No. 11-1194

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

REPLY TO BRIEF IN OPPOSITION

WILLIAM W. SWOR
3060 Penobscot Building
645 Griswold Street
Detroit, MI 48223
(313) 967-0200

MARSHALL DORE LOUIS
SINCLAIR, LOUIS, HEATH,
NUSSBAUM & ZAVERTNIK
169 East Flagler Street
Miami, FL 33131
(305) 374-0544

DAVID W. DEBRUIN
MATTHEW S. HELLMAN*
CHRISTOPHER J. DEAL
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com
** Counsel of Record*

ELIZABETH A. EDMONDSON
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

June 6, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. The Government Cannot Justify Its Interpretation of Rule 701 3

II. Contrary to the Government's Assertion, the Courts of Appeals Are Squarely Divided on the Question Presented 7

III. The Government Is Wrong to Contend That the Errors Below Were Harmless 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200 (4th Cir. 2000) 3, 10

Kotteakos v. United States, 328 U.S. 750 (1946) 12

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) 1, 9, 10, 11

United States v. Grinage, 390 F.3d 746 (2d Cir. 2004) 6

United States v. Johnson, 617 F.3d 286 (4th Cir. 2010) 8, 9

United States v. Meises, 645 F.3d 5 (1st Cir. 2011) 11

United States v. Peoples, 250 F.3d 630 (8th Cir. 2001) 3, 7, 8

OTHER AUTHORITIES

4 Joseph M. McLaughlin et al., *Weinstein's Federal Evidence* 701.02 (2d ed. 2011) 4

INTRODUCTION

In this case, the Eleventh Circuit held that an FBI agent could give extensive lay opinion testimony about the meaning of conversations of which he had no first-hand knowledge. The Government now argues that this construction of Rule 701 is correct and enjoys the unanimous support of the courts of appeals. But the Government is wrong and this serious question, which implicates testimony in criminal and civil proceedings alike, deserves this Court's review.

The Government's central contention that a witness gains "first-hand knowledge" of a conversation by reviewing a translated transcript years after the conversation took place defies both law and logic. Rule 701 is premised on the idea that a witness who personally perceived an event can provide the jury insights "uniquely available to an eyewitness" through lay opinion testimony. *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005). The Rule, in other words, "recognizes . . . that, sometimes, 'you had to be there.'" *Id.* Someone who merely reads a transcript years later simply was not "there." First-hand knowledge is a meaningless limitation if it is equally the province of the eyewitness and the latter-day researcher.

Equally erroneous is the Government's assertion that the courts of appeals have not rejected the sweeping view adopted below. The reality is that five circuits would have refused to admit the testimony in question here, and the Government offers only a half-hearted argument to the contrary. To the extent that the Government discusses these cases at

all, it relies on the fact that they occasionally found the testimony inadmissible on multiple grounds, or it invokes irrelevant factual differences. The conflict here is square and deep, and only this Court can resolve it.

The Government's final contention that harmless error stands as a bar to this Court's review is meritless as well. The Eleventh Circuit declined to rest its decision on this alternative ground, and the Government made only the most cursory argument on this point below. In any event, the Government's harmless error theory – that lay opinion testimony overlapped with expert testimony – does not withstand scrutiny. Agent Kavanaugh gave his lay opinion testimony over the course of nine days and identified dozens of purported code words. The prejudicial effect of his testimony was overwhelming. His testimony was not remotely cumulative of the Government's expert, who testified that Dr. Jayyