1117 at 25:14-19 ("Q. Let me ask you about … the word 'work.' … What does that refer to?" "A. Participation in the jihad."); *id.* at 25:22 - 26:15 ("Q… . Let's talk about the "area that is a little active" phrase, what does that mean? … A. An area where jihad would be occurring, taking place" … "Q. Again the word "action occurs." Define that term[] for us." … "A. Jihad occurring."); *id.* at 29:20-24 ("Q. First of all, the phrase 'best preparation,' do you have an opinion about what he is talking about?" "A. Jihad training."); *id.* at 44:11-18 ("Q. The phrase 'commercial deal,' does that have a meaning to you?" "A. Another phrase to refer to jihad activity."); *id.* at 51:7-8 ("Q. The phrase 'the appropriate work,' what does that mean? A. Jihad."); *id.* at 55:24-56:1 ("Q. You testified earlier that 'tourism' and 'football' meant jihad; do you remember that? A. Yes."); *id.* at 56:19 (""Trade' or 'commerce' is the term used to mean jihad."); DE1140 at 109:13-15 ("Q. This tourism that is being discussed is a reference to what? A. Jihad."); DE1117 at 103:11-17 ("Q. The word 'sneakers,' do you have a general understanding of what this term means? A. Support [for] Jihad in Somalia."); *id.* at 108:15-19 ("Q. First of all, the reference to a picnic, do you have an opinion as to what that refers to? … A. Jihad.); DE1140 at 118:9-19 (testimony regarding fax from Dr. Jayyousi to representatives of Save Bosnia Now) ("Q. Next paragraph, 'I hope that this letter will act as confirmation and renewal of the pledge that our brother Abu Omar took, may Allah have mercy on his soul, in order to serve you in the land of Islam and Europe.' … The reference to serving you entails what? A. Working with Abu Al-Maali and Abu Al-Harif. Q. For what purpose? A. To support their efforts in the jihad in Bosnia.").

Agent Kavanaugh did not give any specific reason as to why he believed these myriad phrases meant jihad. Instead, when asked that question, both on direct and cross-examination, his answer repeatedly was that his opinions were based on "everything he learned in this investigation," Pet App. 86a, or that he felt that the words "were out of place" such that they were not "being used in the normal understanding of the word, at least in my estimation." DE1116 at 90:22-91:11

Defense counsel vigorously objected to the admission of Agent Kavanaugh's testimony, arguing that he could not offer lay opinions about what Dr. Jayyousi "meant" based on his review of translated recordings. DE1116 at 40-41. The trial court stated that it was "concerned" about the admissibility of Agent Kavanaugh's testimony, but ultimately allowed it. *Id.* The one limitation the trial court imposed was that Agent Kavanaugh could opine only that the defendants were speaking about "jihad," rather than "violent jihad," as the government urged. *Id.* Agent Kavanaugh, however, was allowed to opine that the term "jihad" itself meant "battling for the sake of Allah." DE1096 at 43-44.

The government also presented expert testimony about the transcripts from Dr. Ronan Gunaratna, who was qualified as an expert on matters relating to terrorism. Dr. Gunaratna's opinions differed from those of Agent Kavanaugh's. On cross-examination, Dr. Gunaratna conceded that he "discerned no code talk" in the intercepted calls he reviewed involving Dr. Jayyousi. Pet. App. 28a.

In his defense, Dr. Jayyousi presented substantial evidence that he intended to provide humanitarian assistance to Muslims abroad, not to support violent jihad. Pet. App. 6a, 29a-30a. He pointed to expert testimony that the alleged code words that Agent Kavanaugh opined referred to "jihad" were actually normal figures of speech understood by Arabic speakers with more innocuous meanings. Pet. App. 29a; DE1208 at 177-78 (summarizing expert testimony). And Dr. Jayyousi presented evidence that his organization had in fact shipped tens of thousands of pounds of medicine and clothing to Muslims around the world. DE1205 at 59-63.

In closing, the Government relied on Agent Kavanaugh's lay opinion testimony to demonstrate Dr. Jayyousi's alleged bad intent. *E.g.*, DE1208 at 42:5-8 ("Remember, Agent Kavanaugh testified tourism is a code word for jihad. This is the three guys on the bottom saying this is our work, this is what we are agreeing, in the legal concept of conspiracy law, to do.").

On August 16, 2007 the jury found Defendants guilty on all three counts of the Indictment. DE1193. Dr. Jayyousi filed a post-trial motion for a new trial arguing, among other things, that the trial court erroneously allowed Agent Kavanaugh to offer lay opinion as a Rule 701 witness. DE1235. Dr. Jayyousi also filed a post-trial motion for acquittal on all three counts of the Indictment. DE1236. The trial court denied both motions. DE1269; DE1270.

On January 22, 2008, the district court pronounced sentence. DE1373 at 1. The court ultimate-

ly sentenced Dr. Jayyousi to a term of 152 months in prison. Pet. App. 122a.

D. Appeal

Dr. Jayyousi timely appealed to the Eleventh Circuit, which affirmed the conviction in a divided opinion. On appeal, Dr. Jayyousi argued, among other things, that Agent Kavanaugh's lay testimony was not admissible under Rule 701 because it did not meet that Rule's requirements for lay opinion testimony.

The majority disagreed. It acknowledged that Rule 701(a)'s requirement that lay opinion be "rationally based on the perception of the witness" is the "familiar requirement of first-hand knowledge or observation." The majority found that Agent Kavanaugh's testimony met that requirement, even though he was not present at any of the conversations in question, and in fact could not comprehend the conversations in their original Arabic, because it was based on his personal "review of documents." Pet. App. 34a.

As to Rule 701(b)'s requirement that the lay opinion be "helpful … to determining a fact in issue," the majority held that this requirement was satisfied because Agent Kavanaugh's "knowledge of the investigation enabled him to draw inferences about the meanings of code words that the jury could not have readily drawn." Pet. App. 35a. And with respect to 701(c)'s requirement that lay opinion testimony not be based on "scientific, technical, or other specialized knowledge within the scope of Rule 702 [governing expert testimony]," the majority concluded that

Agent Kavanaugh's testimony was permissible because it drew solely upon "his experience from this particular investigation," rather than other expertise. Pet. App. 36a.

Judge Barkett dissented. The dissent found that the "record categorically establishes that Agent Kavanaugh's opinions were not based on anything he rationally perceived through '*first-hand knowledge or observation*.'" Pet. App. 85a (emphasis in original). Instead, Agent Kavanaugh's opinions were solely based on his review of "pre-collected information." *Id.* The dissent argued that the majority's interpretation of the Rule conflicted with decisions of the Eighth and Second Circuits, which, in the case of the decision of the Eighth Circuit, presented "facts materially indistinguishable from those here." *Id.* at 90a (citing *Peoples* and *Garcia*, discussed *infra*).

The dissent also disputed the majority's contention that the testimony satisfied the "helpfulness" requirement of Rule 701(b). Judge Barkett explained that "[a]lthough testimony is certainly 'helpful' when a witness simply agrees with the contentions of one side, that is not the meaning of 'helpful' under Rule 701." *Id.* at 95a. Citing the advisory committee's notes to the Rule and a decision from the First Circuit, the dissent pointed out that lay opinion testimony is not helpful when it "when it does nothing more than give one side's understanding of the evidence." *Id.* at 95a-96a.

Consequently, in the dissent's estimation, "the legal question about the admissibility of his testimony under Rule 701 boils down to the principle that a law

enforcement officer cannot testify about his view of the evidence just because he spent a lot of time investigating the case." *Id.* at 87a, n.5. That the majority did not reach the same result was attributable to the nature of the charged offenses: the dissent concluded by noting that "the old adage that 'hard facts make bad law' is clearly evident here." *Id.* at 120a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS PART OF A DEEPENING SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS.

The courts of appeals are deeply divided over whether lay opinions not based on first-hand perception of the underlying events are admissible under Rule 701. Three Circuits – the Fifth, Tenth, and now the Eleventh – permit witnesses to offer lay opinions based solely on information gathered during an after-the-fact investigation. The Seventh and Ninth Circuits have permitted lay opinion testimony based on a mixture of first- and second-hand knowledge. And five Circuits – the First, Second, Third, Fourth, and Eighth – have held that such testimony does not satisfy Rule 701, and allow a witness to offer lay opinion testimony only about events that the witness personally participated in or contemporaneously observed.[5]

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[5] The remaining two territorial courts of appeals have not addressed the issue directly, although they have suggested that they would come down on the side of the split opposite from the Eleventh Circuit. *See infra* note 8.

1. The Eleventh Circuit found that Rule 701(a) was satisfied because Agent Kavanaugh had personally reviewed transcripts in the case, even though it was uncontested he had no first-hand knowledge of the events. Pet. App. 31a-32a. Like the Eleventh Circuit, the Fifth and Tenth Circuits have also permitted lay opinion testimony with no indication that the agent had perceived the relevant events first-hand. *See United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011) (approving admission of testimony about meaning of wiretapped conversations and recorded videos based on after-the-fact participation in investigation); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1217-22 (10th Cir. 2007) (upholding admission of investigating agent's voice and visual identification of defendant, as well as interpretation of translated transcripts, based on agent's having played recordings multiple times). Under the analysis used by these courts, Rule 701's "first-hand" experience requirement is met so long as the agent has taken part in an investigation, even if the witness has no first-hand knowledge of the particular events in question.[6]

The Seventh Circuit has also, with some reluctance, permitted a lay witness to base his opinions on facts generally gathered in an investigation, including from intercepted phone calls, interviews with witnesses, proffers from members of the conspiracy, and surveillance conducted by the agent and others.

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[6] The Fifth Circuit has arguably gone further and permitted lay opinion testimony drawn from "*past* experiences formed from firsthand observation as an investigative agent." *El-Mezain*, 664 F.3d at 514 (emphasis added).

United States v. Rollins, 544 F.3d 820, 831-32 (7th Cir. 2008). However, the Seventh Circuit in *Rollins* conceded that the case "approaches the line dividing lay opinion testimony from expert opinion testimony," *id.* at 833, and emphasized that the witness had listened to intercepted calls the same day the calls were intercepted, *id.* at 827, and that many of the witness's opinions were based on the combination of contemporaneous surveillance and wiretaps, rather than solely on after-the-fact investigation, *id.* at 831-32. Likewise the Ninth Circuit has permitted lay opinion testimony as to the meaning of ambiguous statements in intercepted phone calls where the witness's understanding "was based on his direct perception of several hours of intercepted conversations – in some instances coupled with direct observation of [the speakers] – and other facts he learned during the investigation." *See United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007); *but see United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993) (rejecting lay opinion identification based on surveillance photo reasoning that because "[t]he jury, after all, was able to view the surveillance photos . . . and make an independent determination," the witness's testimony "ran the risk of invading the province of the jury").

2. Five courts of appeals depart strikingly from the interpretation of Rule 701 adopted by the courts above. For example, the Eighth Circuit has refused to admit testimony in a case with "facts materially indistinguishable from" those here." Pet. App. 90a. In *United States v. Peoples,* "as the recordings of the . . . conversations were played for the jury," an inves-

tigating agent who had no interactions with the defendants before their arrest "was allowed to offer a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant," including the meaning of "plain English words and phrases." 250 F.3d 630, 640 (8th Cir. 2001). The Eighth Circuit cautioned that "[l]ay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying," and held that "[w]hen a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *Id.* at 641; *see also United States v. Cruz*, 285 F.3d 692, 700 n.4 (8th Cir. 2002) (excluding identification testimony when not based on first-hand knowledge as witness was "not more likely to identify Cruz correctly from the photograph than was the jury").

The Fourth Circuit has expressly endorsed the Eighth Circuit's analysis in *Peoples*, holding that an agent's interpretations of intercepted phone calls based on "interviews with suspects and charged members of the conspiracy after listening to the phone calls" were "post-hoc assessments [that could not] be credited as a substitute for the personal knowledge and perception required under Rule 701." *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010). This is because, in the Fourth Circuit's view, "post-wiretap interviews," "statements made by co-defendants," and "experience as a DEA agent" all

constitute "second-hand information" that does not "qualif[y] as the foundational personal perception needed under Rule 701." *Id.* at 292-93. *See also TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994) (witness's testimony was not "based on his own perceptions" when others were his "eyes and ears in the field"); *Certain Underwriters at Lloyd's London v. Sinkovich*, 232 F.3d 200, 204 (4th Cir. 2000) (excluding lay opinion testimony "derived from . . . investigation and . . . analysis of the data" because it is not "first-hand knowledge" as required by the Rule); *United States v. Perkins*, 470 F.3d 150, 155-56 (4th Cir. 2006) ("lay opinion testimony must be based on personal knowledge").

In addition to the above cases, the First, Second, and Third Circuits have all rejected lay testimony not based on personal perception in a host of cases, both in the criminal and civil contexts. *See, e.g.*, *Swajian v. General Motors Corp.,* 916 F.2d 31, 36 (1st Cir. 1990) (excluding testimony where witness did not see key event); *United States v. Garcia*, 413 F.3d 201, 212-13 (2d Cir. 2005) (case agent testimony inadmissible because it does not offer "an insight into an event that was uniquely available to the eyewitness"); *United States v. Glenn*, 312 F.3d 58, 66-67 (2d Cir. 2002) (holding it error to admit opinion testimony that bulge was gun when witness was too far away to have first-hand knowledge under 701); *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 224-28 (3d Cir. 2008) (excluding opinion testimony of whether incident could have been prevented where witness's knowledge was second-hand).

The Courts of Appeals have also rejected a related aspect of the decision below in that they disagree that lay testimony can be helpful under Rule 701(b) where it merely opines on evidence that is before the jury. For the Eleventh Circuit, it was enough that Agent Kavanaugh could guide the jury through the transcripts in front of them, pointing them to "inferences . . . that they could not have readily drawn." Pet. App 35a. Yet the Second Circuit has resoundingly rejected such reasoning, explaining that if testimony of that sort were admissible, "there would be no need for the trial jury to review personally any evidence at all. The jurors could be 'helped' by a summary witness for the Government, who could not only tell them what was in evidence but tell them what inferences to draw from it." *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004); *see also Garcia*, 413 F.3d at 212 (citing *Grinage* and noting that evidence "can only be presented to the jury for it to reach its own conclusion"); *United States v. Meises*, 645 F.3d 5, 21-26 (1st Cir. 2011) (excluding eyewitness testimony about event also seen on video because "[t]he nub of th[e helpfulness] requirement is to exclude testimony where 'the witness is no better suited than the jury' to make the judgment at issue.").

These circuits are equally in disagreement with the Eleventh Circuit's conclusion that lay opinion testimony can be helpful when it summarizes investigative work that has *not* been introduced into evidence. Far from finding that such testimony helps the jury, these circuits have excluded the testimony because it creates an even greater problem of relia-

bility.[7] *Garcia*, 413 F.3d at 213-14; *see also United States v. Dukagjini*, 326 F.3d 45, 58-59 (2d Cir. 2003) (ruling that permitting such testimony is not helpful because it allows a party to skirt the rules of hearsay); *United States v. Vazquez-Rivera*, 665 F.3d 351, 359-64 (1st Cir. 2011) (reversing conviction for soliciting a minor because case agent had relied upon information from others, including hearsay); *cf. Freeman*, 498 F.3d at 903 (holding lay opinion evidence inadmissible where it may have been based on hearsay information).

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In sum, the circuit split presented by this case is deep, mature, and important. Had Agent Kavanaugh's lay opinion testimony been offered in the First, Second, Third, Fourth, or Eighth, it would have been rejected.[8] Only this Court can resolve the split of authority.

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[7] Indeed, these courts have found that when the hearsay evidence is testimonial and there has been no opportunity for cross-examination, such evidence may also violate the Confrontation Clause, whether or not the party "took care not to introduce [the declarant's] actual statements." *Meises*, 645 F.3d at 21-26 (reversing conviction where opinion testimony implicitly revealed testimonial evidence by witness who was not subject to cross-examination); *see also Dukagjini*, 326 F.3d at 59.

[8] While the Sixth and D.C. Circuits have not explicitly addressed the issue, their jurisprudence suggests that they would join these five Circuits. *See United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006) (citing *Peoples* approvingly and noting that "[e]ven before the [2000] amendment, witnesses who performed after-the-fact investigations were generally not allowed to apply specialized knowledge in giving lay testimony"); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003) (upholding,

II. THE DECISION BELOW IS INCORRECT.

In addition to furthering the division in the courts of appeals, the decision below rests on a plainly improper construction of Rule 701(a) and (b).

A. Rule 701(A) Requires First-Hand Perception.

Rule 701(a) requires lay opinion testimony to be "rationally based on the witness's perception." Fed. R. Evid. 701(a). Since the Rule's adoption in 1975, the advisory committee's notes have stated that this provision "is the familiar requirement of first-hand knowledge or observation." As a result, proper Rule 701 opinion testimony must be based on events the witness "personally perceive[d]." 4 Joseph M. McLaughlin et al., *Weinstein's Federal Evidence* 701.03[1] (2d ed. 2011) (citing authority). As the Second Circuit put it, "the rule recognizes the common sense behind the saying that, sometimes, 'you had to be there.'" *Garcia*, 413 F.3d at 211-12. Properly understood, lay opinion testimony thus allows a lay witness to opine that a car that she observed was speeding, or that the defendant appeared agitated when he spoke, or that a substance smelled like ma-

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without comment, exclusion of lay witness because of lack of personal perception); *United States v. Moore*, 651 F.3d 30, 54-61 (D.C. Cir. 2011) (expressing concern regarding whether agent's overview testimony was based on hearsay); *United States v. Wilson*, 605 F.3d 985, 1025-26 (D.C. Cir. 2010) (holding that the basis of an opinion "must come from one of two sources: the firsthand experience of a lay witness or the sort of 'knowledge, skill, experience, training, or education' that would qualify the witness as an expert.").

rijuana. *See* Fed. R. Evid. 701 advisory committee's note.

Agent Kavanaugh's lengthy testimony clearly was not based on first-hand perception. Agent Kavanaugh was not present during any of the conversations at issue, nor did he listen to them in real-time. Indeed, Agent Kavanaugh did not draw any conclusions from the conversations themselves at all because they were in Arabic, a language he does not speak. Instead, he reviewed translated versions of those conversations many years after they originally took place. It was based on this review that he offered his opinion that Dr. Jayyousi was using code words in those conversations and that the code words meant "jihad." *See Garcia*, 413 F.3d 212 n.7 (noting that "any opinion [witness] formed from his review of the recorded conversations could not have been based on his personal perceptions of the participants' discussions but were necessarily informed by what he was told by Spanish-speaking monitors and translators").

There is no way to understand these opinions as being based on first-hand perception without creating an exception that would swallow the rule. To be sure, Agent Kavanaugh had first-hand perception of the transcripts themselves, but that cannot be enough. All opinions are based on perceptions of *something*, but the Rule requires *first-hand* impressions. Reading an eyewitness account of the fall of the Berlin Wall or Boswell's *Life of Johnson* does not give the reader "first-hand" knowledge of the events and people they describe.

The Eleventh Circuit's approach has particularly pernicious effects on the relationship between lay and expert testimony. Experts, of course, are allowed to opine on matters about which they have no first-hand knowledge. Indeed, they may base their testimony on evidence that is itself inadmissible, so long as they do so in the process of applying their expertise and such reliance is standard in their field. *See* Fed. R. Evid. 703; *see also Dukagjini*, 326 F.3d at 58. But experts are allowed this leeway precisely because their testimony is subject to rigorous methodological and procedural safeguards. *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). These rigorous checks ensure that the "expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*

Conversely, lay opinion testimony is not subject to *those* safeguards, but is instead checked by the requirement that it must be based on first-hand perception. If lay opinion about what a defendant "meant" were permitted on the basis of the review of documents, then a party would have a strong incentive not to present expert testimony at all, thereby evading the types of challenges that are typically lodged against experts. For example, a party alleging corporate fraud could put on a witness who had comprehensively reviewed all the relevant communications to opine that, based on his extensive review, the defendant's executives were lying when they wrote that they believed a venture would be successful. Or in an antitrust case, a witness could study the relevant communications and opine about

whether the defendants intended to set prices in concert.

Indeed, this case is a perfect example of how the Eleventh Circuit's rule allows a party to bypass the requirements of expert testimony. The government strongly urged below that Agent Kavanaugh's testimony should be admitted because the government would otherwise be unable to prove its case. Yet the government could – *and actually did* – present opinion testimony about the transcripts through an expert. The problem for the government is that Dr. Gunaratna's testimony was diametrically opposed to Agent Kavanaugh's on this point because the former admitted he "discerned no code talk" by Dr. Jayyousi. Pet. App. 28a. Agent Kavanaugh's testimony was thus necessary to the government's case only in the sense it could not find an expert to offer the same opinions.

B. Testimony Is Not Helpful Under Rule 701(B) Simply Because It Tells The Jury What Inferences To Draw From Evidence.

The Eleventh Circuit also found that the testimony was helpful under Rule 701(b) because Agent Kavanaugh's "knowledge of the investigation" allowed him to lead the jury to "inferences about the meaning of the code words that the jury could not have readily drawn." Pet. App. 35a. The Court emphasized that Agent Kavanuagh's inferences were based on his "examin[ation] [of] thousands of documents, many of which were not admitted into evidence." *Id.* at 34a.

This view is erroneous. Lay opinion testimony is less, not more, helpful when it is based on stacks of

documents "not admitted into evidence." As explained *supra* at 21-22, when a lay opinion witness cannot provide "the unique insights of an eyewitness's personal perceptions," *Garcia*, 413 F.3d at 212, that witness's opinion testimony is not helpful within the meaning of Rule 701(b), *id.* at 214; *Meises*, 645 F.3d at 17. For although such opinion testimony might help its proponent persuade the jury, it does not help the jury "gain 'an accurate reproduction of the event'" about which the witness is testifying. *Garcia*, 413 F.3d at 214 (quoting Fed. R. Evid. 701 advisory committee's note). Indeed, because such testimony just amounts to "choosing up sides," *Cameron v. City of New York*, 598 F.3d 50, 62 (2d Cir. 2010), its admission usurps the jury's proper role, *see Grinage*, 390 F.3d at 750.

Keeping the underlying evidence from the jury only exacerbates the threat that the jury's role as factfinder will be usurped. In such cases, the jury will be unable to judge for itself whether the unspecified evidence actually supports the witness's opinion. This is particularly problematic, where, as here, the witness's opinions are purportedly based on all of the witness's knowledge of the case. Such opinions present two unacceptable risks closely related to those that arise when lay opinion not based on personal perception is admitted. First, there is the risk that the witness's generalized opinions are based at least in part on inadmissible hearsay testimony, *Grinage*, 390 F.3d at 750-51. Under *Crawford v. Washington*, 541 U.S. 36 (2004), admission of these testimonial statements – even indirectly in the form of a lay opinion – violates the Confrontation Clause

unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine the declarant. *See Meises*, 645 F.3d at 19, 21-22 & n.25.

And second, there is the risk the jury will "improperly defer to the [witness's] opinion, thinking his knowledge of pertinent facts more extensive than its own," *Garcia*, 413 F.3d at 215. The problem is particularly acute in a case like this one, in which the lay witness is a law enforcement officer, whose opinions about the culpability of a defendant are likely to be given substantial weight by the jury. *See Meises*, 645 F.3d at 17. Agent Kavanaugh testified for nine days that it was his opinion that Dr. Jayyousi was using a code for jihad. Agent Kavanuagh was free to give this opinion simply on the basis of his conclusion that the words don't "make sense in the context." DE1116 at 90:19. A jury would be likely to credit this testimony simply because it bore the imprimatur of a law enforcement officer who had spent years investigating the defendants. *See Garcia*, 413 F.3d at 213 (explaining that case agent's lay opinion testimony "told the jury that, Klemick, an experienced DEA agent, had determined, based on the total investigation of the charged crimes, that Garcia was a culpable member of the conspiracy"); *Grinage*, 390 F.3d at 750-51 (noting risks that jury would conclude that case agent "had knowledge beyond what was before [the jury]" and would be swayed by agent's "aura of expertise and authority . . . rather than rely on its own interpretation of the calls").

Moreover, the Eleventh Circuit's reasoning would create perverse incentives for the proponents of lay

opinion testimony to keep relevant documentary evidence from the jury in order to ensure the admissibility of the lay opinions on which that evidence is based. Such a regime would be entirely inconsistent with Rules 1002, 1003, and 1004 of the Federal Rules of Evidence, which represent the "elementary wisdom . . . that the document is a more reliable, complete and accurate source of information as to its contents and meaning that anyone's description" of it. *Gordon v. United States*, 344 U.S. 414, 421 (1953).[9]

It is the jury's "singular responsibility to decide [the matters before them] from the evidence admitted at trial." *Garcia*, 413 F.3d at 215. A jury is not helped in meeting that responsibility by lay opinion testimony drawn from inadmissible hearsay or that invites the jury to defer to the witness's superior knowledge of the evidence.[10]

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[9] Where such documents are voluminous, Rule 1006 permits the presentation in the "form of a chart, summary, or calculation" not a general lay opinion as to the ultimate meaning of those materials. *See United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006) ("Charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be accurate and nonprejudicial." (quotation marks omitted)).

[10] Although the Eleventh Circuit found that Agent Kavanaugh was opining on the basis of material not admitted into evidence, the government actually stated at the time of his testimony that all the documents he was relying upon were in evidence. DE1116 at 27:8-14. This does not aid the government. When Agent Kavanaugh testified that it was his opinion that words in the transcripts seemed out of place and meant "jihad," he was

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS THE QUESTION PRESENTED.

Finally, this case, and Dr. Jayyousi's petition in particular, presents an excellent vehicle to review the question presented. The admissibility of Agent Kavanaugh's testimony was fully litigated below, and there is no serious contention that it could be considered harmless error. Reflecting the dearth of other evidence against Dr. Jayyousi, Agent Kavanaugh testified for nine days about the meaning of the call transcripts. His testimony that Dr. Jayyousi's seemingly innocuous conversations were actually code for "jihad" was the lynchpin of the government's case. The government only briefly argued harmless error as an alternative ground in the court below, and the Eleventh Circuit notably declined to suggest it as an alternative basis for its decision.

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offering an opinion that the jury was free to work out for themselves. *See, e.g.*, *Meises*, 645 F.3d at 16 (holding inadmissible lay opinion testimony that the witness had "inferred . . . not from any direct knowledge, but from the same circumstantial evidence that was before the jury"); *Cameron*, 598 F.3d at 67 (holding that witness should not be permitted to testify regarding photos, "which he saw [a] long time after this incident happened" because his opinion was "entirely irrelevant" and "added nothing that the jury could not see for itself by looking at the photos") (quotation marks omitted; bracket in original). The jury had all of the transcripts in question in front of them and was just as capable as Agent Kavanaugh in determining what words appeared to be "out of place" and what the code supposedly meant. The agent's testimony amounted to precisely the type of mere "choosing up sides" that the helpfulness requirement is designed to avoid. Fed. R. Evid. 701 advisory committee's note.

As the cases cited above demonstrate, the question of when to permit a lay opinion testimony concerning the post-hoc review of records is a recurring and important one. And there can be no more important vehicle for addressing that question than where the government seeks to obtain a criminal conviction on the basis of such evidence. This Court should grant review to clarify what Rule 701 requires and confirm that lay opinion testimony not based on first-hand knowledge is inadmissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, versus KIFAH WAEL JAYYOUSI, a.k.a. Abu Mohamed, ADHAM AMIN HASSOUN, Defendants-Appellants, JOSE PADILLA, a.k.a. Ibrahim, a.k.a. Abu Abdullah Al Mujahir, a.k.a. Abu Abu Abdullah the Puerto Rican, Defendant-Appellant, Cross-Appellee.

No. 08-10494

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

September 19, 2011, Decided

September 19, 2011, Filed

JUDGES: Before DUBINA, Chief Judge, BARKETT and PRYOR, Circuit Judges. BARKETT, Circuit Judge, concurring in part, and dissenting in part.

OPINION

DUBINA, Chief Judge:

I. BACKGROUND

A federal grand jury in the Southern District of Florida indicted Appellants Adham Hassoun, Kifah Jayyousi, and Jose Padilla (referred to individually by

name or collectively as "defendants"), along with Mohammed Youssef and Kassem Daher, for offenses relating to their support for Islamist violence overseas.[1] Count 1 charged defendants with conspiring in the United States to murder, kidnap, or maim persons overseas. 18 U.S.C. § 956(a)(1).[2] Count 2 charged defendants with conspiring, in violation of 18 U.S.C. § 371, to commit the substantive 18 U.S.C. § 2339A offense of "provid[ing] material support or resources or conceal[ing] or disguis[ing] the nature, [or] source . . . of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [§ 956(a)(1), i.e., a conspiracy to murder, kidnap or maim overseas]." 18 U.S.C. § 2339A. Count 3 charged defendants with a substantive § 2339A material support offense based upon an underlying § 956(a)(1) conspiracy. The charged conduct began in October of 1993 and continued until November 1, 2001. Before trial, this court reversed the district court's order

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[1] The authorities have not arrested Mohammed Youssef and Kassem Daher, and they remain fugitives.

[2] Specifically, 18 U.S.C. § 956(a)(1) provides:

> Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).

dismissing the most serious count, Count 1, for multiplicity. *United States v. Hassoun,* 476 F.3d 1181 (11th Cir. 2007).

Trial commenced on April 16, 2007, and four months later, the jury returned a special verdict convicting defendants on all counts. The jury expressly found each of the three objects of the Count 1 conspiracy (the murder of persons outside the United States, the kidnapping of persons outside the United States, and the maiming of persons outside the United States) and found that Padilla's and Hassoun's offenses continued beyond October 26, 2001, but Jayyousi's offense did not. The district court denied the defendants' motions for judgment of acquittal and new trial. On Count 1, the district court sentenced Padilla to 208 months, Hassoun to 188 months, and Jayyousi to 152 months' imprisonment. On Count 2, the district court sentenced each defendant to the maximum 60 months' imprisonment. On Count 3, the district court sentenced Padilla and Hassoun to the maximum of 180 months' imprisonment and sentenced Jayyousi to the maximum of 120 months' imprisonment. The district court made all sentences run concurrently and imposed a 20-year period of supervised release for each defendant. The defendants appeal, and the government cross-appeals Padilla's sentence.

II. ISSUES

1. Whether the district court properly admitted the testimony of FBI Agent John Kavanaugh.

2. Whether there is sufficient evidence to support Padilla's convictions on all counts and Jayyousi's conviction on Count 3, the substantive material support offense.

3. Whether the district court properly admitted the expert testimony of Dr. Rohan Gunaratna.

4. Whether the district court properly admitted against Hassoun and Jayyousi portions of a television interview with Osama bin Laden.

5. Whether the district court properly denied Padilla's motion to suppress statements he made during an interview with FBI agents.

6. Whether the district court properly denied Padilla's motion to dismiss his indictment based on alleged outrageous government conduct.

7. Whether the district court precluded Hassoun from admitting evidence of innocent intent.[3]

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[3] Based on our review of the record, we conclude that the district court did not preclude Hassoun from presenting evidence to support his defense of innocent intent. Hassoun presented evidence of Muslim oppression and the genuine relief efforts he

8. Whether the district court properly denied Hassoun's motion for severance.

9. Whether the district court properly applied the terrorism enhancement to defendants' sentences.

10. On cross-appeal, whether the district court erred procedurally or substantively in sentencing Padilla.

III. TRIAL EVIDENCE

The government's theory at trial was that the defendants formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits and equipment overseas to groups that the defendants knew used violence in their efforts to establish Islamic states. The government posited that the defendants' efforts supported an international network of radical Islamists, including al-Qaeda and other terrorist groups such as Maktab al-Khidamat ("MAK"), the precursor to al-Qaeda founded by Palestinian Abdullah Azzam, and The Islamic Group of Egypt founded by an Egyptian cleric, Sheikh Omar Abdel Rahman ("the Blind Sheikh"). The government claimed that each defendant performed an important, but different, role in this support cell. To support its theory, the government presented evidence of

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undertook to assist oppressed Muslims. [Doc. 1201, p. 31-131; Doc. 1246, p. 143-176.]

intercepted telephone calls among defendants, faxes from support groups to defendants, checks and receipts showing financial transactions by defendants, and an al-Qaeda "mujahideen identification form" that the government contended Padilla completed in July 2000, in order to attend a jihad training camp.

The defendants' primary defense was their lack of intent to support a violent form of jihad. They contended that they provided only humanitarian aid to oppressed Muslims and did not knowingly participate in a conspiracy to provide material support or resources for terrorist organizations that engaged in murder, kidnapping, or maiming in their efforts to establish Islamic states.

The government began its presentation of evidence with Jennifer Keenan, an FBI special agent, who was a legal attache in Yemen and Islamabad, Pakistan, in 2001. During this time, United States personnel obtained evidence such as photographs, letters, documents, passports, videotapes, and a blue binder from Kandahar, Afghanistan. The FBI reviewed them for any imminent threat information. The FBI examined the binder for latent fingerprints, but did not translate any of the documents in the binder. [Doc. 1061, p. 9-54.] Tom Langston, a CIA officer, worked in Afghanistan collecting intelligence in support of military operations. He testified that an

individual brought him the blue binder, telling Langston that he discovered it in an office that was formerly used by Arabs. This individual was affiliated with a tribal network that was cooperating with the United States against the Taliban. [*Id.* at 58, 67.]

Peter Carlson, Assistant Special Agent in charge of the Miami, Florida field office for the United States Department of State's Diplomatic Security Service, testified that he issued visas and passports and assisted United States citizens who traveled abroad. [*Id.* at 85.] He identified a certified copy of Padilla's passport application that he received from Washington, D.C., copies of Padilla's social security card and driver's license, and a certified copy of a passport application that Padilla made in February 2001 in Karachi, Pakistan. [*Id.* at 101; Gov't Ex. 408, 408A, 408D, 409.] Carlson also identified a photocopy of the signature page and face page of Padilla's allegedly lost 1996 passport. [*Id.*; Gov't Ex. 409A.] John Morgan, a fingerprint specialist, compared the prints from the blue binder with the FBI's print card containing Padilla's prints. [Doc. 1098, p. 22.] He identified Padilla's prints on the front and back of a "mujahideen identification form," which was in the blue binder. [*Id.* at 35.] An FBI language analyst and interpreter, Nancy Khouri, translated the documents in the blue binder, 403TR-A through 403TR-E, from Arabic to English. She testified that the identification

form had "Top Secret" on the bottom of it, and the applicant noted on the form that "Abu al-Fida" recommended him. [*Id.* at 148-49.] The applicant also noted that he had traveled to Egypt for study, Saudi Arabia for hajj (pilgrimage), and Yemen for jihad. [*Id.*] The applicant answered some questions in Arabic, stated that his country was the United States, and gave his date of birth as 10/18/70, which was the same as the birth date on Padilla's passport. [*Id.* at 144, 148.]

The government then presented evidence from FBI language specialists and agents identifying numerous exhibits containing translated summaries of intercepted phone calls. One language specialist testified that he reviewed verbatim transcripts of the calls and made verbatim translations. [Doc. 1099, p. 61.] When he drafted the summaries, he listened to the calls while he read the translations to ensure a proper and accurate summary. [*Id.* at 80.] FBI Agent Kent Hukill testified that Hassoun was the subject of an intelligence investigation that Hukill, along with other agents, began in May 2002. [Doc. 1110, p. 77.] The agents reviewed the audio summaries and identified the other defendants as part of the investigation. [*Id.* at 90-91.] Agent Hukill interviewed Hassoun numerous times and identified his voice on the recordings. [*Id.* at 106.] He testified that the agents used verbatim transcripts of the pertinent call

summaries, which numbered 700 out of 150,000 total calls. [*Id.* at 124.] He acknowledged that Padilla's voice was identified on only seven of the calls. [*Id.* at 162.]

Another government witness, Yahya Abrahim Goba, testified that he attended an al-Qaeda camp for the purpose of preparing for jihad, which he defined as military fighting. [Doc. 1383, p. 52.] When he obtained a visa from the Pakistani Consulate en route to training camp, Goba told the personnel that he was going to Afghanistan for "tourism." [*Id.* at 61.] Goba stated that an individual who wanted to attend camp had to have a known and trusted al-Qaeda contact recommend him. [*Id.* at 59.] Goba explained that the camp participants stopped at "guest houses" in Pakistan that were managed by the Taliban and used for new recruits. Guards armed with AK-47 machine guns were at the guest houses. [*Id.* at 72.] When a participant arrived at the guest house, he relinquished his passport and other personal belongings to a trustee and filled out paperwork using an alias. [*Id.* at 79-82.] Goba stated that a recruit participated in basic training at the camps, which included war tactics, topography, and instruction with firearms and explosives such as hand grenades, land mines and Molotov cocktails. [*Id.* at 98.] Goba emphasized that no humanitarian work occurred at

the guest houses, and the recruits all practiced military jihad at the camp. [*Id.* at 195, 202.]

Other FBI language specialists testified regarding the translations of the intercepted telephone calls. [Doc. 1111.] Fady Haydar stated that in numerous calls, individuals referred to Padilla as "Ibrahim," "Abu Abdullah," or the "Spanish Brother." [*Id.* at 56.] Baria Dagher commented that Hassoun and Jayyousi were the primary participants in the intercepted calls he translated, and Joyce Kandalaft stated that she recognized the voices of Hassoun, Jayyousi, Kaseem Daher, and Mohammad Youssef on the calls, and she noted that the individuals often used nicknames. [*Id.* at 160.] The government admitted the audiotapes through FBI Agent Russell Fincher, a counter-terrorism agent who listened to numerous audio tapes and read transcripts while listening to the tapes. Agent Fincher also interviewed Padilla at the Chicago O'Hare airport on May 8, 2002. [Doc. 1100, p. 44-94.] The district court admitted the tapes and transcripts over the defendants' authentication and relevancy objections. [*Id.* at 154.]

The government also presented the testimony of two individuals who met some of the defendants at a mosque. Herbert Atwell testified that he attended a mosque in South Florida where he met Hassoun and Padilla. [Doc. 1114, p. 6-48.] Atwell stated that Hassoun would invite people in the mosque to be

mujahideen fighters, but that Hassoun was not recruiting people to be terrorist fighters. [*Id.* at 25.] Atwell understood that the mujahideen fight in wars for the cause of Islam. [*Id.* at 43.] Jeremy Collins testified that he met Jayyousi at a mosque in California, and after becoming friends with Jayyousi, learned that he was publishing a newsletter, "The Islam Report." [*Id.* at 49.] Collins stated that Jayyousi was particularly concerned about the Blind Sheikh, who was convicted of conspiring to blow up the World Trade Center, and solicited funds for his defense. [*Id.* at 64.]

Collins also met Mohamed Zaky at the California mosque and learned that Zaky was forming an organization called "Save Bosnia Now," which he later renamed "American Worldwide Relief" ("AWR"), and this group worked with the American Islamic Group. Collins performed several duties for AWR--he paid bills, deposited checks, purchased medicine to send to Chechnya, sent sleeping bags and shoes to Chechnya on behalf of AWR, and purchased minutes for satellite phones AWR sent to Chechnya. [*Id.* at 70-77.] Later, AWR learned that the satellite phones had been disconnected. AWR also sent hand-held walkie-talkies to Chechnya. Jayyousi was President of AWR and made the decisions about where the organization sent its aid. [*Id.* at 83, 111, 120]. Collins stated that at some point he became concerned that

AWR might be involved in more than humanitarian aid to the Chechen refugees. [*Id.* at 88.] Collins began to distance himself from AWR because the organization's work "seemed to be more fighting than relief work." [Doc. 1115, p. 81.]

A. FBI Agent John Kavanaugh's testimony

Over the defendants' objections, the government presented the lay opinion testimony of FBI Agent John Kavanaugh, who began working on the present case in May 2002. [Doc. 1116, 1117, 1118, 1119, 1123, 1120, 1121, 1140, 1141, 1393.] Agent Kavanaugh reviewed the telephone intercepts, the summaries for the intercepts, financial records, interview summations, faxes, and other documents pertaining to the case. Based on the present investigation and his participation in over 20 terrorist-related cases, he remarked that the people who were involved in terrorism-related cases used code words in their communications. [Doc. 1116, p. 90-91.] In reviewing the intercepted calls in this case, Agent Kavanaugh noticed the use of code words such as "football" and "soccer" for jihad; "tourism" for jihad; "tourist" for mujahideen; "sneakers" for support; "going on the picnic" for travel to jihad; "married" for martyrdom; "trade" for jihad; "open up a market" for opening a group in support of jihad; open up a "branch" for starting a jihad support group; "the first area" for Afghanistan; "school over there to teach football" for a

place to train in jihad; "students" for Taliban; "iron" for weapon; "joint venture" for a group of mujahideen; "full sponsorship" for income for room and board (at training camp); and "open the door" for opportunity to go to jihad. [Doc. 1116, p. 91, 141, 161; Doc. 1117, p. 21-61, 100, 105; Doc. 1118, p. 20-126.] Agent Kavanaugh stated that he knew the speakers were using code words because on some occasions they said they were, and at other times he could detect the speakers were using code words by the context of the conversations. [Doc. 1116, p. 90-91.] The agent mentioned that the FBI did summarize a few of the satellite calls, but they were not produced in full transcript form. [Doc. 1121, p. 19.] He testified that the satellite phones were purchased through the AWR organization.

Agent Kavanaugh testified that the defendants were also secretive in their communications. The speakers on the intercepted calls mentioned that they were not to discuss any "relief" matters over the phone [*Id.* at 99.]; that they knew the lines were always monitored [*Id.* at 105.]; and that they did not like to "name names or areas" during phone conversations. [Doc. 1141, p. 131-33.] Jayyousi mentioned in one of the intercepted calls that "all these calls are recorded." [Doc. 1141, p. 146.]

Agent Kavanaugh stated that it was not unusual for these individuals to use nicknames in their

intercepted communications. In one call, Youssef referred to Hassoun by his nickname, Abu Sayyaf. [Doc. 1118, p. 20, 28-29.] In a call between Hassoun and Youssef, Hassoun stated that they were sending the "Spanish Brother"--Padilla--to Kosovo, where Youssef was participating with Kosovar Muslims in a fight with the Serbian government. [Doc. 1118, p. 33-35.] In another call between Hassoun, Youssef, and an unidentified male, they referred to Padilla as "the Puerto Rican" because of his Puerto Rican descent. [Doc. 1118, p. 81.] Defendants also referred to Padilla by other names, such as "Ibrahim" and "Ukasha." [Doc. 1116, p. 167; Doc. 1117, p. 33; Doc. 1118, p. 35, 37, 81-82; Doc. 1119, p. 33; Doc. 1123, p. 85.]

Agent Kavanaugh testified about Hassoun, Youssef, and Padilla's plans for Padilla to travel to Kosovo. [Doc. 1118, Gov't Ex. 107TR.] They discussed Padilla's visit with the Blind Sheikh. [Doc. 1116, p. 167.] In a call between Hassoun and Youssef, Youssef mentioned his "partner," Padilla, in their discussions about travel arrangements to Afghanistan. [Doc. 1117, p. 31-33 (Youssef mentions to Hassoun that Ibrahim will be in agreement to join Youssef).] In another call between Hassoun, Padilla, and others, Padilla stated that an individual needed discipline and obedience to participate in a jihad. [Doc. 1117, p. 105; Gov't Ex. 81TR.]

The agent also mentioned several intercepted calls discussing Padilla's travel to Egypt. While Youssef was in Egypt, Hassoun discussed with another individual who attended the South Florida mosque that he was getting together some money for Padilla to travel to Egypt. [Doc. 1118, p. 75-76.] Several months later Padilla traveled to Egypt, where he and Hassoun discussed Padilla's finances. [*Id.* at 95-125.] In October 1998, Hassoun conversed with Youssef, who was in Egypt, and an unidentified male, and in response to Hassoun's inquiry about the Puerto Rican, Youssef responded that Padilla was happy; he was next to him in the building. [*Id.* at 80-81; Gov't Ex. 110TR.] During this October call, Hassoun and Youssef discussed finances, particularly Padilla's monthly expenses. [*Id.* at 83.] During this same call, Hassoun referenced other people traveling from the United States to Egypt because they "have established the groundwork through Ibrahim." [*Id.* at 84.]

Furthermore, while Padilla was still in Egypt, he spoke with Hassoun about finances again and asked Hassoun to send him some money. Hassoun told Padilla that he would send him "one grand." [*Id.* at 103.] In a later call, Padilla mentioned to Hassoun that he asked a sister (it was unclear from the record exactly who Padilla asked to assist him) to tell his mother to send him an Army jacket, book bag, and

sleeping bag so he would be ready when "the door opened." [*Id.* at 108-14.] Also during this time, in October 1999, Hassoun and Padilla conversed about the lack of information Padilla was receiving in Egypt. [*Id.* at 123; Gov't Ex. 116TR.] Agent Kavanaugh stated that the information to which Padilla referred regarded the occurrence of jihads. [*Id.* at 126-130.] Hassoun told Padilla to prepare financially so he could be ready to move to "some area close by." [*Id.*] Later in the conversation, they discussed whether Padilla would travel to Yemen. Padilla told Hassoun that he did not know if the brothers were good or whether he needed a recommendation to connect him with the "good brothers with the right faith." [*Id.* at 134.] Agent Kavanaugh opined that he understood the good brothers to be people who shared the same view of Islam as Padilla did. [*Id.* at 135.]

In a September 2000 call between Hassoun, Youssef, and an unidentified female, Youssef mentioned that he would be over at "[O]sama's," and Padilla was expected to be there. [Doc. 1119, p. 33, 44; Gov't Ex. 403TR (English translation of Arabic mujahideen data form dated July 24, 2000).] Agent Kavanaugh understood this to be a reference to Osama bin Laden. [*Id.*] In another call, Youssef told Hassoun and another individual that he traveled to Azerbaijan, near Chechnya, and Padilla went to Al

Muqbil, Yemen. [*Id.* at 87-88.] Padilla told Hassoun that he performed the jihad and met some brothers from Yemen. [Doc. 1121, p. 170-172.]

Agent Kavanaugh testified that the defendants referenced other terrorist groups and leaders in their conversations. [Doc. 1116.] Hassoun mentioned Sheikh Abu Azzam, leader of MAK. [*Id.* at 145.] In one call, Youssef mentioned to Jayyousi that he and Padilla wanted to visit the Blind Sheikh (Islamic Group of Egypt). [Doc. 1116, p. 167.] Hassoun and Youssef discussed Dr. Ayman al-Zawahiri and Abu Fayez ("Mohammad Chehade"), the leader of the Global Relief Foundation. [Doc. 1118, p. 20.]

Agent Kavanaugh also testified about a fax that Hassoun received that contained two documents. [Doc. 1117, p. 78; Govt' Ex. 212FT.] One of the documents was a letter about an issue in Ogaden, Ethiopia, and the second one was a communique involving Libya. The letter mentioned the killing of 200 infidels, which referenced the number of Ethiopian soldiers who were killed by the Muslim brothers. In a call regarding the fax, Hassoun told Youssef that 56 of the brothers were "married there," which indicated that they were martyred during the fighting. [Doc. 1117, p. 73; Gov't Ex. 212FT.] Hassoun also stated that the Ethiopian army moved in with tanks and armored vehicles and the brothers launched a counterattack and drove them away. [*Id.*

at 76] Hassoun mentioned that there were heavy casualties, and that the "dogs" were helping the Ethiopian Army. [*Id.*] Agent Kavanaugh opined that he understood the reference to the dogs as being a reference to the United States government. [*Id.* at 77.]

Agent Kavanaugh interpreted a call between Hassoun, Kassem Daher, and another individual, in which Hassoun stated that "they [were] playing football in Somalia" and they needed to send "sneakers" over there. [Doc. 1117, p. 102-03 (stating that Hassoun meant jihad and support for jihad).] In a lengthy call in August 1998, Youssef called Hassoun from Egypt to inform Hassoun that the "joint venture" they had formed resulted in the loss of 70. [Doc. 1118, p. 58.] Hassoun responded that "70 got married completely." [*Id.*] Youssef then talked about the various groups he encountered in Kosovo and told Hassoun that they thought of joining brothers in another town, but by the time they wanted to join the "club," it was being shelled heavily by the enemy. [*Id.* at 64.] Hassoun asked Youssef if they had "balls and clothes and everything, sports equipment?" [*Id.* at 65.] Agent Kavanaugh opined that these words indicated weaponry. [*Id.*]

Agent Kavanaugh identified banking records associated with Hassoun. [Doc. 1117, p. 103, Gov't Ex. 600A-E.] One of the checks, dated 1/31/97, was addressed to Kassem Daher for the amount of $2,000

and the word "Somalia" was written on the reference line. The check was written five days after a phone call in which Hassoun discussed playing football in Somalia. [*Id.* at 104-05.] Agent Kavanaugh identified a cashier's check written by Hassoun for $5,000 to Mohammad Hisham Sayefedeen, part of Youssef's full name, that appeared in wiretap intercepts and Youssef's passport. [*Id.* at 137-38, Gov't Ex. 413.] The government introduced a deposit slip for $5,000 in the name of Hassoun. [*Id.* At 140, Gov't Ex. 600D.] The agent identified a financial document involving a wire transfer from Hassoun to Mohammad Hisham Youssef. [*Id.* at 141, Gov't Ex. 601.] The government presented Hassoun's credit card statement for June/July 1998, and the agent identified the $5,242 transaction as the amount for the wire transfer reflected in government's exhibit 413. [*Id.* at 143-44, Gov't Ex. 602.] The agent also identified several other checks from Hassoun. [Doc. 1141, p. 36-91.] There were two checks from Hassoun to Global Relief Foundation--each in the amount of $2,500--with one check containing the words "tourism" and "Chechen information" on the memo line, along with a quote from the Koran.

Defendants elicited from Agent Kavanaugh the fact that Padilla was involved in very few phone calls; that Padilla did not use code words in his conversations [Doc. 1121, p. 58-172.]; and that

Hassoun and Jayyousi used similar phrases when they discussed charitable relief work. [Doc. 1119, p. 88; Doc. 1123; Doc. 1120; Doc. 1121, Doc. 1140.] Agent Kavanaugh acknowledged that the government did not intercept any calls between Padilla and Youssef. [Doc. 1121, p. 58-172.] Defendants questioned Agent Kavanaugh about many calls involving the defendants' relief work to show the jury that they lacked the intent necessary to commit the charged crimes. [Doc. 1140, p. 53.]

B. Dr. Rohan Gunaratna's testimony

The government also presented historical background information about conflict zones and key figures in the violent Islamic movement through the testimony of Dr. Rohan Gunaratna, the head of the International Center for Political Violence and Terrorism Research in Asia. Dr. Gunaratna testified about the characteristics of the support cells upon which the violent Islamic movement relies. [Doc. 1393, p. 114-184; Doc. 1137; Doc. 1138; Doc. 1139; Doc. 1136, Doc. 1394; Doc. 1157; Doc. 1158.] Dr. Gunaratna had studied the fields of terrorism and political religious violence for about twenty-five years and had been a teaching fellow at the U.S. Military Academy and at the Fletcher School for Law and Diplomacy at the Egyptian Center for Counter Terrorism Studies. He testified that the International Center manages one of the largest terrorism

databases in the world, and it creates counter-terrorism research centers in conflict zones such as Kabul, Afghanistan, and Pakistan. He explained that the International Center works with a number of governments and countries around the world to create environments that hinder terrorist support.

Dr. Gunaratna testified that he had a special focus on Islamic organizations from 1993 to 1996, particularly organizations advocating jihad. He authored ten books, one entitled "Inside Al-Qaeda," and he had been an expert witness in terrorism cases for both the prosecution and the defense. While conducting his research into al-Qaeda, he interviewed members of Islamist radical groups, spoke to academicians, and traveled to countries where radical Islamist violence occurred, such as Pakistan and Iraq. The district court admitted him as an expert in the area of al-Qaeda and its associated groups and in the area of international terrorism. [Doc. 1393, p. 134.]

Dr. Gunaratna provided background information on al-Qaeda and Osama bin Laden, a Saudi who moved to Pakistan and founded al-Qaeda, an organization committed to establishing Islamic states based on Islamic law. Islamic law is historically opposed to the political process and to democratic regimes. [Doc. 1393, p. 135-39.] Abdullah Azzam helped found the predecessor of al-Qaeda, and he was

a key ideologue of the jihadist movement. [*Id.*] Abdullah Azzam consistently campaigned for the creation of Sharia-based Islamic states (states governed by strict imposition of Islamic laws), and had no problem with using force to achieve his political objectives. When he used the word "jihad," he meant the use of violence. [*Id.*] Abdullah Azzam and bin Laden created MAK, an organization to recruit and assist fighters coming to Afghanistan. In November 1989, Abdullah Azzam was killed, and bin Laden took control of MAK and created al-Qaeda to work with MAK to support different jihadist groups which were fighting globally. Al-Qaeda had a military training camp on the Afghanistan/Pakistan border. [*Id.* at p. 144-155.]

Dr. Gunaratna testified that al-Qaeda established and managed the Advice and Reformation Committee to distribute propaganda. This committee had an office in the United Kingdom, and Khalid al-Fawwaz served as the leader. Dr. Gunaratna acknowledged that Jayyousi received a fax from this committee, informing Jayyousi that al-Fawwaz had been appointed as bin Laden's representative to operate in that region. He acknowledged that this publication, which Jayyousi received via fax, was sent to a specific group of people. [*Id.* at 158-63.] He stated that al-Qaeda had relationships with other radical Islamist groups outside of Afghanistan, and it

provided support for these like-minded groups. [*Id.* at 169-70.]

Dr. Gunaratna also provided information regarding the support cells that provide assistance to terrorist and militant organizations. He stated that the support cells provide funds, transportation, safe houses, communications, training, and recruitment. He explained that these cells operate through "front" organizations, such as community, religious, humanitarian, and educational charities. [*Id.* at 173-80.] He also testified that in his research, he learned that members of these support cells and groups use code words and double talk in their communications by substituting key words likely to draw suspicion with more common verbiage. [*Id.* at 181.]

In reviewing the telephone intercepts in this case, Dr. Gunaratna opined that the defendants used code words in some of their communications. When they used the word "tourism," that meant armed jihad; the word "football and/or soccer" meant fighting or combat; the phrase "to be married" referred to going to paradise or martyrdom; the phrase "first area" meant Pakistan or Afghanistan; the word "screws" meant bullets; the word "eggplant" meant a rocket propelled grenade launcher; and other words denoting fruits and vegetables were used as codes for arms. [Doc. 1137, p. 11-15.] He noted that many of

these words were in other transcripts that he reviewed between radical Islamist groups and their supporters. [*Id.* at 12.] His interpretation of the code words' meanings was similar to Agent Kavanaugh's testimony, except that Dr. Gunaratna opined that when the defendants used the word jihad, they meant the violent or armed jihad, whereas the agent did not specify if the word jihad meant violent or peaceful jihad.

Dr. Gunaratna testified that during a phone call, Hassoun referenced bin Laden by his nickname, "Abu Abdallah," which was known only by his supporters. [*Id.* at 27.] In a later call, Jayyousi mentioned bin Laden's mentor, Sheikh Salman, and mentioned a CNN interview with bin Laden that showed the radical Islamic violence in Somalia during that time period. Both Hassoun and Jayyousi discussed a statement or "fatwa" (a religious opinion usually issued by established religious leaders but also issued by radical leaders) that threatened America. Dr. Gunaratna opined that this fatwa the defendants discussed was "very likely" the same fatwa issued by bin Laden in August 1996. [*Id.* at 52-53.] In that same call, Jayyousi mentioned Armed Islamic Group, which was one of the most violent groups and wanted to establish an Islamic state in Algeria. [*Id.* at 58.] In commenting on a statement by Hassoun that MAK can deal with "these people" by "the sword," Dr.

Gunaratna testified that "these people" meant the people in the White House, and by "the sword" was a term commonly used by the MAK leader and radical Islamists. [*Id.* at 72.]

The government presented other calls in which the defendants discussed the Chechen conflict. Dr. Gunaratna explained that the Chechens were Muslims who lived in Russia and were attempting to separate from Russia. [*Id.* at 94-132.] At some point, the Arab mujahideen assisted the Chechen separatists, and Ibham Omar al Khattab--together with bin Laden and Fat'hi Shishani, leader of the International Islamic Brigade--fought with the Afghans against the Soviets. Shishani's group was violent and wanted to create Islamic states wherever Muslims lived; this group was an extension of al-Qaeda. [*Id.* at 104-06.] Dr. Gunaratna testified that the foreign mujahideen fighters in Chechnya engaged in a lot of violence; killings, suicide attacks, and martyrdom were common. [*Id.* at 108.] He stated that al-Qaeda provided financial support directly to the fighters in the Chechen conflict. [*Id.* at 117.] Dr. Gunaratna also commented on calls between some of the defendants in which they discussed the success of the Chechen conflict, evidenced by the fact that the Russian flag was no longer flying over the Chechen capital of Grozny. They also discussed the provision of funds to the Chechen separatists. [*Id.* at 111-22.]

Dr. Gunaratna described the conflict in the Muslim area of Kosovo, Yugoslavia that occurred in the 1990s. [*Id.* at 143.] Foreign mujahideen assisted in this conflict, later establishing a presence in bordering Albania. Al-Qaeda provided financial and other support to these fighters in Kosovo. The Kosovar people opposed these fighters because the people perceived them as too violent. Dr. Gunaratna commented on a call in which Youssef informed Hassoun that he was in Albania, which was the launching pad for the Arab mujahideen to enter Kosovo. [*Id.* at 149.]

Dr. Gunaratna testified that al-Qaeda's most significant number of training camps was in Afghanistan, and their purpose was to train people to participate in violence. [Doc. 1139, p. 7.] "Al-Qaeda's premier facility for providing training in the 1990's was the al-Frooq camp" near Kandahar. [*Id.* at 10.] He commented on the secrecy of the training camps and the necessity of having an individual recommend you for training, especially for American Muslims. He stated that al-Qaeda kept records on the people who attended the training camps, and the attendees had to complete a mujahideen application form. He noted that a number of these forms were discovered from various Arab safe houses and training camps. [*Id.* at 19-30.] He testified that a new recruit could not

provide his real name on the identification form. [*Id.* at 31.]

The government questioned Dr. Gunaratna regarding other intercepted calls he reviewed. In one call, Hassoun identified himself with the Abu Muhjin group, and he discussed al-Ittihad al-Islami. Dr. Gunaratna stated that both of these groups are radical Islamic groups. [Doc. 1158, p. 145.] He also commented on several calls involving Jayyousi. In one call, Jayyousi referred to funds for preparations and referred to the "first area"--code for Afghanistan. [*Id.* at 146-47.] In another call, Jayyousi spoke to the Blind Sheikh and referred to Chechnya, saying that the government was an Islamic government, "but it is full of heresy." Dr. Gunaratna noted that this statement was consistent with the view of establishing an Islamic state in Chechnya. [*Id.* at 168.] Jayyousi also referred to bin Laden in another call and discussed a fundraiser to collect money to send to Afghanistan. Jayyousi clarified that the brother of whom he spoke was Arab, not Afghani, which Dr. Gunaratna testified was an important distinction because the terrorist groups wanted to support primarily the Arab mujahideen. [*Id.* at 177-79.]

On cross-examination, defendants attacked Dr. Gunaratna's credibility and his qualifications as an expert. [Doc. 1139, p. 71; Doc. 1136; Doc. 1394; Doc.

1157.] They did elicit from Dr. Gunaratna that he had not listed AWR and Save Bosnia Now as cover organizations for jihad terrorist groups; however, he did list the Islamic Group of Egypt as one. [Doc. 1157, p. 96.] He acknowledged that in the intercepted calls he reviewed involving Jayyousi, he discerned no code talk. [*Id.* at 113.]

The government presented several other witnesses in its case-in-chief. A Department of Defense employee testified that he performed a personnel search on Padilla and discovered that Padilla did not serve in the military. [Doc. 1159, p. 21.] FBI Agent Russell Fincher testified that he interviewed Padilla at the Chicago O'Hare airport in 2002. [*Id.* at 90-101.] Fincher stated that Padilla acknowledged some of his travels, but was evasive regarding his overseas travel. Joyce Kandalaft, a contract linguist with the FBI, identified several documents: two checks from Hassoun to the Canadian Islamic Association, one in the amount of $8,000 for "tourism" and another in the amount of $3,000 for "tourism" and "tourists"; a check from Hassoun to AWR in the amount of $5,000 "for the brothers"; a check from Hassoun to Jayyousi for $600; several checks from Hassoun to Global Relief, one in the amount of $5,000 for "Kosovo," one in the amount of $600 for "Kosovo support," one with "Chechen tourism and media" and a Koranic verse on it, and

one in the amount of $2,000 for "Afghan Relief." [Doc. 1160, p. 7, Gov't Ex. 600H-R.] The government also presented a portion of a CNN videotape of an interview with Osama bin Laden. [Doc. 1137, p. 32.]

C. Defense case

The defendants presented an expert in English/Arabic interpretation and translation to challenge the government's evidence regarding the defendants' use of code words. [Doc. 1200.] He testified that many of the alleged code words had other, more innocuous meanings than indicated by the government witnesses. He stated that a mujahid is someone who fights for a cause, either religious or political, or it can mean a person who provides a service for the infirm or for refugees. [*Id.* at 71, 97.] However, he acknowledged that most of the government's translations were correct. [*Id.* at 127-28.]

An Iman, a religious leader in the Muslim community, testified that he met Hassoun at a Florida mosque. [Doc. 1201.] He testified that the mosque was very involved in charity and "alms giving," and the mosque collected money for victimized Muslims in other countries. Hassoun asked him for permission to hold fundraisers in the mosque for projects in Bosnia, Kosovo, and Chechnya. The Iman testified that Hassoun did not recruit

mujahideen fighters within the mosque. Hassoun presented the testimony of his father-in-law, who testified that he and Hassoun were joking when they spoke of belonging to Abu Muhjin. [Doc. 1203, p. 45-59.] The other defense witnesses were character witnesses, such as co-workers and people who participated in humanitarian relief efforts with some of the defendants. [Doc. 1246, 1204, 1205.]

IV. DISCUSSION

A. Admission of Agent Kavanaugh's testimony

Defendants challenge the district court's admission of Agent Kavanaugh's testimony under Federal Rule of Evidence 701, specifically arguing that the district court abused its discretion in allowing Agent Kavanaugh to testify regarding his interpretation of the meanings of alleged code words the defendants used in the telephone intercepts. They argue that the agent should not have been allowed to proffer his lay opinion because he was not present during all of the intercepted calls and he did not have a rationally based perception of what the individuals meant when they used the code words. We review the district court's ruling regarding the admissibility of the agent's lay testimony under Rule 701 for a clear abuse of discretion. *See United States v. Myers*, 972 F.2d 1566, 1576-77 (11th Cir. 1992).

Rule 701 allows a lay witness to offer opinions or inferences if they are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Subsection "(a) is the familiar requirement of first-hand knowledge or observation" and the limitation in (b) is phrased in terms of requiring that the lay witness's testimony be helpful in resolving issues. *Id.* advisory committee's note. In the 2000 Amendments, Rule 701 was changed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *Id.* advisory committee's note.[4]

Agent Kavanaugh's testimony was rationally based on his perception. While investigating this case for five years, Agent Kavanaugh read thousands of wiretap summaries plus hundreds of verbatim

[4] Rule 702 provides that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

transcripts, as well as faxes, publications, and speeches. He listened to the intercepted calls in English and Arabic.

At trial, defendants objected to Agent Kavanaugh's opinion testimony because he did not personally observe or participate in the defendants' conversations and based his testimony largely on documents admitted into evidence. We have never held that a lay witness must be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation. We have allowed a lay witness to base his opinion testimony on his examination of documents even when the witness was not involved in the activity about which he testified. We have held that the testimony of a financial analyst of the FBI who "simply reviewed and summarized over seven thousand financial documents," was properly admitted under Rule 701 in *United States v. Hamaker*, 455 F.3d 1316, 1331-32 (11th Cir. 2006). The financial analyst of the FBI in *Hamaker* "added and substracted numbers from a long catalogue of . . . records, and then compared those numbers in a straightforward fashion." *Id.* The testimony was "rationally based on the perception of the witness." *Id.* at 1332 (quoting Fed. R. Evid. 701). We have also held that testimony of a lay witness in a prosecution for Medicare fraud was "based on 'first hand knowledge

or observation,'" *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984) (quoting Fed. R. Evid. 701 advisory committee note), when it was "based on [the witness's] own examination of . . . store[] records," *id.*

Defendants rely on *United States v. Cano*, 289 F.3d 1354 (11th Cir. 2002), to support their argument, but their reliance is misplaced. In *Cano*, a cocaine trafficking and money laundering case, the government proffered Case Agent Donnelly to testify regarding the "hieroglyphics" or symbols contained in a defendant's phone book. *Id.* at 1360-61. The government did not proffer the agent as an expert. *Id.* at 1360. The agent "decipher[ed] the hieroglyphics-by correlating the ten digit telephone number of members of the conspiracy (obtained from the wiretaps) with the ten hieroglyphic symbols opposite their names in the phone book." *Id.* at 1360-61. For the first time on appeal, the defendants objected, based on Rule 701(a), to Agent Donnelly's testimony regarding his deciphering. We agreed with the defendants that the agent was prohibited from testifying about the meaning of a simple code that the jury could have deciphered easily based on evidence admitted at the trial, *id.* at 1363-64, but based on the overwhelming evidence of guilt, we concluded that the error did not affect the defendants' substantial rights. *Id.* at 1364.

In the present case, Agent Kavanaugh testified about the meanings of code words that he learned through his examination of voluminous documents during a five-year investigation. His testimony was more similar to the lay testimony held admissible in *Hamaker* and *Gold* than the testimony held inadmissible in *Cano*. Just as the testimony of the lay witnesses in *Hamaker* and *Gold* was "rationally based," Fed. R. Evid. 701(a), on their perception of business records, Agent Kavanaugh's testimony was also based on a review of documents and "rationally based on [his] perception," *id.* By contrast, Agent Donnelly "merely delivered a jury argument from the witness stand" when he drew "inferences . . . based on facts already in evidence." *Cano,* 289 F.3d at 1363. But Agent Kavanaugh had examined thousands of documents, many of which were not admitted into evidence. Agent Donnelly deciphered only a simple code, but Agent Kavanaugh's familiarity with the investigation allowed him to perceive the meaning of coded language that the jury could not have readily discerned.

We also reject the defendants' argument that Agent Kavanaugh's testimony was not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701(b). We have held that a lay witness may provide interpretations of code words when the meaning of

these words "[is] not 'perfectly clear' without [the witness's] explanations." *United States v. Awan*, 966 F.2d 1415, 1430-31 (11th Cir. 1992) Agent Kavanaugh's knowledge of the investigation enabled him to draw inferences about the meanings of code words that the jury could not have readily drawn. His testimony helped the jury understand better the defendants' conversations that related to their support of international terrorism because they "would likely be unfamiliar with the complexities" of terrorist activities. *Id.* at 1430. In his testimony he linked the defendants' specific calls to checks, wire transfers, and other discrete acts of material support that put the code words into context. [Doc. 1120, p. 21.]

The defendants also contend that the district court erred in allowing Agent Kavanaugh's testimony under Rule 701(c). We disagree. In *Hamaker*, the financial analyst of the FBI testified as a lay witness even though "his expertise and the use of computer software may have made him more efficient at reviewing [the] records." 455 F.3d at 1331-32. We permitted his testimony because he "did not testify . . . based on his financial expertise, nor did he express any expert opinion." *Id.* at 1331. *See also United States v. Rollins*, 544 F.3d 820, 832-33 (7th Cir. 2008) (holding that a law enforcement agent's testimony was admissible under Rule 701(c), even though the

agent had "years of experience as a law enforcement officer," because "his understanding of the[] conversations came only as a result of the particular things he perceived from monitoring intercepted calls" and his testimony was based on his "perceptions derived from [that] particular case"), *cert. denied*, 130 S. Ct. 3343, 176 L. Ed. 2d 1236 (2010).

The record confirms that Agent Kavanaugh based his testimony about the meaning of the code words on his experience from this particular investigation. He limited his testimony to what he learned during this particular investigation, and he testified that he interpreted code words based on their context [Doc. 1116,p. 90, 93.] The district court explained that "it appears as if this witness's training and experience to opine on what certain things mean is the investigation of this case." [Doc. 1116, p. 41.] The district court also limited the agent's testimony to facts he learned in his investigation of the defendants. [Doc. 1119, p. 118 ("I want to make sure . . . this witness's answer . . . is based upon things that he learned in the course of this investigation. That is how he was proffered to the Court as a 701 witness.").] Therefore, we conclude that the district court did not abuse its discretion in allowing Agent Kavanaugh to testify regarding his interpretation of the defendants' use of code words in the intercepts

because the government satisfied the criteria under Rule 701.

B. Sufficiency of the evidence

Padilla challenges the sufficiency of the evidence on all three counts, and Jayyousi contends that the government did not present sufficient evidence to convict him on Count 3, the substantive 18 U.S.C. § 2339A material support offense based upon an underlying 18 U.S.C. § 956(a)(1) conspiracy. In reviewing challenges to the sufficiency of the evidence, we must accept all reasonable inferences that support the verdict and "affirm the conviction if a reasonable trier of fact could conclude that the evidence establishes guilt beyond a reasonable doubt." *United States v. Mieres-Borges*, 919 F.2d 652, 656 (11th Cir. 1990) (internal quotation marks omitted). When a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . A jury is free to choose among the constructions of the evidence." *United States v. Calderon*, 127 F.3d 1314, 1324 (11th Cir. 1997) (quoting *United States v. Hardy*, 895 F.2d 1331, 1334 (11th Cir. 1990)).

The record shows that the government presented evidence that the defendants formed a support cell linked to radical Islamists worldwide and conspired to send money, recruits, and equipment overseas to groups that the defendants knew used violence in their efforts to establish Islamic states. Agent Kavanaugh, who was in charge of the bulk of the investigation in this case, identified numerous conversations among the defendants discussing Padilla's travels to countries where Muslims were victimized. The government presented Padilla's mujahideen identification form that indicated his intent to attend a jihad training camp. The government's expert testified to the secrecy of the training camps, and the requirement that a recruit, particularly an American Muslim, receive a recommendation from a reliable brother to attend the camp. He also acknowledged that al-Qaeda kept records on the recruits who attended the training camps and that the recruits did not provide their real names on the identification forms. Government witness Goba confirmed the expert's testimony regarding the secrecy of the jihad training camps, the need for someone to recommend each recruit, and the purpose of the camp, which was to train individuals in weapons and war tactics for military jihad.

The record provides sufficient evidence for a reasonable jury to find that Padilla trained with

al-Qaeda and shared his conspirators' intent to support jihad violence overseas to establish Islamic states. The government presented evidence of numerous discussions between the conspirators regarding the various conflicts involving Muslims overseas. The evidence showed that Youssef, Hassoun, and Padilla began discussing attendance at al-Qaeda camps before Padilla left for Egypt in September 1998. [Doc. 1117, p. 28-35, 43-50; Gov't Ex. 58TR.] In various calls, Youssef stated that he was ready to work with the refugees in Kosovo, and that he fought on the front lines in the Kosovar conflict. [Doc. 1117, p. 149-51; Doc. 1118, p. 35-37; Gov't Ex. 97TR, 100TR.] Hassoun expressed his desire to send another recruit to Kosovo, and Youssef suggested Padilla. [Doc. 1117, p. 150-51.] Later, Hassoun told Youssef that he would send money with Padilla. [Doc. 1118, p. 35-37.] Further, Padilla was secretive about his plans to attend the training camp, instructing Hassoun not to tell Youssef any plans over the phone. [Doc. 1117, p.117-18; Gov't Ex. 88TR.]

The record also demonstrates that the conspirators did not intend for Padilla to remain in Egypt, but instead, they planned for him to prepare to leave Egypt for jihad at the first opportunity, [Doc. 1118, p. 105; Gov't Ex. 113TR/114TR (Padilla telling Hassoun how to reach him in case the "door opens").], and planned for Padilla to travel to the Chechen jihad

after he received his training. While traveling to fight in Chechnya, Youssef told Hassoun that he would soon be with bin Laden and Khattab's company, and when Hassoun asked about Padilla, Youssef stated that Padilla was traveling to the "area of [O]sama [bin Laden]." [Doc. 1119, p. 44-46, 58-59; Doc. 1158, p. 153-56, Doc. 1393, p. 58-63; Gov't Ex. 118TR, 119TR.] Another intercept further dispels Padilla's contention regarding the sufficiency of the evidence. In October 2000, Hassoun asked Youssef if he would join "Abu Abdullah, the Puerto Rican" in Afghanistan, and Youssef responded that he had experience fighting on the front lines and did not need to hone his military skills. [Doc. 1119, p. 79-80; Gov't Ex. 124TR.] Based on the above, we conclude that there is sufficient record evidence to support Padilla's convictions on Counts 1 and 2.

Padilla and Jayyousi both challenge the sufficiency of the evidence to convict them on Count 3. In order to convict Padilla and Jayyousi under the substantive count, the government did not have to prove that Padilla and Jayyousi personally committed violent acts; rather, the government had to prove that these individuals knew that they were supporting mujahideen who engaged in murder, maiming, or kidnapping in order to establish Islamic states. The evidence supports the jury's reasonable inference that Padilla and Jayyousi knew the training camps

trained recruits in weaponry and war tactics and that they shared a common purpose to support violent jihad to regain the lands that were once under Islamic control [*See, e.g.*, Gov't Ex. 802, *The Islam Report* where Jayyousi wrote, "May Allah help the mujahideen topple these un-Islamic and illegal puppet regimes in our Muslim lands."]. The record indicates Padilla provided himself as material support in the form of a recruit for jihad training; personal information on the mujahideen identification form matched Padilla's personal information on his passport; the government expert identified Padilla's fingerprints on the form; the government expert testified that the use of code words is a signature trait of a terrorism support cell; Jayyousi received a fax that had bin Laden's signature on it [Gov't. Ex. 200.]; Jayyousi oversaw the purchase of satellite phones, walkie talkies and encrypted radios to send to Chechnya to aid the Muslims in their armed conflict; Jayyousi told Mohamed Shishani that the donations for the radios (to assist in communication during fighting) did not come in time to prevent the killing of mujahideen by friendly fire; and Jayyousi acknowledged in a conversation that all their calls were recorded. We conclude that this evidence, along with other evidence presented by the government, was sufficient for a reasonable jury to conclude that Jayyousi and Padilla were guilty of providing material support or

resources, knowing that these would be used in preparation for carrying out a conspiracy to murder, kidnap, or maim overseas.

C. Admission of Dr. Gunaratna's testimony

Defendants argue on appeal that the district court erred in allowing Dr. Gunaratna to testify as an expert witness because his methodology was unreliable. Specifically, they claim that they were unable to verify his methods because he would not identify the interviewees upon whom he based his information due to confidentiality agreements he had signed with them. Furthermore, Dr. Gunaratna had to rely on translators during his communications with the interviewees, and defendants contend that this compromised the reliability of the information he gleaned from his interviews. They also contend that he was not qualified to testify about the use and importance of code words in communications among violent jihad supporters. "We review a trial court's evidentiary rulings on the admission of expert witness testimony for abuse of discretion." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000).

Rule 702 of the Federal Rules of Evidence controls the admission of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier

> of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-95, 113 S. Ct. 2786, 2796-98, 125 L. Ed. 2d 469 (1993), the Supreme Court stated that Rule 702 compels the district courts to perform the critical "gatekeeping" function concerning the admissibility of expert evidence. This function "inherently require[s] the trial court to conduct an exacting analysis" of the foundations of expert opinions to ensure they meet the standards for admissibility under Rule 702. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002). In determining the admissibility of expert testimony under Rule 702, district courts must consider whether the expert can testify competently on the areas he intends to discuss, whether the expert's methodology is sufficiently reliable, and whether the expert's testimony, through the

application of his scientific, technical, or specialized expertise, will assist the trier of fact to understand the evidence. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998).

Defendants filed a pre-trial *Daubert* motion, which the district court denied without holding a hearing. At trial, the district court accepted Dr. Gunaratna as an expert in the areas of al-Qaeda and its associated groups and international terrorism. During their cross-examination, defendants objected to Dr. Gunaratna's testimony because he based his opinion on confidential or classified information. [Doc. 1136, p. 42-50.] They also made a *Sixth Amendment* objection. [*Id.*] The government responded that the location where Dr. Gunaratna interviewed these individuals was irrelevant, and he would be breaching confidentiality agreements with governments if he revealed where he conducted the interviews and the identity of the people he interviewed. [*Id.* at 50-54.] The government also responded that Dr. Gunaratna based his identification of the al-Qaeda form from his viewing of similar documents, not from his interviews. [*Id.*]

The district court noted that the defendants had been able to call into question Dr. Gunaratna's credibility on cross. [*Id.* at 49.] Then, the district court sustained the objections on relevance grounds, finding that "the fact that he has maintained

confidential relationships with other governments is not relevant to this case." [*Id.* at 54-55.] The defendants made no specific objection to Dr. Gunaratna's testimony about the use of code words by violent Islamists. Therefore, because the defendants did not preserve this particular challenge to Dr. Gunaratna's testimony regarding code words, we will address this challenge under the plain error doctrine. *See United States v. Arias-Izquierdo*, 449 F.3d 1168, 1185 n.8 (11th Cir. 2006) (noting that appellate court will remand on an issue not raised in the district court only if "there is (1) error, (2) that is plain, (3) that affects substantial rights, and . . . (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings"). We conclude from the record that the district court did not plainly err in allowing Dr. Gunaratna to testify regarding the use of code words by violent radical groups. Based on his specialized knowledge of Islamist radicals, Dr. Gunaratna was able to testify regarding their method of communication. Further, his testimony related to trial evidence, helped the jury understand the unique use of certain words in the intercepted calls, and countered defendants' claim that these words did not have violent connotations.

With regard to defendants' objection to Dr. Gunaratna's qualification as an expert, we conclude that the district court did not abuse its discretion in

accepting him as an expert witness. A review of the record indicates that the defendants had broad latitude in their cross-examination, and the district court acknowledged that they had been able to call into question Dr. Gunaratna's credibility during cross. Defendants challenged his undisclosed sources for his published works and thoroughly questioned him about his interviews with extremists. [Docs. 1139, 1136, 1394, 1157, 1158.] The district court properly determined that the defendants' inability to obtain the location of Dr. Gunaratna's interviews and the identities of the interviewees did not make Dr. Gunaratna's methodology unreliable. Accordingly, we conclude that the district court's admission of Dr. Gunaratna's testimony was not "manifestly erroneous. *United States v. Douglas*, 489 F.3d 1117, 1124 (11th Cir. 2007) (quoting *Quiet Tech. DC-8 v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1339-40 (11th Cir. 2003)).

D. Admissibility of televised interview of Osama bin Laden

Defendants argue that the district court erred by admitting into evidence a portion of a 1997 CNN interview with Osama bin Laden. Jayyousi and Hassoun objected at trial to the video's presentation based on Rule 401, arguing relevancy. Padilla objected based on Rule 403, arguing that it was prejudicial to him because there was no evidence he

watched the interview or discussed the interview with another co-defendant. The district court admitted a seven-minute portion of the bin Laden interview, stating that the jury could consider the evidence as it pertained to Jayyousi and Hassoun's states of mind, but not Padilla's. The government presented evidence of numerous calls, [*see* Gov't Ex. 84, 85, 52, 53], in which Jayyousi and Hassoun referred to bin Laden by his nickname "Abu Abdallah," which was known only to his supporters and identified him as one of the biggest backers of jihad in Afghanistan. The two also discussed the videotaped interview and an August fatwa that Dr. Gunaratna stated was "very likely" issued by bin Laden as a threat to America. [Doc. 1137, p. 23.]

We review the district court's admission of the edited portion of the videotaped interview for abuse of discretion. *See United States v. Jiminez*, 224 F.3d 1243, 1249 (11th Cir. 2000). *Federal Rule of Evidence 403* states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. The district court conducted the proper balancing test and mitigated the prejudice to the defendants by instructing the jury to consider the video not for its truth, but rather as state of mind evidence against Hassoun and Jayyousi. [Doc. 1137, p. 32-34.] The district court clearly expressed to the jury that there

was no indication that the defendants were connected to the 9/11 attacks. [*Id.*] Further, the district court only admitted a seven-minute portion of the twenty-four minute video, only played it once for the jury, and did not allow the government to ask any witnesses questions regarding the video's content. *Cf. United States v. Chandia*, 514 F.3d 365, 375 (4th Cir. 2008) (finding that if the district court erred in admitting three-minute video clip glorifying the 9/11 attacks, any error was harmless because clips were not a central part of government's case, they only lasted three minutes of five-day presentation of government's case, and clips were only played once to jury). Because "Rule 403 is an extraordinary remedy which should be used only sparingly," *United States v. Merrill*, 513 F.3d 1293, 1301 (11th Cir. 2008) (internal quotation marks omitted), the excerpted portion of the video did not present a risk of unfair prejudice such that the district court committed an abuse of discretion in allowing the government to present it to the jury.

E. Padilla's Motion to Suppress

Padilla filed a motion to suppress statements he made during his interview with FBI agents at the Chicago O'Hare International Airport in May 2002. He argued that his statements were inadmissible

because the FBI agents failed to administer *Miranda*[5] warnings prior to interrogating him. The magistrate judge conducted an evidentiary hearing on the motion and issued a report and recommendation denying the motion to suppress. Padilla filed his objections with the district court, and the government filed its response. The district court fully adopted the factual findings of the magistrate judge and denied Padilla's motion. On review of the district court's disposition of the motion to suppress, we review the facts under the clearly erroneous standard and the application of the law to the facts *de novo. United States v. Brown*, 441 F.3d 1330, 1344 (11th Cir. 2006).

In *Miranda*, the Supreme Court established a set of enumerated warnings that officers are required to give suspects prior to custodial interrogation. *See United States v. Acosta*, 363 F.3d 1141, 1148 (11th Cir. 2004). An interrogation is custodial when "under the totality of the circumstances, a reasonable man in [Padilla's] position would feel a restraint on his freedom of movement to such extent that he would not feel free to leave." *Brown*, 441 F.3d at 1347 (internal quotation marks omitted). The test is objective, and "the reasonable person from whose perspective 'custody' is defined is a reasonable innocent person." *United States v. Moya*, 74 F.3d

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[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

1117, 1119 (11th Cir. 1996). Additionally, because of the sovereign interest in securing entry points to the United States, "some degree of questioning and of delay is necessary and is to be expected at entry points." *Id.* at 1120. "Because of this expectation, questioning at the border must rise to a distinctly accusatory level before it can be said that a reasonable person would feel restraints on his ability to roam to the degree associated with formal arrest." *Id.* (internal quotation marks omitted). *See also United States v. Lueck*, 678 F.2d 895, 899 (11th Cir. 1982) ("Interrogation at the border constitutes one notable exception to the constitutional protection of *Miranda*. Because of the overriding power and responsibility of the sovereign to police national borders, the fifth amendment guarantee against self-incrimination is not offended by routine questioning of those seeking entry to the United States.").

When Padilla arrived at the airport, he passed through customs where agents discovered that he possessed $10,526 in United States currency, although his written declaration stated that he possessed only $8,000. [Doc. 500, p. 4-46.] A customs agent escorted Padilla to a conference room to talk to the FBI agents. Padilla was not in handcuffs or otherwise physically restrained. FBI Agent Fincher stated that he wanted to speak with Padilla to gain

his cooperation because the FBI believed that Padilla had information which would prevent a terrorist attack. Agent Fincher testified that he did not restrain Padilla, and Padilla was forthcoming about his background and some of his travels. After a dinner break, which lasted over an hour, Agent Fincher asked Padilla if he would continue discussing his travels and the money he had in his possession, and Padilla indicated his desire to cooperate. Agent Fincher asked Padilla why he declared $8,000 when he was carrying over $10,000, and Padilla stated that he did not know that this was against the law and that the amount of money was not a "big deal." Agent Fincher expressed skepticism about Padilla's statement that the amount of money was not a big deal. Padilla then asked to call his mother, but when Agent Fincher asked him why he wanted to call his mother, Padilla "dropped the subject." [Doc. 549, p. 4] Padilla did not ask to leave or to speak with an attorney. After Padilla stated that he was tired, the agents thanked Padilla for his cooperation and offered to take him to a hotel and pay for his stay in order to give him an opportunity to rest and continue the interview the following day, but Padilla declined because he wanted to "clear this up that day." [Doc. 549, p. 4-5] Padilla again stated that he wanted to contact his mother, and Agent Fincher testified that the agents did not tell Padilla that he could not contact his mother. [Doc. 549, p. 5] But Padilla did not

make the phone call, and the interview continued. [*Id.*] They continued discussing Padilla's overseas travel, and when Agent Fincher asked about his passport, Padilla stated that it had been stolen in a market, but he could not remember the name of the market or the date it was stolen.

Following another break, Agent Fincher confronted Padilla with what the agent believed were Padilla's intentions during his travels. He stated that he believed Padilla had been in Afghanistan, training with and meeting al-Qaeda officials, that these officials sent Padilla back to Pakistan, where he later departed for another location to commit an act of terrorism, that Padilla had been delayed and detailed in Karachi, and that Padilla then traveled from Zurich to Egypt and eventually to Chicago, where he intended to commit or conduct surveillance for a terrorist act. Agent Fincher asked for Padilla's assistance to understand what was going on, but Padilla stood up and announced that the interview was over and it was time for him to go. Agent Fincher told Padilla that if he did not assist the government, he would be served with a grand jury subpoena to compel his testimony in New York. About an hour later, Padilla declined to assist Agent Fincher, and the agent arrested Padilla and read him his *Miranda* rights.

We agree with the district court that the earlier portions of the interview were not custodial in nature, but we do not agree with the district court's conclusion that the entire interview was non-custodial in nature. Similar to *Moya*, where we held that a defendant was not in custody, Padilla "was [not] handcuffed . . . physically held or moved, or . . . accompanied by uniformed officers. Nor was he subjected to booking procedures, [or] told he was not free to leave." *Moya*, 74 F.3d at 1119. "Nothing indicates that [Padilla] ever asked to leave or to see a lawyer" before Agent Fincher's accusation that Padilla was linked to terrorist activities. *See id.* Even Agent Fincher's offer to take Padilla to a hotel for the night to allow him to rest establishes that a reasonable person under the circumstances would not have believed that he was subject to a degree of restraint comparable to arrest because he was given the opportunity to leave the interview.

After the second break, however, when Agent Fincher accused Padilla of terrorist activities, a reasonable person would have felt subjected to a degree of restraint comparable to arrest. At this point, the interrogation became custodial, and it is evident by Padilla's reaction to Agent Fincher's accusation--he stood up and announced that the interview was over. Because the interview became custodial in nature, any statements Padilla made

after he was accused of participating in terrorist activities and before he received his *Miranda* warning would have been inadmissible. A review of the record reveals that Agent Fincher did not testify at trial about any statements Padilla made after he accused Padilla of participating in terrorism-related activities. [Doc. 1159, p. 90-129.] Thus, no error occurred at trial, and Padilla is not entitled to relief on this claim.

The dissent contends that the questioning became accusatorial when Agent Fincher confronted Padilla about not telling the truth about the source and purpose of the money that he had failed to declare, but being accused of lying about the funds did not make the interview custodial. We have held that a suspect questioned for approximately four hours at an entry point after he had tried to retrieve a shipment of 62 kilograms of cocaine was not in custody for purposes of *Miranda* until he was formally arrested. *United States v. McDowell*, 250 F.3d 1354, 1362 (11th Cir. 2001). Law enforcement agents knew about the cocaine and questioned McDowell extensively about his activities at the point of entry, and the agents accused McDowell of lying. *Id.* at 1359. But "[t]he substance of the questioning was not accusatory," and "the teachings of *Moya* suggest[ed] that McDowell was not 'in custody,'" *Id.* at 1363.

The dissent relies on several decisions, most of which do not involve interrogation at a border crossing, and its reliance on factors that support a finding of custodial interrogation in non-border cases is of limited value. We have "stress[ed] that events which might be enough often to signal 'custody' away from the border will not be enough to establish 'custody' in the context of entry into the country." *Moya*, 74 F.3d at 1120. The only precedential decision relied on by the dissent that involves a border crossing is *United States v. McCain*, 556 F.2d 253 (5th Cir. 1977), where our predecessor court explained that being forced to abandon one's luggage was "itself . . . a sufficient restriction on one's freedom of action so as to trigger the giving of *Miranda* warnings before proceeding with any interrogation." *Id.* at 255. The dissent argues that Padilla was in custody because he did not have possession of his money or luggage, but Padilla's money would have been subject to forfeiture whether or not Padilla left the interview as a part of customs enforcement, [Doc. 549, p. 2 n.1] and the district court made no finding that the government had seized Padilla's luggage. The dissent also argues that Padilla was in custody for purposes of *Miranda* because, in a context that did not involve customs enforcement we explained that, "[a]n officer's asking an individual to accompany him or her to an office is an intrusive request that raises a presumption that the individual would not feel free to

leave." *United States v. Espinosa-Guerra*, 805 F.2d 1502, 1507 (11th Cir. 1986). But the dissent ignores that "'referral of a person entering this country to a secondary inspector is part of the 'routine' border interrogation and does not, in and of itself, focus on the person so as to require a *Miranda* warning.'" *Moya*, 74 F.3d at 1120 (quoting *United States v. Henry*, 604 F.2d 908, 920 (5th Cir. 1979)).

F. Padilla's motion to dismiss his indictment

The district court denied Padilla's motion to dismiss his indictment based on alleged outrageous government conduct while he was in custody at the Naval Consolidated Brig in South Carolina due to his designation as an enemy combatant. "[A] motion to dismiss the indictment due to outrageous government conduct involves a question of law that we review *de novo*." *United States v. Avery*, 205 F. App'x 819, 824 (11th Cir. 2006). We have never applied the outrageous government conduct defense and have discussed it only in dicta. *See United States v. Ciszkowski*, 492 F.3d 1264, 1272 (11th Cir. 2007) (Carnes, J., concurring) (describing the outrageous government conduct doctrine as rooted in "speculative dicta" and noting that we have never "reversed a conviction or vacated a sentence on th[is] basis"). Several of our sister circuits have either rejected this defense completely, *see United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995), or have been sharply

critical of the defense, *see e.g., United States v. Tucker*, 28 F.3d 1420, 1422-27 (6th Cir. 1994) (citing separation of powers concerns and discussing the lack of authority for any argument that outrageous government conduct violates due process); *United States v. Santana*, 6 F.3d 1, 3 (1st Cir. 1993) ("Outrageous misconduct is the deathbed child of objective entrapment, a doctrine long since discarded in the federal courts.").

Although we have never acknowledged the existence of the outrageous government conduct doctrine, we note that the actionable government misconduct must relate to the defendant's underlying or charged criminal acts. "Outrageous government conduct occurs when law enforcement obtains a conviction for conduct beyond the defendant's predisposition by employing methods that fail to comport with due process guarantees." *Ciszkowski*, 492 F.3d at 1270 (majority opinion) (citing *United States v. Sanchez*, 138 F.3d 1410, 1413 (11th Cir. 1998)).

Padilla does not allege any government intrusion into his underlying criminal conduct. Padilla does not claim that the government caused him to leave the United States to be a jihad recruit. Instead, his claim of outrageous government conduct relates to alleged mistreatment he received at the brig after the conclusion of his criminal acts and prior to the

indictment on the present charges. Thus, even if we were to adopt it, the doctrine does not apply in this situation, and the district court properly concluded that Padilla was not entitled to the relief he sought in his motion for dismissal of his indictment. *See United States v. Morrison*, 449 U.S. 361, 365-66, 101 S. Ct. 665, 668-69, 66 L. Ed. 2d 564 (1981) (stating that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate" and that the remedy in such situations "is limited to denying the prosecution the fruits of its transgression").

G. Exclusion of Uways's statement and Padilla's statement

Hassoun contends that the district court excluded evidence that was material to his defense in violation of his constitutional rights. There are two specific pieces of evidence about which Hassoun complains. One involves a classified statement by Abdallah Ahmad al-Rimi, a.k.a. "Uways," demonstrating that an al-Qaeda facilitator, Malik, and not Hassoun, recruited Padilla to go to Afghanistan. The government required, and the district court conducted, an *ex parte* in camera review under § 4 of the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1-16 ("CIPA"). After reviewing all the pertinent materials, the district court approved an

unclassified summary of Uways's statement, which was produced as discovery before trial. [Doc. 914.] The summary stated:

> During the 2003-2004 timeframe, Uways noted that fellow facilitator Abu Mal[ik] Al-Sharabi had met Abu Abdallah Al-Amriki during the Hajj and had convinced him to come with him to Yemen in 2000, so that he could then travel to join the second jihad in Afghanistan. During this time, Uways met with Abu Abdallah on numerous occasions to get to know him, ask him why he was willing to join jihad, and vet his personality in order to determine whether he would be a satisfactory candidate to send to jihad. Uways claimed that he ultimately decided not to send Abu Abdallah to jihad. As a result, Abu Malik turned to Rashad Sa'id Al-Abi, aka Al Fida, to get Abu Abdallah to Afghanistan. Eventually, Uways saw Abu Abdallah again in Qandahar and Zormat, Afghanistan, in late 2001. Uways identified a picture of U.S. citizen Jose Padilla as being Abu Abdallah Al-Amriki.

[*Id.* at 2.] Hassoun sought admission of the unclassified summary, and the district court denied the motion, finding that Uways's statement was

hearsay and not admissible under Federal Rule of Evidence 807 because Hassoun did not present the court with indicia of trustworthiness pertaining to Uways's hearsay statement. [Doc. 1052, p. 2.] Hassoun also moved to compel production of Uways, but the government responded that he was not in the custody of the U.S. government. The district court denied the motion. [*Id.*]

The other specific piece of evidence that Hassoun claims was improperly excluded involves statements Padilla made to officials in a classified videotaped interview taken during Padilla's detention at the brig. During his detention, Padilla explained to the authorities that Malik had introduced him to al-Fida. After briefing and evidentiary hearings, the court concluded that Padilla's statements were not admissible under *Rule 807* because they were untrustworthy due to the conditions of Padilla's detention. [Doc. 1053.] Hassoun also filed a motion to sever his trial from Padilla's based on Uways's statements, Padilla's admissions, and pervasive pretrial publicity generated by the government regarding Padilla's alleged activities. The district court denied this motion. [Doc. 992.]

We review the district court's evidentiary rulings and its denial of a motion for severance for an abuse of discretion. *United States v. Westry*, 524 F.3d 1198, 1214 (11th Cir. 2008) (evidentiary motions); *United*

States v. Blankenship, 382 F.3d 1110, 1120 (11th Cir. 2004) (denial of a motion for severance). An abuse of discretion occurs where "the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Westry*, 524 F.3d at 1214 (internal quotation marks omitted). We see no abuse of discretion in the district court rulings.

The district court properly excluded Uways's statement under Rule 807, which provides in part:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed. R. Evid. 807. The residual hearsay exception applies only when "certain exceptional guarantees of trustworthiness exist and when high degrees of

probativeness and necessity are present." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009) (internal quotation marks omitted). Congress intended the residual hearsay exception to be used only in exceptional circumstances. *Id.*

Exceptional circumstances are not present in this case. The district court reviewed the classified material and provided a summary of Uways's testimony for the parties to consider. The district court found that Uways's statement did not contain "equivalent circumstantial guarantees of trustworthiness" as required by Rule 807. Additionally, Uways's statement was not "more probative on the point for which [Hassoun] offered than any other evidence" that Hassoun could have procured. *Id.* As a matter of fact, Hassoun made arguments at closing that he did not recruit Padilla for the training camp. [Doc. 1208, p. 139-145.] Moreover, the government introduced Padilla's identification form which states that the person who recommended Padilla for camp entry was al-Fida. [Gov't Ex. 403.] Accordingly, we conclude that the district court did not abuse its discretion in excluding Uways's statement.

The district court also properly excluded Padilla's statements because it found that the statements were not trustworthy in part because the military interrogators themselves stated that Padilla was

often untruthful. [Doc. 1053, p. 7-8.] Because the district court was in the best position to access the reliability of the evidence, we cannot say that its exclusion of the evidence was an abuse of discretion.

We also cannot say that the district court's denial of Hassoun's motion for severance was an abuse of discretion because there was no error in the district court's exclusion of the challenged evidence. Furthermore, we see no merit to Hassoun's argument that the district court should have granted his motion for severance due to the pre-trial publicity surrounding Padilla. The district court presided over a four-week jury selection and gave instructions to the jury about the pre-trial publicity. [Doc. 1269, p. 7-10; Doc. 1247; Doc. 992.] Hassoun cannot show that the joint trial "prevent[ed] the jury from making a reliable judgment about guilt or innocence" such that the district court should have granted a severance. *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 938, 122 L. Ed. 2d 317 (1993). Accordingly, we conclude that Hassoun is not entitled to a reversal of his convictions on this ground.

H. Application of the terrorism enhancement

Hassoun and Jayyousi object to the district court's application of the terrorism sentencing enhancement, U.S. Sentencing Guidelines Manual § 3A1.4 (2001). Defendants rely primarily on their assertion that

their benign motive in assisting the oppressed Muslims was not calculated to influence or affect the conduct of any government. They also claim that the evidence was insufficient for the district court to find that their activities were intended to displace infidel governments that opposed radical Islamist goals. The 12-level enhancement applies if the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism." *Id.* § 3A1.4(a). The Guidelines, § 3A1.4 cmt. n.1, define a federal crime of terrorism by referring to 18 U.S.C. § 2332b(g)(5), which states that it is any offense that violates a specified federal statute and is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5). We review the district court's interpretation and application of the Guidelines *de novo* and its underlying factual findings for clear error. *United States v. Foley*, 508 F.3d 627, 632 (11th Cir. 2007).

The district court found that the crimes charged are among the specified statutes that could give rise to a "federal crime of terrorism." [Doc. 1372, p. 6-7.] The district court noted that the version of 18 U.S.C. § 2332b(g) in effect in 2001 specifically identified 18 U.S.C. § 2339A as an offense supporting the terrorism enhancement. [*Id.*] The district court also found that the defendants' activities were calculated to

influence, affect, or retaliate against government conduct, satisfying the other element of the enhancement. [*Id.* at 7-10.] Specifically, the district court reasoned:

> Defendants Hassoun and Jayyousi argue that any conduct that resulted in criminal liability in this case was based upon their motives to help Muslims under physical attack or to provide each other aid to Muslims in distress. The government intends that motive is unimportant in this analysis. The counts of conviction specify the nature and level of the defendants' intent and that is all the Court needs to examine in making the determination under the statute, according to government counsel. . . .
>
> The language of the indictment available to the jury contained the following language: It was the purpose and object of the conspiracy to advance violent jihad, including supporting and participating in armed confrontations in specific locations outside the United States, and committing acts of murder, kidnapping and maiming for the purpose of opposing existing governments, ...

> Given the indictment, there is within the jury verdict a finding that the defendants' actions were intended to bring about the downfall of governments that were not Islamic or not Islamic enough.
>
> There was also ample evidence introduced at trial that defendants Jayyousi and Hassoun wished to impose Sharia throughout the Middle East and remove governments in the process. . . . Hassoun railed against secular governments in the Middle East and pledged allegiance to individuals and organizations who sought to eliminate the secular governments or non-Islamic governments in the Middle East.
>
> . . . .
>
> . . . However, in finding the defendants guilty, the jury rejected the defendants' premise that they were only providing nonviolent aid to Muslim communities. Even so-called benign motive is subject to the enhancement if the defendants, as here, intended by their acts to affect or retaliate against the conduct of the government.

[*Id.* at 7-9.]

The district court did not err in applying the terrorism sentencing enhancement. As the district court found, the crimes charged against the defendants are among the specified statutes that can give rise to a federal crime of terrorism. Thus, the first element is satisfied. The district court also found that the Guidelines's precise language focuses on the intended outcome of the defendants' unlawful acts--i.e., what the activity was calculated to accomplish, not what the defendants' claimed motivation behind it was. *See United States v. Mandhai*, 375 F.3d 1243, 1248 (11th Cir. 2004) ("[I]t is the defendant's purpose that is relevant, and if that purpose is to promote a terrorism crime, the enhancement is triggered."); *United States v. Awan*, 607 F.3d 306, 316-17 (2d Cir. 2010) (finding that government only had to demonstrate that defendant's offenses were intended to promote a federal crime of terrorism, whatever his reasons for committing them). The record demonstrates that the defendants' support activities were intended to displace "infidel" governments that opposed radical Islamist goals. Jayyousi and Hassoun spoke expressly about their desire to impose Sharia, toppling existing governments in the process. [Gov't Ex. 802 (Jayyousi's statement in *The Islam Report*: "May Allah help the mujahideen topple these un-Islamic and illegal puppet regimes in our Muslim lands."); Gov't Ex. 70 (Hassoun's statement that Muslims have

a duty of jihad to regain every land that was under the umbrella of Islam).] Defendants' motive "is simply not relevant." *Awan*, 607 F.3d at 317. Thus, the second element is satisfied, and the district court properly applied the terrorism sentencing enhancement.

I. Padilla's sentence (cross-appeal)

The government contends that the district court erred procedurally and substantively in imposing a sentence below the Guidelines range for Padilla. The district court calculated Padilla's advisory range, applying the 2001 Guidelines, and placed him at offense level 40 and criminal history category VI, corresponding to a 360 months-to-life sentence. The district court also imposed the terrorism sentencing enhancement. After hearing arguments on the 18 U.S.C. § 3553(a) factors, the district court lowered Padilla's offense level to 33, which produced a guideline range of 235-293 months' imprisonment, then selected 250 months as the possible term of imprisonment. The district court then varied downward an additional 42 months to reflect Padilla's prior detention and imposed a 208 months sentence.

The government argues that the district court committed numerous sentencing errors: first, it improperly relied on the fact that Padilla's actions did not involve an act of terrorism directed to the United

States; second, it improperly relied on the fact that the defendants did not personally kill, maim, or kidnap anyone; third, it erred by finding that a variance was necessary to avoid unwarranted sentencing disparity; fourth, it erred by finding that Padilla did not complete his al-Qaeda training; and fifth, the district court did not provide sufficient detailed explanation for why it deviated from the Guidelines range. The government also asserts that the district court committed a substantive error in imposing Padilla's sentence because it did not fully acknowledge Padilla's extensive criminal history. The government stated that Padilla was a career offender based on over 17 arrests, his participation in a murder while he was a juvenile, his offense for battery on law enforcement, and his weapons possession offense. [PSI para. 160-82.] Because the district court did not sufficiently consider Padilla's criminal record, the government posits that it substantively erred in imposing his sentence.

We review the district court's sentencing decision for reasonableness, imposing a deferential abuse of discretion standard of review. *Gall v. United States*, 552 U.S. 38, 41, 128 S. Ct. 586, 591, 169 L. Ed. 2d 445 (2007). The Supreme Court created a two-step process for review to ensure that district courts do not commit either procedural or substantive errors in imposing sentences. The appellate courts "must first ensure

that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range." *Id.* at 51, 128 S. Ct. at 597. The first step, aimed at addressing procedural errors, highlights the continued importance of the Guidelines, and the Supreme Court's intention that the "continued use of the Guidelines in an advisory fashion would further the purposes of Congress in creating the sentencing system to be honest, fair, and rational." *United States v. Talley*, 431 F.3d 784, 787 (11th Cir. 2005). The second step concerns the substantive reasonableness of the sentence. "When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U.S. at 51, 128 S. Ct. at 597. If the sentence imposed is outside the Guidelines range, the appellate court must determine that the district court's consideration of the 3553(a) factors justified the variance. *Id.*

The district court did not commit procedural error. Neither party contends that the district court failed to properly calculate the Guidelines range or treated the

Guidelines as mandatory. The district court considered the 3553(a) factors, and we do not require "the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553 factors." *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005). Although a district court errs when it relies on clearly erroneous findings of fact and the government argues that the district court erroneously found that Padilla did not complete his al-Qaeda training, the record does not support a conclusion that this finding was clearly erroneous. Padilla's Arabic alias was listed only on the second translation of the al-Qaeda training graduation list. [Doc. 1371, p. 19.] The original translation listed a similar name that was referenced several times in the blue binder. [*Id.* at 19-20.] Furthermore, the district court adequately explained that it gave Padilla a sentence that was below the Guidelines range for several reasons: the conditions of Padilla's prior confinement, his allegedly low risk of recidivism due to his age at the time of his anticipated release, the comparable sentences imposed on other terrorists, and the fact that Padilla did not personally injure anyone or target Americans in his conspiracy.

However, Padilla's sentence is substantively unreasonable because it does not adequately reflect his criminal history, does not adequately account for

his risk of recidivism, was based partly on an impermissible comparison to sentences imposed in other terrorism cases, and was based in part on inappropriate factors. First, the district court acknowledged that Padilla had a criminal history but then unreasonably discounted this criminal history when it imposed a sentence. The presentence investigation report classified Padilla as a career offender, pursuant to U.S.S.G. § 4B1.1, because of his extensive criminal history, which included 17 arrests and a murder conviction. Congress has expressed a desire that career offenders receive sentences "of imprisonment at or near the maximum term authorized," 28 U.S.C. § 994(h), and Padilla's Guidelines sentence reflected this policy, but the district court deviated from this policy. The Guidelines are not mandatory and a district court is often free to give a below-Guidelines sentence, but the discretion of a district court to sentence a criminal is not unbounded. Padilla's sentence of 12 years below the low end of the Guidelines range reflects a clear error of judgment about the sentencing of this career offender. Hassoun had no prior criminal history but received a sentence that is only 20 months less than Padilla's sentence.

Second, Padilla's sentence unreasonably fails "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). The district

court explained that given Padilla's age when he is eligible to leave the criminal system, he will unlikely engage in new criminal conduct. [Doc. 1373, p. 14.] The government argues to the contrary that "the risk of recidivism upon release is very real. That risk is greater because Padilla has literally learned to kill like a terrorist." [Gov't Br., p. 75.] We agree that the district court failed to consider the nature of Padilla's crimes and his terrorism training. Although recidivism ordinarily decreases with age, we have rejected this reasoning as a basis for a sentencing departure for certain classes of criminals, namely sex offenders. *See United States v. Irey*, 612 F.3d 1160, 1213-14 (11th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1813, 179 L. Ed. 2d 772 (2011). We also reject this reasoning here. "[T]errorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). Padilla poses a heightened risk of future dangerousness due to his al-Qaeda training. He is far more sophisticated than an individual convicted of an ordinary street crime.

Third, in considering "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), the district

court unreasonably failed to consider the significant distinctions between Padilla's circumstances and the sentences of other offenders the district court referenced at the sentencing hearing. [Doc. 1373, p. 15-16.] In comparing Padilla to criminals like David Hicks, Yahya Goba, and Imran Mandhai who had either been convicted of less serious offenses, lacked extensive criminal histories, or had pleaded guilty, the district court erred. *See United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009). The district court also improperly relied on the Terry Nichols and Zacarias Moussaoui prosecutions as examples of the types of behavior that warrant a life sentence because the government sought the death penalty in those cases. On remand, we admonish the district court to avoid imposition of a sentence inconsistent with those of similarly situated defendants. It should not draw comparisons to cases involving defendants who were convicted of less serious offenses, pleaded guilty, or who lacked extensive criminal histories, nor should it draw comparisons to cases where the government sought the imposition of the death penalty. *See United States v. Abu Ali*, 528 F.3d 210, 265 (4th Cir. 2008) ("[T]o require a similar infliction of harm before imposing a similar sentence would effectively raise the bar too high. We should not require that a defendant do what . . . Nichols did in order to receive a life sentence.").

Next, the district court substantively erred in reducing Padilla's sentence based on the fact that Padilla did not personally harm anyone and his crimes did not target the United States. The jury convicted Padilla of violating a statute that prohibits any conspiracy to murder, kidnap, or maim outside the United States. We held in a pre-*Booker* case that a district court may not reduce a sentence of a terrorist because the terrorist committed an inchoate crime. *United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir. 2004). Post-*Booker*, the Fourth Circuit held that "[t]o deviate [a sentence downward] on the basis of unrealized harm is to require an act of completion for an offense that clearly contemplates incomplete conduct." *Abu Ali*, 528 F.3d at 264 . Furthermore, the Guidelines account for the distinction between a murder offense and a conspiracy to murder offense. *See* U.S.S.G. § 2A1.5.

Lastly, we have held that a district court may reduce a sentence to account for the harsh conditions of pretrial confinement, *United States v. Pressley*, 345 F.3d 1205 (11th Cir. 2003), but that decision does not justify a downward departure as extensive as the one the district court gave Padilla. In *Pressley*, we held that a district court had discretion to lower a 30 year sentence by two and one-half years when the defendant had been confined for six years prior to trial, five of which were spent in a 23 hour a day

"lockdown." *Id.* at 1219. Here, the district court reduced Padilla's sentence by 110 months largely based on the harsh conditions of his prior confinement and then lowered his sentence by another 42 months to account for the time Padilla spent in pre-trial confinement, for a total of 152 months' departure. Although some downward variance is allowed in this circumstance, the district court abused its discretion when it varied Padilla's minimum Guidelines sentence downward by 42 percent, a period more than three and one-half times his period of actual pretrial confinement. [6] Accordingly, the district court substantively erred in imposing Padilla's sentence, and we vacate and remand his sentence to the district court for re-sentencing.

The dissent argues that by vacating Padilla's sentence we have usurped the authority of the trial judge, but "[l]ooking at sentencing decisions through the prism of discretion is not the same thing as

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[6] Although the government does not challenge the district court's decision to reduce Padilla's sentence by 42 months to reflect his time of pretrial confinement, we note that the Attorney General must already give Padilla credit for his time served in pretrial confinement. 18 U.S.C. § 3585(b); *United States v. Wilson*, 503 U.S. 329, 334, 112 S. Ct. 1351, 1354, 117 L. Ed. 2d 593 (1992). On remand, we remind the district court that we "have determined that custody or official detention time is not credited toward a sentence until the convict is imprisoned." *Dawson v. Scott*, 50 F.3d 884, 888 (11th Cir. 1995).

turning a blind eye to unreasonable ones." *Irey*, 612 F.3d at 1160. The dissent emphasizes that the district court considered all the factors it was required to consider, but the district court "commit[ted] a clear error of judgment in considering the proper factors." *Id.* at 1189. The district court attached little weight to Padilla's extensive criminal history, gave no weight to his future dangerousness, compared him to criminals who were not similarly situated, and gave unreasonable weight to the conditions of his pre-trial confinement.

V. CONCLUSION

We have meticulously reviewed the entire record of the four-month trial in this case and conclude that the defendants are not entitled to relief on any of their claims. We do conclude, however, that the district court erred in imposing Padilla's sentence. Accordingly, we affirm the defendants' convictions in all respects but vacate Padilla's sentence and remand his case to the district court for re-sentencing consistent with this opinion.

AFFIRMED in part; **VACATED** and **REMANDED** in part.

CONCUR BY: Barkett (In Part)

DISSENT BY: Barkett (In Part)

DISSENT

BARKETT, Circuit Judge, concurring in part, and dissenting in part:

I concur in the majority's resolution of issues three, four, six, seven, eight, and nine. However, I believe the majority makes three significant errors in this case affecting issues two, five, and ten. First, Agent Kavanaugh was never qualified as an expert and should not have been permitted, as a lay witness, to give his opinion of the evidence in the case, because it was not based on firsthand knowledge and his lay opinion testimony was merely the government's closing argument in disguise. Permitting a government agent to give his lay opinion based only on the fact that he has investigated the case contravenes both the spirit and the letter of our evidentiary rules and case law. Second, in concluding that Padilla's *Miranda* rights had not been violated, the majority ignores clear record evidence that Padilla was "in custody" at the time of any

incriminating statements and conduct.[1] Finally, as to Padilla's sentence, I see no principled basis on which to conclude that the district court reversibly erred in applying the 18 U.S.C. § 3553(a) factors to reach the seventeen and one-half years sentence.

I. Agent Kavanaugh's Lay Opinion Testimony Was Not Admissible Under Rule 701

In our legal system, it is the jury's function to weigh the credibility of witnesses, to draw inferences from contradictory evidence, and to reach conclusions about the evidence. *See e.g.*, *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010); *Nesmith v. Alford*, 318 F.2d 110, 137 (5th Cir. 1963).[2] Generally, witnesses testify to facts of which they have direct knowledge. However, witnesses may give their opinions under two circumstances: either when they have expert knowledge and are qualified under Federal Rule of Evidence 702 to render such an opinion; or when they have personally experienced an event and therefore have the ability to describe their layperson's perception of the event that the jury cannot otherwise experience for itself. Such lay

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[1] Although it is possible that these two errors might be considered harmless, the government makes no substantial argument or showing that these significant errors of law are harmless in this case.

[2] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions handed down by the Fifth Circuit before October 1, 1981.

opinion testimony is permitted under Rule 701 because it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event. It includes "the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *See* Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995)). Further examples include "a witness's opinion that a person with whom he had spoken was drunk, or that a car he observed was traveling in excess of a certain speed," *United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999), or a witness's characterization of a vessel that he personally saw in operation as a "go-fast" boat. *United States v. Tinoco*, 304 F.3d 1088, 1119 (11th Cir. 2002).

To ensure that a witness's lay opinion puts "the trier of fact in possession of an accurate reproduction of [an] event" and does not "amount to little more than choosing up sides," *Rule 701* permits lay opinion testimony only under certain circumstances. *See* Fed.

R. Evid. 701 advisory committee note (1972 Proposed Rules). The rule provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is *limited* to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701 (emphasis added). I agree with the majority that subpart (c) does not apply.[3] Thus, the

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[3] It is clear that under the 2000 Amendment to Rule 701 which added subpart (c) to the rule, and this Circuit's subsequent precedent, *see United States v. Dulcio*, 441 F.3d 1269, 1275 (11th Cir. 2006), that law enforcement officers now cannot testify under Rule 701 should they wish to offer opinion testimony that is based on their years of law enforcement experience, but must instead be qualified as an expert under Rule 702. Even prior to *Dulcio*, this Circuit generally required a law enforcement officer's testimony about the modus operandi of drug smugglers and the meaning of coded language in conversations to qualify as expert and not lay opinion when derived from their years of experience. *See e.g.*, *United States v. Garcia*, 447 F.3d 1327, 1335 (11th Cir. 2006) (permitting DEA agent to testify as an expert about the structure of drug trafficking organizations and the use of coded language); *United States v. Chastain*, 198 F.3d 1338, 1348-49 (11th Cir. 1999) (holding that a federal agent who had been a pilot for twenty-one years, was a flight instruc-

only question is whether Agent Kavanaugh's opinions were "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." *Id.*

The requirement that lay opinion testimony be "rationally based on the perception of the witness" has been explained as the "familiar requirement of *first-hand* knowledge or observation." *See* Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules) (emphasis added); *see also Marshall*, 173 F.3d at 1315 (holding that under Rule 701, "the opinion of a lay witness on a matter is admissible only if it is based on first-hand knowledge or observation"). For example, in *United States v. Mock*, we held that a lay witness's opinion testimony that she "believed" someone else set two fires was properly excluded under Rule 701 because it was *not* based on her first-hand knowledge. 523 F.3d 1299, 1303 (11th Cir. 2008). Likewise, in *Marshall*, we held that the testimony of a supervisory DEA agent about the origins of a supply of cocaine was inadmissible because the agent "was not present at any of the

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tor, had spent ten years in the United States Customs Service investigating drug smuggling, and had testified six previous times as an expert on drug smuggling by plane was qualified to offer his expert opinion on general techniques of drug smugglers).

meetings between [the drug dealer] and the defendants" and thus he "had no personal knowledge regarding the origin of the cocaine given to him by [the drug dealer]" even though he was investigating the case. 173 F.3d at 1315. When we have permitted witnesses to give their lay opinion about an event, it is because the witnesses personally perceived the events as they occurred, drawing on their sensory and experiential observations. *See e.g.*, *United States v. LeCroy*, 441 F.3d 914, 926-27 (11th Cir. 2006) (holding that the trial court had properly admitted as lay opinion a crime scene specialist's testimony based on direct observation that a blood stain on a shirt appeared to be caused by someone "wiping a bloody knife off on the shirt"); *United States v. Myers*, 972 F.2d 1566, 1570, 1577 (11th Cir. 1992) (holding that a witness who "saw six pairs of scabbed reddish burn marks approximately two and one half inches apart," on the victim's back could give his lay opinion that the "marks on [the victim's] back were consistent with marks that would be left by a stun gun" because the witness's "conclusion was rationally based upon his personal perception of [the victim's] back and his nineteen years of experience[4] on the police force").

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[4] Although the officer's nineteen years of experience would no longer be a permissible basis to support his lay opinion under the 2000 Amendments to Rule 701 that preclude lay opinions that are based on "scientific, technical, or other specialized knowledge," *see Dulcio*, 441 F.3d at 1275, there is no dispute

We have rejected the argument that an officer's lay opinion as to the meaning of facts already in evidence satisfies Rule 701(a)'s personal perception requirement. In *United States v. Cano*, the lead detective testified that the individual hieroglyphic symbols in a phone book in evidence represented a specific numeral. 289 F.3d 1354, 1360-61 (11th Cir. 2002). He testified that based on his comparison of two of the conspirators' phone numbers to the hieroglyphic symbols, he could break the code used and figure out that each symbol represented a specific numeral. *Id.* We concluded that this testimony did not satisfy the requirement of Rule 701(a) that testimony be "based on the perception of the witness." *Id.* at 1363 (quoting Fed. R. Evid. 701(a)). We explained that the detective "did nothing more than call the jurors attention to the fact that the hieroglyphics appearing next to the names of two of the conspirators . . . represented their telephone numbers." *Id.* "Nothing in the inferences [the detective] drew was based on his perception; rather, the inferences were based on facts already in evidence." *Id.* In other words, the detective's review of the documentary evidence could not meet the personal perception requirement of Rule 701(a).

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that the officer in *Myers* saw first-hand the burn marks on the victim's back and could render a lay opinion based on his personal perception of this injury.

This record categorically establishes that Agent Kavanaugh's opinions were not based on anything he rationally perceived through "*first-hand knowledge or observation*." Agent Kavanaugh testified that his opinions were based solely on his involvement in the case. His assignment consisted of reviewing pre-collected information, including phone calls, facsimiles, financial records and interviews; conducting some additional interviews; identifying which phone calls and facsimiles ("the intercepts") were pertinent to the investigation; and having those both transferred to an audio cassette and transcribed. Many of the intercepts were in Arabic and required translation into English, which was done by someone other than Agent Kavanaugh, who does not speak or read Arabic.

Prior to Agent Kavanaugh's testimony, each juror had been provided with binders containing English translations of the 120 intercepts that had been admitted into evidence through another FBI agent. Each transcript contained the date of the phone call, the telephone number of the incoming or outgoing phone call or facsimile, the identity of the participants on the call, and the verbatim transcript of each conversation. All of the phone and facsimile intercepts were either placed from or received at telephone numbers associated with Hassoun or Jayyousi.

After the jurors listened to an individual call that corresponded to a transcript in the binder, Agent Kavanaugh then gave his *interpretation* and *opinion* about the meaning of the defendants' conversations in that transcribed phone call. He pointed out to the jury when he believed the defendants were speaking in code and then gave his opinion of what he thought the conversation and dozens of "code words" actually meant. He not only told the jury that a particular conversation meant something other than what the conversation purported to be about, he also supplied the meaning he believed actually should be attributed to the conversation. However, other than the one or two instances in which the defendants themselves identified the meaning of a code word, Agent Kavanaugh never explained the source of the words and phrases that he claimed were the "true meaning" of the defendants' words. He merely testified that his opinions about the meaning of the "code" words came from "everything he learned in this investigation."

But Agent Kavanaugh never explained what knowledge or perception he gained during the investigation that allowed him to interpret the conversations any better than the jury. While no one disputes that Agent Kavanaugh spent a significant amount of time investigating this case, there is nothing in the record, and the majority fails to identify anything therein, that identifies the specific

first-hand experiences and observations from his investigation that would support his lay opinion about the meaning of evidence before the jury. The *only* specific aspect of his investigation that he identified as the basis for his opinions were the transcripts themselves, which were before the jury. Although he stated generally that he read volumes of documents and interviewed individuals, he never identified anything specific from that investigation that informed his opinions of the actual meaning of the defendants' conversations.[5]

The majority's assertion--that Agent Kavanaugh's opinions were permissible because they were based on his personal perception of the defendants' pre-recorded conversations as informed by everything he learned in his investigation--has no support in the law. When we have permitted law enforcement officers to offer their lay opinion about the meaning of conversations, we have required the opinion to be

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[5] Although the jury might have determined for themselves that the defendants were trying to hide the real meaning of their conversations, Agent Kavanaugh testified for many days in great detail about many of the conversations under the authority of his status as the FBI's lead case agent on this case. More importantly, regardless of whether the jury could have reached conclusions similar to Agent Kavanaugh's, a question which would be considered in an analysis of harmless error, the legal question about the admissibility of his testimony under Rule 701 boils down to the principle that a law enforcement officer cannot testify about his view of the evidence just because he spent a lot of time investigating the case.

based on more than merely the officer's knowledge of the particular investigation, contrary to the majority's conclusion otherwise. A law enforcement officer's lay opinion about the meaning of a conversation is based on his or her *first-hand* knowledge when he or she is either (1) a personal participant in a conversation as an undercover agent, or (2) a listener to a conversation while observing a defendants' behavior in real time to coordinate the conversation with the conduct.

For example, in *United States v. Awan*, we upheld the admission of an undercover agent's lay opinion testimony about the meaning of terms involving high finance because the agent "was actually present and participating in the conversation and observing what was happening at the time in terms of gestures and the like of those who are speaking[.]" 966 F.2d 1415, 1430 (11th Cir. 1992). In allowing the testimony of the agent, who *personally* participated in the conversations, we explained that under Rule 701 "[a] witness may clarify conversations that are abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that were clear only to the defendant and the witness." *Id.* (citations and internal quotation marks omitted).

The majority's reliance on *Awan* to support the admission of Agent Kavanaugh's testimony is completely misplaced. Unlike the agent in *Awan*,

Agent Kavanaugh was not a personal participant in either the alleged conspiracy or a single conversation about which he opined, elements essential to the admissibility of the testimony in *Awan*. Not only was the agent in *Awan* an active participant in the conversations involving the high finance terms he testified about, but he had been undercover for two years posing as a financial consultant and had actually participated with Colombian drug dealers in a highly complex money laundering scheme involving sophisticated banking transactions. *Id.* at 1417-22. Surely, it cannot be suggested that Agent Kavanaugh's cold review of transcribed phone calls is remotely similar to the first-hand experiences and observations that the undercover agent in *Awan* was permitted to opine in his testimony. *See also United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) (upholding the admissibility of lay opinion testimony from two government witnesses about the double meaning of a conversation in which each witness was a personal participant).

Likewise in *United States v. Novaton*, we upheld the admission under Rule 701 of law enforcement agents' lay opinions that a reference to a "fifteen year old girl" actually referred to fifteen kilograms of cocaine. 271 F.3d 968, 1007 (11th Cir. 2001). We did so because the law enforcement officers conducted real-time video and foot surveillance of the several

suspected drug conspirators, while simultaneously listening to their conversations. *Id.* at 980-81. Thus, the witnesses could confirm that no fifteen-year old girl was present.[6]

In a case with facts materially indistinguishable from those here, the Eighth Circuit, too, recognized in *United States v. Peoples* that under Rule 701 a law enforcement officer's testimony "is admissible as lay opinion *only* when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." 250 F.3d 630, 641 (8th Cir. 2001) (emphasis added). Like Agent Kavanaugh, the agent in *Peoples* "did not personally observe the events and activities discussed in the recordings, nor did she hear or observe the conversations as they occurred." *Id.* at 640. Instead, the investigation upon which she based her opinion consisted of listening to the

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[6] The court in *Novaton* also noted the officers' years of experience in other drug-related investigations as another factor tending to support their lay opinion about the meaning of coded language. 271 F.3d at 1008-09. However, the court explained in a footnote that, under the 2000 Amendment to Rule 701, it could well be that "the experiences which provided the testifying agents with a basis for rationally perceiving the information provided in their opinion testimony in this case would constitute 'specialized knowledge,' and that such testimony would now be admissible only under Rule 702." 271 F.3d at 1009 n.9. The court in *Novaton* however, did not answer that question because the pre-amendment version of Rule 701 was applicable.

recorded calls after the fact, just as Agent Kavanaugh did here. *Id.* "[A]s the recordings of the [defendants'] conversations were played for the jury, [the agent] was allowed to offer a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant." *Id.* Accordingly, the *Peoples* court held that the lead case agent's interpretation of the meaning of pre-recorded and transcribed telephone conversations already before the jury in written form was inadmissible under Rule 701. *Id.* The same is true of Agent Kavanaugh's testimony. *See also United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005) (recognizing that an agent who relies on all of the information gathered in an investigation to offer an opinion as to a person's culpable role in a charged crime "is not presenting the jury with the unique insights of an eyewitness's personal perceptions," and therefore, "the investigatory results reviewed by the agent--if admissible--can only be presented to the jury for it to reach its own conclusion").

The majority also erroneously relies on *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984) and *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006) to conclude that Rule 701 permits a lay witness to offer opinion testimony based solely on his examination of documents that concern activities in which he did not personally participate.

Gold involved the permitted testimony of the president of a large eyewear company that the volume of eyewear sales at another large eyewear company was "excessive." 743 F.2d at 817. *Gold*, however, does nothing more than follow the long-standing practice in which "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701, advisory committee's note (2000 Amendments) (emphasis added). The practice of courts in allowing business owners to testify under Rule 701, without undergoing the rigors of Rule 702, exists "because of the particularized knowledge that the witness has by virtue of his or her position in the business." *Id.* For us to extend this principle to law enforcement officers would require us to take into consideration an officer's years of experience in the "business" of law enforcement, which this Circuit has specifically held will run afoul of the limitation of Rule 701(c), *see Dulcio*, 441 F.3d at 1275, that requires the officer to qualify his testimony under Rule 702, *see Garcia*, 447 F.3d at 1335; *Chastain,* 198 F.3d at 1349.

Hamaker is equally inapplicable and does not support the majority's contention that simply reviewing volumes of business records satisfies Rule 701(a)'s requirement that a lay witness's opinion

testimony be "rationally based on [his] perception." The witness in *Hamaker* was an FBI financial analyst who testified about mathematical computations he performed using data from business records. 455 F.3d at 1330. The court in *Hamaker* explained that the witness "factually described [the defendant's] records and then matched a small subset of the voluminous payroll, accounting, and invoice records." *Id.* at 1331 (emphasis added). The only question before the court in *Hamaker* was whether the witness's testimony was expert and should have been subject to Rule 702, which the court concluded it was not. Indeed the court in *Hamaker* summarily concluded that because the witness's testimony was not expert testimony, it therefore was allowed under Rule 701. It never engaged in any analysis of how a review of business records provides the witness with Rule 701(a)'s necessary first-hand knowledge or experiential observation.

Moreover, allowing a witness to testify about mathematical computations based in data actually in evidence is much different than allowing a witness to invade the jury's prerogative by choosing among various inferences that could be drawn from evidence and testifying that his inference is the correct one. *Hamaker*'s permission of the application of mathematical computations to existing data does not provide an avenue through Rule 701 for a law

enforcement officer to offer opinions or inferences about the hidden, coded, or double meaning of the contents of written documents in evidence based only on the evidence itself.

The majority also asserts that *Cano* is not applicable because Agent Kavanaugh based his opinions on what he learned during his investigation, which included some documents that were not in evidence, unlike the agent in *Cano* who based his testimony only on facts in evidence. That position fails for two reasons. First, as I have already explained, it is impermissible under Rule 701 for a law enforcement officer to state that his lay opinion is based on "everything he learned in his investigation." Second, Agent Kavanaugh, just like the witness in *Cano*, purported to base his opinions on the facts already in evidence, namely the face of the transcripts of the defendants' many conversations, evidence that was available to the jury in exactly the same format as when Agent Kavanaugh reviewed it. Accordingly, not only is the defendants' reliance on *Cano* reasonable, but *Cano*'s reasoning is directly applicable here.

Given our precedent, there is simply no support for the majority's conclusion that Agent Kavanaugh's opinions about the meaning of the defendants' conversations--which he asserts are based on everything he learned in an investigation that

involved reading volumes of documents and conducting interviews--satisfies the first-hand knowledge and personal observation requirements of Rule 701.

Nor was Agent Kavanaugh's testimony "helpful" within the meaning of the requirements of Rule 701(b). Although testimony is certainly "helpful" when a witness simply agrees with the contentions of one side, that is not the meaning of "helpful" under Rule 701. Lay opinion testimony is not "helpful" for purposes of admissibility under Rule 701 when it does nothing more than give one side's understanding of the evidence. *See* Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules) (explaining that "meaningless assertions which amount to little more than choosing up sides" are excludable under Rule 701 for lack of helpfulness).

We have concluded that a witness's testimony about the meaning of facts already before the jury is inadmissible lay opinion specifically because the testimony "merely delivered a jury argument from the witness stand." *Cano,* 289 F.3d at 1363. The detective's testimony in *Cano* "did precisely what the prosecutor invited the jury to do in closing argument; the jurors were asked to perform the same exercise [the detective] had carried out in their presence and break the code themselves." *Id.* at 1362. Here, Agent Kavanaugh's lay opinions were nothing more than

the government's closing argument in disguise because the jurors were able to review the same transcripts of the pre-recorded telephone conversations and could draw their own conclusions about that evidence.[7] *See also United States v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004) (en banc) (explaining that, for purposes of admissibility under Rule 702, expert testimony "generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments"); *United States v. Garcia-Ortiz*, 528 F.3d 74, 80 (1st Cir. 2008) (concluding that a witness's opinion testimony "about a non-technical subject which was not beyond the purview of the jury" was inadmissible under Rule 701 because "[t]he jury was perfectly capable of drawing its own independent conclusion based on the evidence presented").

Accordingly, because Agent Kavanaugh's lay opinion testimony had no basis in any first-hand experiences or observations and merely delivered the government's position on how the jury should view the evidence before it, his opinion testimony about the

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[7] The majority's contention that Agent Kavanaugh linked the defendants' calls to checks, wire transfers, and other discrete acts of material support is equally unavailing because, like the transcripts of the telephone calls, the checks, wire transfers, and other discrete acts were also in evidence. Thus, it was the jury's role to draw reasonable inferences from the evidence before it.

meaning of the defendants' conversations was erroneously admitted under Rule 701.

II. Padilla's Miranda Rights Were Violated at the Airport

Special Agent Russell Fincher testified to incriminating statements that Padilla made in the FBI interview while detained at O'Hare Airport in Chicago. Although there is no dispute that Padilla did not receive *Miranda*[8] warnings before making these incriminating statements, the majority concludes that no such warnings were required because Padilla was not "in custody" at the time he made the statements. The record, however, cannot support this contention.

A defendant is "in custody" for *Miranda* purposes when there "is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (citation omitted). This test "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v.*

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[8] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

California, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). Thus, "the only relevant inquiry is how a reasonable man in the [defendant's] position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). In determining whether the defendant was in custody, we "examine all of the circumstances surrounding the interrogation." *J.D.B. v. North Carolina*, 564 U.S. ___, ___, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011) (citation omitted).[9]

The majority discounts or ignores several critical facts that, under controlling precedent, compel the conclusion that a reasonable person in Padilla's position would have felt a "restraint on freedom of movement of the degree associated with a formal

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[9] The majority relies on language in *United States v. Moya*, 74 F.3d 1117, 1120 (11th Cir. 1996), suggesting that a border interrogation must rise to a "distinctly accusatory" level before *Miranda* warnings must be given. *Moya*, however, involved only routine administrative questioning at the border by immigration officers for the purpose of determining the defendant's admissibility into the country. *Id.* at 1118-19. It therefore does not resemble the FBI's interrogation in this case, which was designed to obtain incriminating information. In any event, our precedent clarifies that whether the substance of a border interrogation was accusatory is only one factor to consider in the totality-of-the-circumstances analysis; *see United States v. McDowell*, 250 F.3d 1354, 1362-63 (11th Cir. 2001); and, as explained below, the FBI's interrogation in this case became accusatory well before Agent Fincher ceased eliciting incriminating statements subsequently introduced at trial.

arrest," *Beheler*, 463 U.S. at 1125 (citation omitted), and was, accordingly, "in custody."[10]

Upon his arrival at O'Hare from Pakistan, Padilla proceeded to the customs area for inspection, where he was removed from the general population and subjected to a secondary examination at the direction of the FBI. That secondary examination, which was conducted by a Customs Service inspector, typically involves a pat down, a luggage search, and an inquiry about currency or produce brought into the United States. During Padilla's examination, the inspector discovered that Padilla had declared on his customs form that he possessed $8,000 when he actually possessed a little more than $10,000. Because the failure to declare over $10,000 was a violation of the law, the inspector confiscated the money and retained Padilla's luggage. As a result, any attempt by Padilla to leave the airport following the secondary examination would have required him to abandon both $10,000 and his luggage. Under our precedent, "[retaining luggage] itself is a sufficient restriction on one's freedom of action so as to trigger the giving of *Miranda* warnings before proceeding with any

[10] As noted by the magistrate judge in his report and recommendation, a comparison of the testimony given by the various law enforcement officers at the suppression hearing reveals several material discrepancies. I nonetheless describe the facts in the light most favorable to the government.

interrogation." *United States v. McCain*, 556 F.2d 253, 255 (5th Cir. 1977).[11]

Following the secondary examination, Padilla was brought to an airport conference room. Although Padilla was not physically restrained, precedent from both the Supreme Court and this Circuit establish that the fact that Padilla was escorted to the conference room--as opposed to going there on his own volition--weighs heavily in favor of finding that he was in custody. *See Yarborough v. Alvarado*, 541 U.S. 652, 665, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *United States v. Hunerlach*, 197 F.3d 1059, 1066 n.8 (11th Cir. 1999); *United States v. Phillips*, 812 F.2d 1355, 1362 (11th Cir. 1987). Indeed, we have explicitly stated that "[a]n officer's asking an individual to accompany him or her to an office is an intrusive request that raises a presumption that the individual would not feel free to leave." *United States v. Espinosa-Guerra*, 805 F.2d 1502, 1507 (11th Cir. 1986).

Moreover, the conference room to which Padilla was escorted was located in a restricted part of the

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[11] While the district court made no finding regarding Padilla's luggage, the record nonetheless reflects that the government retained it following the secondary examination and this is but one of the many factors supporting the conclusion that Padilla was in custody.

airport that was not accessible to the public. The Supreme Court has emphasized that "exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect's] fear that, if he does not cooperate, he will be subjected to abuse." *Berkemer*, 468 U.S. at 438. We have similarly emphasized this point. *See United States v. Acosta*, 363 F.3d 1141, 1150 (11th Cir. 2004) ("Instead of being detained in a remote area far from public scrutiny, [the defendant] was stopped in the parking lot of an apartment building in broad daylight. The officers' actions were visible to anyone in the area who chose to look."). Not only was the conference room located in a secure part of the airport, but it had no windows through which anyone could peer in. *See United States v. Chavira*, 614 F.3d 127, 135 (5th Cir. 2010) (emphasizing that "the questioning occurred in a windowless, secured area that was not accessible to the public"). And after Padilla was escorted inside the room, the door was closed behind him.

At that point, the government had successfully isolated Padilla in an unfamiliar environment, another critical fact in the custody analysis. *See Beckwith v. United States*, 425 U.S. 341, 346 n.7, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976) ("[T]he principal psychological factor contributing to successful

[custodial] interrogation was isolating the suspect in unfamiliar surroundings for no purpose other than to subjugate the individual to the will of the examiner."); *United States v. Brown*, 441 F.3d 1330, 1348-49 (11th Cir. 2006) (emphasizing that the interview took place in a "familiar setting" where the defendant "often resided"); *United States v. Manor*, 936 F.2d 1238, 1241 (11th Cir. 1991) (emphasizing that the defendant "selected the location of the meeting and the conversation itself took place in the defendant's car").

Exacerbating Padilla's confinement in an unfamiliar environment, *four* armed FBI agents, not customs inspectors, immediately joined him inside the conference room. After closing the door behind them, the FBI agents identified themselves, presented their credentials, and announced their intention to interview Padilla. Four additional FBI agents waited outside. The presence of these FBI agents created precisely the "police-dominated atmosphere" that *Miranda* was designed to guard against. 384 U.S. at 445.

The totality of the circumstances described above, largely omitted from the majority's analysis, establish that Padilla was in custody before questioning even began. But if this conclusion was in doubt, the interview itself would eliminate any question that he was in custody. Agent Fincher began the interview by

informing Padilla that his failure to accurately declare the $10,000 was a violation of the law. Although Agent Fincher never told Padilla that he was under arrest, it is unrealistic to suggest that a reasonable person in Padilla's position would not experience a substantial restriction on his freedom of movement upon being informed by an FBI agent--in an enclosed and isolated room with several other FBI agents, separated from his luggage and $10,000--that he had just violated the law. Cf. *United States v. Luna-Encinas*, 603 F.3d 876, 881 (11th Cir. 2010) (concluding that the defendant was not in custody in part because the officers "expressly stated at the outset that [the defendant] was not a suspect").

Moreover, despite informing Padilla of his legal violation, Agent Fincher did not ask Padilla a single question related to the currency over the next hour. Nor did Agent Fincher ask routine booking questions in order to ascertain basic biographical information. Rather, Agent Fincher proceeded to conduct a comprehensive background examination regarding Padilla's entire life history, from his time growing up in the United States to his time in the Middle East. Although Padilla was cooperative, this line of questioning had no bearing on his currency violation, and it would have therefore suggested to a reasonable person in Padilla's position that the FBI was looking for additional signs of illegal activity.

Indeed, Agent Fincher asked Padilla at the end of the first hour whether he had used any other names while traveling in the Middle East. Significantly, Padilla responded by asking to call his mother. Even more significantly, Agent Fincher did not allow Padilla to make this call, despite the fact that Padilla had his own cellular telephone and there was a telephone in the conference room. That Padilla even felt obligated to ask permission to make this call confirms that he was already in custody; that Agent Fincher failed to grant the request went so far as to render Padilla incommunicado. *See Miranda*, 384 U.S. at 457-58 ("The . . . practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles--that the individual may not be compelled to incriminate himself."); cf. *Brown*, 441 F.3d at 1349 (concluding that the defendant was not in custody in part because he was free to use the telephone and did so).

Following a break, Agent Fincher resumed the interview and increased the pressure. Agent Fincher reiterated that Padilla's currency discrepancy was a violation of the law, and he openly expressed skepticism regarding Padilla's statement that he did not believe that his failure to properly declare the $10,000 was "a big deal." Agent Fincher's increased pressure prompted Padilla to request permission to call his mother for the second time, a request that

Agent Fincher again denied. Agent Fincher then "pressed" Padilla about the source and purpose of the $10,000, an issue distinct from Padilla's failure to accurately *declare* the currency. And when Padilla failed to provide answers that Agent Fincher deemed adequate, Agent Fincher accused Padilla of not telling the truth.

When analyzed in conjunction with the circumstances preceding the interview, these facts compel the conclusion that Padilla was in custody absolutely no later than this point in time--over two hours after the interview began, but before the second break in the interview, before Agent Fincher accused Padilla of being a terrorist, and, most importantly, before Agent Fincher ceased eliciting the incriminating statements introduced at trial. Accordingly, on this record, I conclude that there was a *Miranda* violation in this case.

III. Padilla's Sentence is Substantively Reasonable

Because the majority usurps the authority of a trial judge to decide on a sentence that was "sufficient, but not greater than necessary," to achieve the statutory sentencing goals, *see* 18 U.S.C. § 3553(a), I also dissent from the majority's reversal of Padilla's sentence. In reversing Padilla's sentence, the majority fails to adhere to the principles articulated by the Supreme Court and this Circuit

requiring appellate courts to accord the trial judge the "considerable discretion" granted district courts in sentencing and to guard against substituting its judgment for that of the trial judge. As this Court has explained:

> The district court must evaluate all of the § 3553(a) factors when arriving at a sentence, but *is permitted to attach great weight to one factor over others*. In assessing the factors, the sentencing court should remember that each *convicted person is an individual and every case is a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue*. When the district court decides after "serious consideration" that a variance is in order, it should explain why that variance is appropriate in a particular case with sufficient justifications. The justifications must be compelling enough to support the degree of the variance and complete enough to allow meaningful appellate review. *But the Supreme Court has specifically rejected the idea that an extraordinary justification is required for a sentence outside the guidelines range*.

> *Because of its institutional advantage in making sentence determinations, a district court has considerable discretion in deciding whether the § 3553(a) factors justify a variance and the extent of one that is appropriate.* We must give its decision due deference. We may vacate a sentence because of the variance only if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case. However, *that we might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal*.

United States v. Shaw, 560 F.3d 1230, 1237-38 (11th Cir. 2009) (emphasis added) (internal citations and quotation marks omitted).

The majority, however, concludes that Padilla's sentence is substantively unreasonable because it "does not adequately reflect his criminal history, does not adequately account for his risk of recidivism, was based partly on an impermissible comparison of sentences imposed in other terrorism cases, and was based in part on inappropriate factors." As

demonstrated below, there is no support in this record for the majority's stated reasons and thus no support for its conclusion that the trial judge abused its discretion by imposing a below-Guidelines sentence of seventeen and one-half years' imprisonment.

A. Criminal History

The majority first suggests, in citing 28 U.S.C. § 994(h), that the trial judge improperly discounted Padilla's criminal history because his sentence was not at or near the top end of his Guidelines range. This record, however, categorically refutes any possible conclusion that the trial judge failed to consider Padilla's criminal history. The sentencing hearing in this case spanned nine days during which the trial judge heard testimony of several witnesses and considered numerous boxes of documentary evidence and lengthy arguments from counsel. At the conclusion of the evidence, the trial judge explicitly stated that: "Mr. Padilla is the only defendant in this matter with a prior criminal record. He has both a juvenile and adult record. His last conviction occurred just prior to the beginning of the conspiracy." And later, just prior to rendering Padilla's sentence, the trial judge again stated: "As to Defendant Padilla, unlike the other two defendants, he has a significant criminal record," and proceeded to sentence Padilla to a longer term of imprisonment than his two co-defendants.

The majority's contention that the *only* appropriate sentence for Padilla is one at or near the high end of the Guidelines range also defies logic. Such a contention violates *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and its progeny by inappropriately treating the Guidelines as mandatory. Indeed, if the trial judge had treated the Guidelines as mandatory, we would be required to reverse the sentence as procedurally erroneous. *See Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007) (explaining that the appellate court must ensure that the district court committed no significant procedural error such as treating the Guidelines as mandatory). Moreover, such a contention completely ignores Congress' mandate to consider, not only criminal history, but *all* of the history and characteristics of the defendant, as well as the other § 3553(a) factors, before imposing sentence. *See* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

B. Pre-Trial Confinement

Here, the trial judge appropriately took pains to consider all of the requisite § 3553(a) sentencing factors, not just Padilla's criminal history, when

deciding on a reasonable sentence that was "sufficient, but not greater than necessary," to achieve the statutory sentencing goals. *See* 18 U.S.C. § 3553(a). Among other things, the trial judge correctly concluded that a sentence reduction is available to offenders who have been subjected to extraordinarily harsh conditions of pre-trial confinement. *See United States v. Pressley*, 345 F.3d 1205, 1218-19 (11th Cir. 2005). Padilla presented substantial, detailed, and compelling evidence about the inhumane, cruel, and physically, emotionally, and mentally painful conditions in which he had already been detained for a period of almost four years. For example, he presented evidence at sentencing of being kept in extreme isolation at the military brig in South Carolina where he was subjected to cruel interrogations, prolonged physical and mental pain, extreme environmental stresses, noise and temperature variations, and deprivation of sensory stimuli and sleep. In sentencing Padilla, the trial judge accepted the facts of his confinement that had been presented both during the trial and at sentencing, which also included evidence about the impact on one's mental health of prolonged isolation and solitary confinement, all of which were properly taken into account in deciding how much more confinement should be imposed. *None* of these factual findings, nor the trial judge's consideration of them in fashioning Padilla's sentence, are challenged on

appeal by the government or the majority. Indeed, the majority accepts that our decision in *Pressley* allows for a sentence reduction to account for the conditions of defendant's pre-trial confinement, but then asserts that *Pressley* does not permit a reduction as "extensive" as the one given here. Contrary to the majority's suggestion, that case did not create a cap on how great a reduction can be in any specific case. Rather, *Pressley* reaffirms the trial judge's discretion to consider the unique facts of a defendant's pre-trial confinement when deciding what weight to give and how to account for those conditions in ultimately imposing the sentence. 345 F.3d at 1219. *See also Shaw*, 560 F.3d at 1237-38 (explaining that the district court "is permitted to attach great weight to one factor over others" and "has considerable discretion in deciding whether the § 3553(a) factors justify a variance and the extent of one that is appropriate").

The majority fails to identify any clear error in the trial judge's decision to vary downward, and instead arbitrarily concludes that the variance was just too much. In blatantly substituting its own view for the discretion of the trial judge, the majority contravenes the well-established principle that "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at

51. This principle exists because "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id.* (emphasis added) (internal quotation marks omitted). Thus, by declaring, without explanation, that the downward variance the trial judge applied in this case due to the harsh conditions of Padilla's pre-trial confinement was too "extensive," the majority impermissibly usurps the discretion of the sentencing judge in direct contravention of clear and unequivocal Supreme Court and Circuit precedent.

C. Future Dangerousness

The majority also concludes that the trial judge erred in determining that Padilla will not pose a high risk of recidivism upon his release from prison when he is in his mid-fifties, and even though he will be subject to a twenty-year term of supervised release. While the majority recognizes that a trial judge may find that recidivism generally decreases with age,[12] it not only rejects that presumption for Padilla, but goes

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[12] *See e.g*, *United States v. Cavera*, 550 F.3d 180, 219 n.4 (2d Cir. 2008) (Sotomayor, J., concurring and dissenting in part) (citing a 2004 recidivism study of the United States Sentencing Commission for the proposition that there is an inverse relationship between age and recidivism).

one step further and decides that trial judges may no longer consider, for anyone convicted of a terrorism-related offense, the likelihood that the risk of recidivism will decrease with age. The majority does so, *even in the absence of any evidence* supporting that conclusion, and even though the government does not challenge on appeal as clearly erroneous the trial judge's fact-finding that Padilla would be unlikely to engage in new criminal activity when released from prison.[13] *See United States v. Irey*, 612 F.3d 1160, 1216 (11th Cir. 2010) (en banc) (accepting the district court's finding that the defendant posed a low risk of recidivism upon release because the government never challenged this fact-finding as clearly erroneous).

The majority concludes that because we rejected the presumption that recidivism decreases with age for sex offenders in *Irey*, we can do the same for those

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[13] The government makes only a passing and conclusory reference to recidivism on the last page of its brief without specifically addressing the sentencing court's fact-finding. The totality of the government's argument regarding recidivism is the following: "[The risk of recidivism upon release is very real. That risk is greater because Padilla has literally learned to kill like a terrorist." Even if this brief statement is construed as a challenge to the trial judge's fact-finding that Padilla is not likely to commit future crimes when released from prison in his mid-fifties, the government's argument fails to explain why Padilla should be presumed dangerous *after* serving a seventeen and one-half years' sentence and remaining subject to an additional twenty years of supervised release.

convicted of terrorism-related crimes. The majority's reliance on *Irey* for this contention is misplaced for two reasons. First, although the majority in *Irey* provided numerous reasons why it would, *if it could*, reject such a presumption for sex offenders, its discussion on this point was merely dicta and admittedly advisory. *Irey*, 612 F.3d at 1216 n.35 ("Although we have pointed out for the benefit of sentencing courts in the future the reasons and decisions indicating that the district court's finding is wrong, because the government has not challenged the factfinding we have expressly accepted the low risk of recidivism finding for purposes of reviewing this sentence."). Contrary to the majority's assertion here, *Irey* did not establish that it is erroneous to find that recidivism decreases with age for sex offenders, because that question was not at issue.

Second, in *Irey*, the Court went to great lengths to identify numerous decisions and empirical studies to support its belief that the district court clearly erred in concluding that the defendant in that case, a sexual predator, posed a low risk of recidivism. *See id.* at 1213-16. Here, other than the majority's conclusory statement that "Padilla poses a heightened risk of future dangerousness due to his al-Qaeda training," the majority fails to point to any evidence in the record supporting its rejection of the trial judge's finding that Padilla is not likely to commit future

crimes after twenty years in prison.[14] Rather, the majority simply posits that Padilla will continue to present a special risk of dangerousness because terrorists are "far more sophisticated" than ordinary street criminals. But even if we accept the assertion that terrorism-related crimes are more sophisticated than ordinary crimes, the majority fails to explain, and there is no evidence in this record to show, how the complexity of one's crime either correlates to or increases one's future dangerousness.

The one case the majority cites for support only belies its conclusion. In *United States v. Meskini*, the Second Circuit concluded that Congress had a rational basis to boost the criminal history category to VI for first time terrorism offenders based on the "likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." 319 F.3d 88, 92 (2d Cir. 2003). The court in *Meskini* did not establish a rule that, as a category of offenders, those convicted of terrorism-related offenses will never be able to show that they do not pose a danger to the public due to their advanced age for purposes of evaluating specific deterrence under § 3553(a). To the contrary, the *Meskini* Court noted that in individual

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[14] Even though the majority points to the fact of Padilla's al-Qaeda training, there is nothing in this record to show how his training correlates to his future dangerousness sufficient to render the trial judge's fact-finding regarding Padilla's risk of recidivism after his term of imprisonment clearly erroneous.

cases, a sentencing court always has the discretion to depart downward when it determines that the criminal history category of VI over-represents the likelihood that an individual defendant charged with a crime of terrorism will commit other crimes in the future. *Id.* That is what the trial judge did in Padilla's case and the majority has no principled basis to reject out of hand the fact-finding that Padilla is not likely to commit future crimes when he is released from prison.

D. Unwarranted Disparity Among Similarly Situated Defendants

The majority also unnecessarily "admonishes" the trial judge to avoid re-sentencing Padilla in a manner inconsistent with similarly situated defendants. Despite the majority's concern that the trial judge failed to consider the differences between Padilla and other offenders charged with acts of terrorism, the record reflects that the trial judge referenced the other terrorism cases to ensure that Padilla be sentenced consistently with any similarly situated defendants. For example, even though Padilla identified and the trial judge noted other offenders who had received shorter sentences for providing material support to terrorists, such as David Hicks

(nine months) and Yahya Goba (ten years), the trial judge sentenced Padilla more harshly than those two defendants had been precisely because they were *not* similarly situated to Padilla. Padilla *was* sentenced significantly more harshly than those defendants who pled guilty, were convicted of less serious offenses, or who lacked extensive criminal histories, and yet less severely than those convicted of more serious crimes. A trial judge is not precluded from identifying and commenting upon the sentences of other offenders who were charged with less serious crimes, pled guilty, or had less of a criminal history. Indeed that is exactly what the trial judge should do to accommodate as best as possible "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

The sentences imposed on all three defendants in this case properly reflect this principle. All three defendants were charged with and convicted of the same three offenses. All three had a guidelines range of 360 months to life, from which the trial judge departed downward and imposed a unique sentence on each defendant. The government raises no concerns that Hassoun and Jayyousi received downward departures, even though they both were credited with criminal histories at a level four. As their criminal history scores were two levels below

Padilla's, they both accordingly received lower sentences than Padilla. That Padilla's sentence was not significantly greater than Hassoun's most likely resulted from weighing of all other § 3553(a) factors, in particular the unique and extremely harsh conditions of Padilla's pre-trial confinement.

E. Absence of Personal Harm or Targeting of the United States

Finally, the majority faults the trial judge for remarking that the defendants' crimes did not personally harm anyone nor target the United States. It is a complete misreading of the record to suggest that the trial judge reduced Padilla's sentence on this basis. The trial judge's comments were made as general remarks applicable to each of the defendants, and were never given as a reason to depart downward. Rather, in rejecting the defendants' contention that they had been overcharged, the trial judge noted that the defendants' "behavior is a crime," and characterized the crimes as "very serious." Finally, just prior to announcing the terms of imprisonment for each defendant, the trial judge reiterated that "[t]he sentences that I announce today do reflect the seriousness of the offense and each defendants' culpability in criminal conduct. I have already discussed the seriousness of the offenses and each defendants' culpability." The trial judge further explained that the sentences will serve to inform

others that conspiracy to murder, maim, and kidnap abroad will not be tolerated in this country and the fact that the activities were directed overseas does not excuse them and indeed warrants incarceration. Given the trial judge's numerous references to the seriousness of the crimes in this case, it can hardly be reversible error also to recognize what the crimes did not entail.

Much of what the majority takes issue with concerns the trial judge's discretion in weighing the § 3553(a) factors, but the record simply cannot support the conclusion that Padilla's sentence involves an abuse of such discretion. Precedent from the Supreme Court and this Circuit recognize that trial judges may "attach great weight to one factor over others," and "remember that each convicted person is an individual and every case is a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Shaw*, 560 F.3d at 1237-38 (citations and alterations omitted). The trial judge followed these principles such that her conclusion to sentence Padilla below the Guidelines is entitled to "due deference," even by those who "might reasonably have concluded that a different sentence was appropriate." *Id.* at 1238 (citations omitted).

IV. Conclusion

The old adage that "hard facts make bad law" is clearly evident here. First Agent Kavanaugh's opinion testimony should have been excluded because he was never qualified as an expert and did not have the requisite first-hand knowledge to offer his lay opinion. His lay opinion testimony was merely the government's closing argument in disguise. Second, the incriminating statements Padilla made prior to being read his *Miranda* rights should have been suppressed, because, under the undisputed facts in this record, it is beyond peradventure that Padilla was in custody at the time he made them. Finally, the sentence imposed on Padilla should not be disturbed by this Court, because doing so simply substitutes this Court's sentencing judgment for that of the trial judge, in whom that authority inheres.

Appendix B

United States District Court

Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

KIFAH WAEL JAYYOUSI

JUDGMENT IN A CRIMINAL CASE

Case Number: 04-60001-CR-COOKE

USM Number: 39551-039

Counsel For Defendant: William Swor and Marshal Dore Louis
Counsel For The United States: Russell Killinger
Court Reporter: Robin Dispenzieri

The defendant was found guilty on Counts one, two and three of the Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18, U.S.C. § 956(a)(1)	Conspiracy to murder, kidnap and maim persons in a foreign country.	November 1, 2001	1
18, U.S.C. § 371	Conspiracy to provide material support for terrorism.	November 1, 2001	2
18, U.S.C. § 2339A(a)	Material support to terrorists.	November 1, 2001	3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
1/22/2008

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

DEFENDANT: KIFAH WAEL JAYYOUSI
CASE NUMBER: 04-60001-CR-COOKE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **152 months as to Count 1; 60 months as to Count 2, and; 120 months as to Count 3. All to be served concurrently**.

The Court makes the following recommendations to the Bureau of Prisons:

That the Defendant serve his sentence at FCI Milan, Michigan where his family resides.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

DEFENDANT: KIFAH WAEL JAYYOUSI
CASE NUMBER: 04-60001-CR-COOKE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **20 years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KIFAH WAEL JAYYOUSI
CASE NUMBER: 04-60001-CR-COOKE

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: KIFAH WAEL JAYYOUSI
CASE NUMBER: 04-60001-CR-COOKE

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$300.00	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KIFAH WAEL JAYYOUSI
CASE NUMBER: 04-60001-CR-COOKE

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$300.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE 04-60001-CR-COOKE

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ADHAM AMIN HASSOUN,
KIFAH WAEL JAYYOUSI,
JOSE PADILLA,
a/k/a "Ibrahim,"
a/k/a "Abu Abdullah the Puerto Rican",
a/k/a "Abu Abdullah Al Mujahir",

Defendants.

MIAMI, FLORIDA
JUNE 7, 2007
THURSDAY - 9:30 A.M.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARCIA G. COOKE,
UNITED STATES DISTRICT JUDGE

DAY 23

* * * *

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MORNING SESSION

THE COURT: We are on the record in United States versus Hassoun. We had the issue left over from last Tuesday, which was the nature of the testimony from Agent Kavanaugh. I have had an opportunity, Ms. Baker, to read your filing which you had wanted an opportunity after the government admitted their -- did you have anything else that you wished to say, Ms. Baker?

MS. BAKER: It probably depends where your thinking is at the moment as to whether or not I have --

THE COURT: I have concerns on both fronts, and I think I let all of those out for the government as well as the defense. In this circuit, it seems as if agents are given a bit more latitude in this area than they are in the other circuits.

I am specifically looking at the case law from the

Eighth that more limits how law enforcement officers can testify between kind of your issue that this is a 702 walking as a 701, and that seems to be what the Eighth Circuit guards against.

MS. BAKER: And the Ninth as well.

THE COURT: But it does not seem to be as much of a restriction in this type of testimony in the Eleventh. As recently as Jones, which had an opportunity to discuss Novaton, De La Fe, and all of those areas, it talks about an agent being

able to talk about or testify on areas related to his or her experience.

So where does one -- and I could not find any case law recently that talks about this drawing the line between 701 and 702 in the Eleventh Circuit.

MS. BAKER: Your Honor, I don't dispute anything you have said, but I want to point the following out. In the cases in the Eleventh Circuit which have been more liberal, if that's the word, in allowing --

THE COURT: Why don't we say less restrictive than others.
MS. BAKER: Applying the word "liberal" to the Eleventh Circuit probably sounds like an oxymoron. So, in the Eleventh Circuit, where there has been analysis, and I think the Awan case from 1992, is the one case that really gives analysis --
THE COURT: Awan is interesting because it's not a drug case. Most of the other cases are talking about, does this mean kilo, does this mean cocaine, does this mean -- Awan, if I recall, was the money laundering.
MS. BAKER: That is correct, Your Honor, and in Awan, I think there is a really clear analysis that when an agent functions as a participant, as an undercover, and then is taking the witness stand to play tapes to the jury of what happened undercover, the agent can properly, without 702, give

his opinion as to what was meant when there are passages in those conversations that are unclear.

THE COURT: Since Awan, the Eleventh Circuit has allowed agents who are not participants to do the same thing.

MS. BAKER: No, I don't think so, Your Honor. They did in one case, and only one case, which was -- because Russell was earlier. Russell was '83, and Russell had no analysis. In Novaton they did allow it, Your Honor, but the defendants did not dispute, the defendants and the appellants did not dispute the issue that we are disputing. In Novaton, the defendants conceded that the agents had a rational basis to describe their own perceptions. They conceded that, so it was not litigated. They also conceded the second point, which is that the agent's testimony was helpful to the jury, and we dispute that as well.

There is no case in the Eleventh Circuit that has our factual configuration, non drugs, first of all, a situation where -- I don't know exactly what Mr. Kavanaugh is going to say his experience is, but it's not like the 50 cases in the

Garcia case that I mention in a footnote, and it is not like the 19 years of experience that is mentioned in Myers, which is another Eleventh Circuit case.

THE COURT: Doesn't the Court in Jones say, be careful what you say about Garcia. It doesn't say what we think it says?

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MS. BAKER: I am just bringing it up as an example where the Court was comfortable that an agent had a lot of experience, 50 cases was a lot of experience. I am not proposing that Garcia undermines Novaton's rule, which is that insofar as the issue in Novaton was should the agents be precluded from testifying under 701 just because they could have been brought in under 702. Novaton says, no, just because they could have come in under 702 doesn't mean they can't come in under 701. I am not citing Garcia to the contrary. Garcia happens to be in practical fact a 702 case.

It's an example, and we have many of them in the defense bar, a great deal of experience in this courthouse where agents are put on the witness stand to give specific interpretive definitional testimony to the jury where they are brought in under 702. That happens a lot.

THE COURT: Would you dispute Agent Kavanaugh's ability to -- experience and/or ability to be a 702 type witness?

MS. BAKER: Well, we would have to so what his qualifications were. We have not been given a notice of what he would say under 702, nor what his qualifications are, and we don't know. I mean, I say on information and belief we don't think he has enough experience to be the deep, experienced, garnered, quote unquote, whatever the language is --

THE COURT: I think in one case they talk about 19

years experience, in another case it's 15 years experience.

MS. BAKER: Yes, in the type of case that is relevant, by the way. It's our belief, but again, none of us have had a chance to question Mr. Kavanaugh about this, but it is our belief that he became involved in this case in 2002. The United States Government decided after 9/11 that it was going to make looking for cases that it could prosecute as "terrorism cases" a high priority. I don't know what Mr. Kavanaugh was doing prior to that, but he was certainly tasked to work on a case that the --

THE COURT: So, if this is his first terrorism investigation you would say he is unable to testify even as a 701 witness?

MS. BAKER: Your Honor, he is unable to testify as a 701 witness to meanings of words that he's just learned from the case himself that he tells us in the grand jury testimony that I quoted. He "broke the code" because the conversations themselves disclose what the words mean. Yes, I think if this is his first case and if he is relying on this case, he should

not be permitted to --
THE COURT: Isn't there a first time? Doesn't every
agent have to have their first case to testify?
MS. BAKER: Yes, but that doesn't entitle him to
testify as a 701 or a 702 witness. Of course he has to have
his first case. So, something that I haven't articulated and

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isn't quite said in the papers, maybe it is implied, what the
government wants Mr. Kavanaugh to testify to, we think, they
want him to say to the jury, when Mr. Hassoun in such and such
a tape recording on page ten uses the word tourism, he is
talking about violent jihad. That's what they want
Mr. Kavanaugh to tell the jury and that's --
THE COURT: Why is that different that in cases -- how
is that different than what happened in Awan?
MS. BAKER: It is different in two regards, maybe
three. In Awan, the agent himself was present as an undercover
agent in a long series of communications with the defendant and

they were tape recorded. In many of the specific conversations that he had words were not spoken, sentences were not finished, ambiguous phrases were used. The Awan Court said that agent was a personal participant, he was a percipient witness, he made observations, he saw hand gestures, he heard tone of voice. He had an understanding that was contemporaneous with the conversations themselves. What Mr. Kavanaugh has done in this case, Your Honor, is what we, the defense attorneys, have done and what the jury is going to be able to do and what the prosecutors have been able to do. He has taken a series of written transcripts, he has read it, and Mr. Kavanaugh has decided what he thinks certain words mean from the context of the conversations themselves.

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He was never there. He, of course, can't listen in Arabic because he is not fluent in Arabic. He has only read the same English transcripts that the jury is going to be able

to read. All he would be doing is providing the government argument, and that's the point that I don't know that the papers that I wrote really get to.

What happened in Awan was, the jury was given evidence from which they could decide whether or not the defendant in Awan was guilty. That's not what Mr. Kavanaugh wants to present when he wants to say tourism means violent jihad.

Mr. Kavanaugh is providing the government's argument for the jury. He is telling the jury how to view evidence. It's the jury's duty, and Novaton, I think, mentions this, Your Honor, that it's very important when you do allow somebody to testify as an expert, or under 701, to instruct the jury that it's the jury's duty to evaluate the evidence. In fact, the language from Novaton is, the jury was instructed that they were to independently determine the meaning of the statements that were in the tape recordings in Novaton.

That's not what the government wants here. The

government wants Mr. Kavanaugh to tell the jury that tourism means, quote, "violent jihad," unquote.
THE COURT: Does it say in Novaton whether that instruction was given contemporaneous with the testimony or whether it was given as all the other instructions are at the

conclusion of the proof?
MS. BAKER: It doesn't state either way, Your Honor.
Of course, we oppose Mr. Kavanaugh being permitted to testify as I've anticipated he might wish to.
If you were to permit his testimony along those lines, I would ask for two things, Your Honor. First of all, I would ask specifically that Mr. Kavanaugh not be permitted to add the word "violent" to the word jihad. If Mr. Kavanaugh is permitted to say that, in his opinion, and it's his opinion based just on what he is reading in the transcripts himself, because he has no independent expertise on this, no independent experience from other cases, but if he is allowed to say that

tourism means something, jihad, but not violent jihad.
If he is permitted to tell the jury that tourism means
violent jihad, you are then permitting him to tell the jury,
ladies and gentlemen, I am an FBI agent, I know better, and he
is guilty.
THE COURT: What is the second thing, Ms. Baker?
MS. BAKER: A contemporaneous instruction that, with
respect to meaning of the statements on the tape recorded
calls, it is up to the jury to independently determine the
meaning of the statements and that Mr. Kavanaugh has not been
accepted by the Court as an expert, and any opinions rendered
by him during his testimony are merely his opinions and should
have no greater or lesser weight because they come out of the

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mouth of an FBI agent.
THE COURT: Mr. do Campo, you have been standing.
MR. do CAMPO: Your Honor, this Court is not bound by

Novaton. Novaton was a case that did an analysis on Rule 701 prior to the rule change in 2000.
THE COURT: Except De La Fe says Novaton stays the same despite the 2000 amendment.
MR. do CAMPO: I agree that they say that, Your Honor, however, those are nonpublished cases that are not binding on this Court. They are only of precedential value according to Eleventh Circuit Rule 36-2. There is a reason why they are not binding on this Court.
THE COURT: Jones was not published?
MR. do CAMPO: No, neither one was published. They were both from the non-argument calendar. These cases, though, they are fully briefed, but they don't get totally argued. The three judges in the panel don't sit together and thrash it out.
THE COURT: But the 2000 amendment adds just that one extra line.
MR. do CAMPO: Judge, the history of this is that, as we all know, the Supreme Court for about the last 15 years has really been tightening up what kind of expert testimony will be

admitted in Court and has designated Judges the gate keeper of what expert testimony can come in. On the heels of this development, the amended 701,

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because there is no point in having all this rigorous requirements for expert testimony if you are going to back door an expert witness as a lay witness, which is why they added subsection C, which says it does not require other specialized knowledge, and references 702. So, I believe, Your Honor, De La Fe -- those are not binding on this Court. They are only of persuasive value. I think when we look at the law that Ms. Baker cited from other circuits, it is far more persuasive because it doesn't make any sense why they would have amended 701 to add that subsection C except to avoid exactly this sort of testimony. Your Honor, even Novaton itself says in footnote 9 that the outcome of the case probably would have been different if it had been given with the new amended version of the rule.

That is footnote nine of Novaton.
THE COURT: Footnote 9 in Novaton?
MR. do CAMPO: Footnote 9.
Your Honor, I want to pass a case to the Court. I don't know if Ms. Baker -- I heard you discussing Garcia.
THE COURT: Garcia is in footnote 3. It's United States versus Garcia, 447 F.3d 1327, Eleventh Circuit, 2006.
There is another one?
MR. do CAMPO: No, I have a different Garcia. I want to direct the Court's attention to the second prong of Rule 701, which requires that the testimony be --

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THE COURT: This isn't Eleventh Circuit, is it?
MR. do CAMPO: No, that's Second Circuit.
THE COURT: We have all kind of agreed that the Eleventh Circuit probably takes the least restrictive approach to 701 of any of the circuits.
MR. do CAMPO: I agree, Your Honor, although this is focusing on a different issue that we haven't really discussed yet, which is, will this proposed testimony by Agent Kavanaugh be helpful to the jury. If you turn to page 10, my page 10 on

my printout of Garcia, it has an explanation and analysis which I think is useful to this Court about prong two and whether testimony is helpful to the jury. What it essentially lays out is that if a conversation is obscure, vague, difficult to decipher, lay opinion regarding that conversation might be relevant, that may meet the foundational requirement of prong B. However, where a conversation is clear on its face, its meaning is not subject to any confusion, then lay opinion is improper. In fact, I will just briefly quote language that says, "without a foundation creating doubt about what seemed to be obvious, it is unlikely that opinion testimony would be helpful to the jury; rather, the testimony would then serve to direct the jury what to conclude on a matter that it should be deciding in the first instance." That is on the right-hand column on page ten, end of

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the middle paragraph.

THE COURT: What does the paragraph begin?

MR. do CAMPO: "July 10."
Your Honor, in this case, Agent Kavanaugh, before the
grand jury, said exactly that, these conversations, they are
not rocket science figuring them out. I direct the Court to
page three of Ms. Baker's motion where she has like a block
text quote from Agent Kavanaugh's testimony saying, look, this
is not complicated. It is fairly apparent just from a straight
reading of the conversation. So, I think there is also a
problem with that.
Your Honor, the last thing I will say is, another way
you can distinguish De La Fe and Jones, in those cases the
agents were talking about drug routes, terms that are used
commonly in the drug trade, things based on their experience.
I do not believe Agent Kavanaugh is going to say in terrorism
cases or supporting terrorism cases people often use the term
"football" to mean a battle, or people often use the term
"fresh air" to go out and fight.
He is basically just inferring that based on his

analysis of this conversation, and that's the difference. He is providing analysis, which is really the jury's job, not the job of a witness from the government to tell the jury what to think or what to interpret from this case. I join with Ms. Baker, I adopt all of her arguments,

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and I do think the instruction should be given, if Your Honor agrees that he should testify, should be given contemporaneously. This jury may not be charged until August.

THE COURT: Mr. do Campo, one of the things, and I didn't bring it up with Ms. Baker, but I know I'm going to discuss it with Mr. Frazier, and that is, the Courts say you can have a witness, one witness that's doing the same thing. You can have a witness, and it makes clear in some of the discussions that it's not the witness, it is the testimony. You can have a witness that is a 701 and a 702 witness simultaneously.

MR. do CAMPO: Absolutely. The problem, Your Honor,

is, if all of a sudden Mr. Kavanaugh were to be converted into a 702 witness we would have other objections like failure of notice.

THE COURT: I am going back to your pointing me out to footnote nine. "Despite our conclusion, we note that it is an open question whether the amendments made in Rule 701 in 2000, might require a different result if the trial were held today. Those amendments limit lay witness opinion testimony to that which is not based on scientific, technical or other specialized knowledge for the scope of Rule 702. The stated purpose behind the 2000 amendment was to eliminate the risk that the reliability requirements set forth in Rule 702 will be evades for the simple expediency of proffering an expert in lay

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witness clothing.

"It could well be that the experience which provided the testifying agents with a basis for rationally perceiving

the information provided in their opinion testimony, in this case, would constitute specialized knowledge and that such testimony would now be admissible only under Rule 702."

MR. do CAMPO: That is our argument, Your Honor, that in essence what he is offering is specialized knowledge as a case agent, as he has reviewed this case. That testimony comes in under 702, not 701. Lay witnesses are not allowed to testify their opinions that are based on specialized knowledge.

THE COURT: The me hear from the United States.

MR. do CAMPO: Can I just say one other thing, Your Honor?

THE COURT: Yes, Mr. do Campo.

MR. do CAMPO: If he is going to testify, and again we oppose it, based on his experience in this case, we have only been given a couple of 302s, I think we would be entitled to every 302 he wrote in this case. If the subject-matter of his testimony is going to relate to everything he did in this case

which is what leads him to -- leads to this lay opinion, then I think we're entitled to every single one of the 302s he wrote in this case.

THE COURT: Do you think, Mr. do Campo, that given the amendments to 701, the analysis of the Eighth Circuit is

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probably more on point now? One of them is United States versus Peoples, where the Court says, "Federal Rule of Evidence 602 requires that a witness have personal knowledge of the matters about which she" -- the agent in this case was a female -- "except in the case of expert opinions. Rule 701 adds, the testimony in the form of lay opinions must be rationally based upon the perception of the witness. When a law enforcement officer is not qualified as an expert by the Court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation" -- which we know is not necessarily required in

the Eleventh Circuit -- "has personal knowledge of the facts being related in the conversation" -- which we know doesn't happen here because Agent Kavanaugh listened to these conversations somewhere downstream -- "or observed the conversations as they occurred.

"Lay opinion testimony is admissible only to help the jury or the Court to understand the facts about which the witness is testifying, and not to provide specialized explanations or interpretations that an untrained layman could not make in perceiving the same events."

That case is from 2001.

MR. do CAMPO: I do, Your Honor, and I think we have to look at -- I think a right way to characterize the state of Eleventh Circuit law in this area is that there has not been a

full briefing and argument of this issue where the Court has made a position. When we put De La Fe and James in their proper role, which they are advisory, they are not binding on

this Court because they were not fully argued, and we look at what other circuits are doing, and we look at -- there was an express reason for amending 701. The rules of evidence aren't changed unless there is an intent on the part of the drafters to bring about a different, you know, manner of proceeding. Your Honor, just to add, again, what this testimony would do is just tell the jury that which could be argued in closing argument. In closing argument, whoever does it for the government can say, on the context these are what these things mean. In en banc case United States versus Frazier that is exactly the sort of testimony that was not permitted.

THE COURT: What was the case you cited?

MR. do CAMPO: United States versus Frazier. It came up quite a bit. I've got it, 387 F.3d 1244. The pen cite is 1262. That's a 2004 case, Your Honor.

THE COURT: That's Eleventh Circuit?

MR. do CAMPO: Yes, en banc.

MS. BAKER: About expert testimony.

THE COURT: Mr. Frazier, what is Agent Kavanaugh's

experience in the investigation of terrorism cases?
MR. FRAZIER: Your Honor, he has had multiple

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terrorism investigations that he has participated in.
THE COURT: When you say "multiple," what do you mean?
MR. FRAZIER: Over 20 cases.
THE COURT: How many of them have resulted in
indictment?
MR. FRAZIER: One.
THE COURT: How many times has he testified in court
about these matters?
MR. FRAZIER: Well, he has testified multiple times in
the grand jury. In terms of open court, I don't think he has
testified as to any of those matters.
THE COURT: I think we have established that Agent
Kavanaugh does not speak, read or write Arabic, correct?
MR. FRAZIER: Correct.
THE COURT: When did he join the investigation that,
for lack of a better word, we will abbreviate as United States
versus Hassoun?

MR. FRAZIER: I believe around May 8, 2002, contemporaneous with Kent Hukill, the other agent.
THE COURT: What was the date of the last tape recording that we admitted? What was the actual date of that tape?
MR. FRAZIER: That will be admitted?
THE COURT: That you anticipate being admitted, or the ones that we have done so far.

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MR. FRAZIER: The ones that we have done so far, those were back in the '90s, but let me double check. October of 2000.
THE COURT: I don't recall from the previous testimony. How long has Agent Kavanaugh been an FBI agent?
MR. FRAZIER: Eight years.
THE COURT: Mr. Frazier, you may continue.
MR. FRAZIER: Thank you, Your Honor. As I interpret what the defense is saying, I think they are saying two inconsistent things. Let me see if I can't crystallize the issue. I think initially the concern was this is a true expert

witness, a 702 witness posing in the guise of a 701 witness.
There was some concern due to lack of notice, et cetera,
qualification to speak to a 702 issue which, of course, is
expressly excluded and differentiated from a 701 issue.
THE COURT: I hear two things, Mr. Frazier. I am
hearing this is 702 testimony dressed up like 701. I am also
hearing that, if it is 701 testimony and I follow the analysis
of the Courts in other similar cases, then the agent has
considerable training and experience. I remember one case was
19, another was 15, or the agent had been -- and this is my
language, not any from any of the Courts -- substantially
immersed in the investigation.
For example, the agent in Awan had been undercover
with this investigation for years, had been a participant in

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many of these conversations. So you have that kind of
specialized involvement, training, experience there on the

ground. Then you have coming off from that, is that when you get to a point where the agent's testimony comes out as 702 testimony -- and there are a lot of those cases out there where the agent is qualified as an expert, they have so many years of experience. Unfortunately, many of them are drug cases. As a drug agent undercover, they talk about certain terms, how drug organization are set up, what certain things mean on certain days. They come in as essentially 701 -- initially 701 witnesses, but then, based upon training and experiences, giving 702 testimony, but having been qualified that way. I kind of sort of hear that that's not where you want to go with Agent Kavanaugh.

MR. FRAZIER: No, I don't think it is, Judge. I mean, we stand by the agent's representation in the grand jury, and I think the Court will see from the testimony you will hear that he is basically taking the calls within their own confines, as well as other materials that were accumulated during the

investigation, and will be interpreting what certain terms
mean, what certain references mean, what certain individuals
are being mentioned within the confines of these calls.
THE COURT: But in the same confines of these calls,
he said before the grand jury in a quote in the defense papers
that it's not that hard to figure this out.

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MR. FRAZIER: I don't think it is that hard to figure
it out, Judge, if you have the benefit of five years and the
ability to look at all of this information accumulated in a
room, cross referenced between transcripts, and if you have the
luxury of time without the constraints that obviously the jury
is under for receiving information.
So, I think the characterization is accurate. The
problem here is we need to help the jury --
THE COURT: Mr. Frazier, can you lay out for me what
you anticipate Agent Kavanaugh will say that would assist the
jury in understanding this testimony? What is he going to

discuss? How is he going to interpret what these tapes say?
MR. FRAZIER: Your Honor, I can give individualized
examples and maybe this will be of some assistance. As a
general matter, I think he is going to put the recordings in
the context in which they were made or received.
THE COURT: What does that mean? My understanding was
there was no -- when I say no context, I don't mean it quite
that way. I mean that these -- unlike many other tape recorded
conversations that we have, this is not a situation where this
was made as part of a criminal investigation. These were
initially gathered as intelligence with no one listening or
analyzing them on a daily basis. I use this term and I don't
mean it -- like the tape recorder was running.
MR. FRAZIER: No, I understand. Let me use an example

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that I think the Court is probably familiar with based on our
arguments last week about excluding certain of these

intercepts. A good example is the Hassan Katerji phone call with Adham Hassoun's wife. Hassan Katerji is someone that is not named in this indictment. The jury has no idea who that is or what events may have preceded this call. As the Court knows because we represented it to the Court, Hassan Katerji is an associate of Hassoun's and Agent Kavanaugh can testify about that if for no other reason than he interviewed Adham Hassoun and Hassoun told him who Katerji was. Katerji is coming over to the United States to join up with Hassoun to do a fund raising tour. He is intercepted at Kennedy Airport and interrogated by the INS and is kept with the INS for about 24 hours. He is turned around and sent back because of some concerns about him being on a terrorism watch list.

So what Katerji does is, he attempts to call Hassoun when he gets back overseas to say, look, you guys better watch out. The INS questioned me. They asked me about terrorism.

Don't talk about sensitive matters, tourism and such.
There are some things that the jury needs to understand to put that call in context. First is, who is
Katerji? Second, what is doing talking about the Immigration
and Naturalization Service? Third, what is the sensitive
matters that he is calling about and why is there a reference

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to tourism in the context of this call?
THE COURT: And what would Agent Kavanaugh say?
MR. FRAZIER: He would say Hassoun Katerji is an
associate of Adham Hassoun. He was coming over to the United
States from overseas to engage in fund raising. He was
intercepted by the INS. He was questioned by the INS because
he was on a watch list. He was turned around. This call was
then subsequently made from, I believe, Istanbul to say what
the call says, don't talk about these matters, tourism and
such. And "tourism" in this context means jihad, fund raising
for jihad, things of that nature.

So, I think that is a call where the jury -- and it's just one example of many where --
THE COURT: See, that one almost makes sense because we don't know about what happened at Kennedy Airport. We don't know why he turned around, and what you just represented, don't talk about tourism and such and that could mean fund raising and it could mean jihad.
MR. FRAZIER: Correct.
THE COURT: Here is my concern. I am not saying this is what Agent Kavanaugh would say. There is a conversation and somebody says, let's ship 14 pounds of sugar, I am just pulling this out, to Kosovo to assist them in -- let's ship 60 pounds of flour to Kosovo because we know that they are lacking bread there. That's the conversation. Someone, and I am saying in

this case that someone would be Agent Kavanaugh, opines that 60 means 60 pounds of explosives so that they could make 60 bombs.
I am not pulling this from any conversations. I am using this only as an illustration.

How does this witness get to say that just on that conversation, as opposed to something else or some other interpretation?

MR. FRAZIER: What we will be doing, Judge -- and I want the Court to be comfortable with the fact that we are not going to stretch it, we are not going to over sell it. If there is a term, for example, zucchini -- the term zucchini comes up, it is a nonsensical term in the context in which it is used. We could wildly speculate as to what it is. If we don't know precisely, based on other facts --

THE COURT: I think this is what the defense is saying, there may be those occasions where it is appropriate. Yes, Katerji was turned back, that is an appropriate thing because we don't have a tape of Katerji being sent back to say that.

MR. FRAZIER: Right.

THE COURT: But, what I am trying to understand from the government and what I don't have is, when are you going to say that X equals Y? What are the terms that you are going to ask this witness to give his lay opinion about?

MR. FRAZIER: Well, if we are talking about terms,

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Judge, I think there are three or four that come to mind,
obviously "tourism."
THE COURT: And "tourism" will mean what?
MR. FRAZIER: "Tourism" will mean violent jihad or
fighting jihad. The witness will say, based on the context of
calls and other documents that he has reviewed, that jihad
is -- when they are talking about it --
THE COURT: Are those other documents in evidence?
MR. FRAZIER: The other calls are largely -- yes, I
think they are.
THE COURT: You say he has reviewed other documents to
make this determination.
MR. FRAZIER: For example, there are faxes that will
be in evidence. I can comfortably say yes. This does not
preclude -- what I ask him does not preclude the defense from
probing him on cross.
THE COURT: I am not saying you can't. No offense to

Agent Kavanaugh, but he is using this case and his experience in this case to opine on this case, whereas in many of the reported cases the agent or law enforcement officer is using multiple cases and experiences to opine on why they are testifying in this way. They have been in 20 or 30 investigations. They have been in investigations that have returned five or ten indictments. They have testified not only in front of the grand jury, but in State and Federal Court, or

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State Court.
As I said, no disrespect to this agent, but I am talking about right now, at this moment, the kind of experience that he has. He is basically using the experience of investigating this case to opine on this case.
MR. FRAZIER: Yes and no, Judge. I think your comment was well placed to Ms. Baker and Mr. do Campo, one of the two, that every agent has to start somewhere. There is always a first time. I don't think he should be precluded simply

because he has never testified in this capacity before.
This second is, this case is very broad, and let me give you an example in terms of code words that I think
illustrates this very well. Agent Kavanaugh was present for
multiple debriefings of Yahya Gobo who came in here and
testified. He obviously was not related to this case, but he
was someone else that was recruited and attended the same
training camp.
Now, through that experience, this agent realizes that
when the recordings say "students" in this case, and in the
context of the students in the first area, that means the
Taliban in Afghanistan. When we debriefed Yahya Gobo about
codes that his organization used, he said, well, we would refer
to the Taliban as the students. We would refer to Afghanistan
as the first area. We would refer to the training camps in
Afghanistan as the schools.

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Those terms, all three of those terms, come up in the

context of our case. So, in investigating this case it's not as if all he has done is sat in a room and looked at intercepts and faxes. He has a broad experience in terms of interviewing --

THE COURT: I don't disagree, but isn't that what expert witnesses do?

MR. FRAZIER: I don't know that we have to get to that point.

THE COURT: I am asking you. Expert witnesses are allowed to take what would be otherwise inadmissible testimony in reviewing it and in analyzing it and giving an opinion. For example, he has interviewed other people who say student means Taliban, correct?

MR. FRAZIER: Yes.

THE COURT: That person's statement, if that's what he wanted to say, would be an out of court statement offered to prove the matter asserted, right?

MR. FRAZIER: Correct.

THE COURT: That statement would not be admissible. But if he testifies as an expert it would be because it forms

the underlying basis upon which he is making his opinion.
MR. FRAZIER: I don't disagree with you, Judge. This
is why I kind of wanted to isolate what the real argument is
here when I first stood up. I think you are right and I see it

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the same way, that the defense is saying two things. On the
one hand, this is really 702, but on the other hand, it is
really not because it is very simple and the jury can figure it
out themselves, i.e. it doesn't involve technical, precise
knowledge.
THE COURT: I think they are saying both, and both of
those are equally something that the Court should guard against
because it can travel down these two ways. You could have one
witness that could be a legitimate 701 witness that is also
giving 702 testimony. I think what the defense is asking the
Court is to do one of -- two of about three things.
One of this many them is, Your Honor, if he is a 701

witness, then the Court's gate keeping function is -- and I think that's what it says in Awan, is the Court has a specific gate keeping function there to make sure that this 701 testimony is essentially 701 testimony. Then, in doing that, that there are some of these statements, Judge, that may be 702. If they are 702, then this witness does not have the specialized skill, training, et cetera, et cetera to do -- or give a 702 opinion.

MR. FRAZIER: I guess I disagree with the Court in this sense. There are multiple cases in the Eleventh Circuit -- by the way, when talking about investigating agents, the Eleventh Circuit inevitably starts from the 701 frame of reference. I think we can agree on that.

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Simply because an investigating agent in the 701 cases has experience that comes to bear vis-a-vis his other investigations, i.e. if Agent Kavanaugh had been one of the

Lackawanna agents and understood how the recruitment process worked and what the terminology was and how they communicated, that does not per se convert him from a 701 witness into a true expert witness. I think that's very clear.

THE COURT: I think that's exactly what the footnote in Novaton says.

MR. FRAZIER: Here is the problem with that footnote. Let me call the Court's attention to our page five on our memorandum, it's footnote one. This is why the defense references to that footnote is incorrect. The question is, what is the effect of the 2000 amendment on Rule 701? We write in the footnote that the Eleventh Circuit has expressly held that at least with regard to law enforcement officers, the kind of situation we are talking about, the rule operates just as it did before the amendment, citing Jones, citing Chambers, and lest we need, a reported case. The key case here is Tampa Bay Ship Building and Repair versus Cedar Shipping Company, Eleventh Circuit,

2003, obviously a later case than Novaton and the speculative
footnote 9 in that case.
So, I don't think we should get off track based on any
preclusive effect of the 2000 amendment. Everything operates

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as it did before. In fact, if you look at the post 2000 cases,
including Novaton, they always reach back past 2000, and cite
the older cases, including Awan. So, I think when we are
talking about law enforcement, there is really no distinction.
I think we need to put aside footnote 9 in that regard.
To speak about Awan, Your Honor, let me talk about
Awan and Novaton and how they interact. I think the defense
has over sold Awan. How that case came about was, there was a
finding when the District Court was looking to establish
whether the lay opinion testimony was rationally based on the
perception of the witness. This was a situation where there
was an undercover participating in conversations and the

District Court said one basis for deciding whether the testimony is rationally founded on the perception of the witness is if the witness was there, is if the witness was there.

Now, the Eleventh Circuit parrots back that statement by the District Court, but it does not elevate this finding of the District Court to an inflexible standard. In other words, Awan nowhere says that in order to be admissible lay testimony the witness has to have been there and participated. Nowhere does it say that.

In fact, Awan tellingly is cited in Novaton, which is on all fours with our case. In Novaton what happened was, true, the defense did not contest the issue of the rational

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basis of the perception, but again, the Eleventh Circuit was under an obligation, since a 701 challenge had been raised, to make sure that each of those three elements were satisfied under 701.

Then in the holding, not the dicta, but the holding of Novaton, which occurs on page 1009 of the reported opinion, the Eleventh Circuit writes that we believe that the District Court did not abuse its discretion by permitting agents involved in this case -- again, the wire monitors and their supervisors, no one who participated in an actual conversation involved in the case. There was no abuse of discretion for them to give opinion testimony based on their perceptions and on their experience as police officers about the meaning of code words employed by the defendants in the intercepted telephone conversations.

So the Eleventh Circuit here in its holding is recognizing explicitly that wire monitors, people that listened to recorded conversations that they were not participating in, are allowed to testify about the contents and the meaning of those conversations and that that fits within the perception prong of Rule 701.

So, I think Novaton is really on all fours with our situation and should decide the issue.

THE COURT: What page were you reading from in Novaton?

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MR. FRAZIER: I believe it's 1009. If the Court has nothing further, we are obviously available for further discussion.

MS. BAKER: I would like to respond briefly.

THE COURT: Just briefly, counsel.

MS. BAKER: Tampa Bay was a civil case and its discussion of Novaton and the other police cases was dicta. Novaton, the Court specifically pointed out that there was no dispute over rational perception. More importantly, in the passage that Mr. Frazier just read, the Court emphasizes the experience of the officers to be permitted, as they were in that case, to testify about meanings of code words.

Let's go to the issue of experience. Although Mr. Kavanaugh has apparently, according to the representation, been involved in 20 cases, only one of which has come to indictment, et cetera, et cetera, there has been no

representation, and I believe it is because it doesn't exist,
the facts, no representation that in any of those other cases
was he exposed to the same alleged code words.
The example of the debriefing of Mr. Goba, it points
it out. Mr. Goba apparently talked about three substitute
words that were used in that case. In fact, that was brought
out on the witness stand from Mr. Goba. That has nothing to do
with what is the meaning of "tourism." It has nothing to do
with what is the meaning of "zucchini."

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There is not an iota of a representation from the
government that Mr. Kavanaugh has experience with those words
from any other investigation. It is clear in the context of
Mr. Kavanaugh's grand jury testimony that he decided what those
words meant just from reading the transcripts themselves.
I point out, Your Honor, that the quotation that
appears, I think, on page 3 of my memorandum is from grand jury
testimony that Mr. Kavanaugh gave May 8, 2003, just one year

after he began his work in this case. It was not based on the five years of experience and the accumulated knowledge from the 20 other cases or whatever. Mr. Kavanaugh is a bright guy, he reads well, he reads within the four corners of the transcripts. He said to the grand jury, hey, it's laughable. In a conversation Mr. Hassoun will be talking about jihad and he'll slip in another word. It clearly means the same thing. Well, that is just telling the jury what he is going to hear on the transcripts themselves. That is not the wisdom of an experienced, for example, DEA agent who has been himself in undercover operations for 20 years and involved in countless undercover investigations that he has learned the rules and the ropes of that drug trade through his own experience. That's what Novaton was talking about, experience. That's the emphasis in the last statement that Mr. Frazier quoted from Novaton. That experience isn't here.

I have one more point that I do want to make. Originally Mr. Frazier said, when asked by Your Honor, what would Mr. Kavanaugh say, for instance, about the Katerji communication with the wife, what would Mr. Kavanaugh say tourism meant. Mr. Frazier said, well, he will tell the jury it could mean jihad or fund raising. That's one form of testimony.

Then, separately, when Your Honor asked Mr. Frazier, tell us what you anticipate Mr. Kavanaugh would say, oh, well, he'll say that "tourism" means violent jihad. That's an entirely different order of testimony. I think the first "could mean jihad or fund raising" is unnecessary and not helpful to the jury in the traditional way that helpfulness is defined as in that en banc case United States versus Frazier, which dealt with expert witnesses. The Eleventh Circuit en banc, all of them said it's not helpful to the jury for an expert witness to tell the jury what is essentially an argument

that the government can make in closing. What the Eleventh Circuit on bank said about expert testimony clearly must also apply to lay opinion testimony, if it's just an argument that can be made to the jury in closing it is not "helpful" to come out of the mouth of the witness. Indeed, we would submit it is unhelpful and counter to the notion of due process and to try this case on the facts and not trying it on the government's arguments.

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We believe that it would be entirely not only prejudicial, but violative of the most basic premise of the jury trial to permit Mr. Kavanaugh to say from the witness stand that, in his opinion, "tourism" means "violent jihad." That's the term in the indictment that the government needs to prove beyond a reasonable doubt in order to get its conviction, and it would be a direct comment and it -- in this case, which is a conspiracy case so that the intent of the defendants is what is at issue, because they are not claiming any substantive

acts of murder, it is just whether or not the intent was there,
for Mr. Kavanaugh to give that testimony would be a direct
comment on the intent of the defendants.
It would directly violate -- there is a rule, and I am
not remembering the number, that says that, expert or not,
nobody can comment on the mental state of the defendants. For
him to say violent jihad, that that's the meaning of tourism,
that would absolutely be a comment directly on the mental state
of the defendants.
THE COURT: Let me hear briefly from Mr. do Campo so I
may rule, Ms. Baker.
MR. do CAMPO: Your Honor, if the Court has not done
so, I would encourage the Court to look at the Tampa Bay case.
The Tampa Bay case is a civil case involving a ship that needed
repairs and there was a dispute as to whether they were done
properly. The witnesses that testified there were based on

their experience as ship repairers and ship builders as to what

would be the proper procedure, and what were your orders, and whose fault is it that the ship was not fixed properly. It had nothing to do with law enforcement officers. I concede that either De La Fe and/or James cite to that in support for the idea that law enforcement officers, the rule change in 701 has nothing to do with it, but there is nothing in Tampa Bay to support that, which is why we should always look very carefully before we rely on unpublished decisions that were not argued. There are three prongs to 701. It's got to be, first, helpful to the jury. Either Mr. Kavanaugh is going to testify to things that are already in evidence or will be in evidence before this jury, which means they already have the tools they need to reach those conclusions if that's what they want to do, or they don't because he's basing it on evidence that's not going to be admitted, which would also be improper. So that is one prong. By his own words, a year after he started the case he

had already read all these transcripts and said, this is a fairly simple matter to decipher. That's what the jury should be allowed to do. The third prong with respect to specialized knowledge, I won't repeat all my arguments, but the Court knows if specialized knowledge is going to be used, he has got to come

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in under 702, not 701, and they didn't follow those procedures. Your Honor, I want to just flag one issue. I know the Court has got a lot on its plate, but with respect to the example that Mr. Frazier gave about what Mr. Kavanaugh would testify, for instance, with Katerji, he has no personal knowledge of any of that and there are a number of confrontation issues. So, I am not sure what their design is with Mr. Kavanaugh, but for him to testify about all these different events that were happening before he even knew that this case existed --

THE COURT: Well, I understand it's to put certain facts in context to say that he learned on such and such a date X individual came to Kennedy Airport and was not allowed admission because --

MR. do CAMPO: The because part is a little -- that's a little problematic. I don't see how he would have any personal knowledge of the because. I don't want to get the Court off track. I know this has been a hotly contested issue, but I just wanted to flag it.

MR. FRAZIER: Just a very final word, Your Honor. Of course the other cases in footnote 1 that cite the Tampa Bay Ship Building case, they are criminal cases. I think they are crystal clear that the rule change does not affect the law enforcement analysis. Just to bring this back to the first principle, no different, indistinguishable from a drug case

where someone is interpreting code, is saying this nickname refers to this person.

I think that was the Court's initial instinct when we first raised this issue last week. I think it's absolutely the right way to go on this issue.

THE COURT: Obviously, by the fact that I took up a lot of time on Tuesday and today evidences that I have some concern about Agent Kavanaugh's testimony. As I said in my argument today, and I will say it with Agent Kavanaugh here, none of what I am saying is meant to denigrate him personally, but I do have concerns about the breadth of his experience in regards to the testimony the government would like him to give.

I think it is appropriate that Agent Kavanaugh testifies as to certain 701 areas as a law enforcement officer, given his training and experience.

However, I do have a concern that Agent Kavanaugh's experience is not of the depth as those described in many of the cases that allow this testimony where an agent has had substantial years of experience in investigating these kinds of cases.

I believe that there is some latitude for this agent to be able to talk about some of the information that he has learned from this case. I do believe, however, it is inappropriate for him to characterize the specific nature of words such that it invades either the actual legal fact that

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needs to be proven, that is, whether or not something was violent jihad, or how to characterize the intent of the defendants in this case.
So, for example, I think it is appropriate for this witness to discuss how he came to the conclusion that a particular word meant jihad. I do think it is inappropriate for this witness to say that something was meant to be violent jihad. As I said, and I think I said it in questioning, it appears as if this witness's training and experience to opine on what certain things mean is the investigation of this case.
So this one case is kind of creating the experience and almost

in some sort of a bootstrapping manner allowing him to opine on a number of subjects. I realize that what I have said this morning does not give either side a lot of specific guidance as to how to proceed, and I suppose that is because I am using only the examples that have been given to me this morning. One of the things that all of the cases talk about, and I think that is the reason why there was the amendment to 701, is the Court has to perform a specific gate keeping function. It talks about two things occurring in the Awan case. One, obviously the Court sustaining appropriate objections if it is outside the 701 realm; and, two, allowing the defense to engage in appropriate cross-examination, which I think this past three weeks have shown that the defense in this case is

quite capable of performing that task. So, we are going to proceed with Agent Kavanaugh's testimony. We are going to take a brief, brief break. The jury

has been sitting for almost two hours. We are going to go
until 1:00 before we take another break. Please let the jury
know we will be starting in five minutes.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10494

UNITED STATES OF AMERICA,

Plaintiff-Appelle,
Cross-Appellant,

versus

KIFAH WAEL JAYYOUSI,
a.k.a. Abu Mohamed,
ADHAM AMIN HASSOUN,

Defendants-Appellants,

JOSE PADILLA,
a.k.a Ibrahim,
a.k.a. Abu Abdullah Al Mujahir,
a.k.a. Abu Abu Abdullah the Puerto Rican,

Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for
the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: DUBINA, Chief Judge, BARKETT and PRYOR, Circuit Judges.

PER CURIAM:

ENTERED FOR THE COURT:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

November 15, 2011

ENTERED FOR THE COURT:

/s/ Dubina
UNITED STATES CIRCUIT JUDGE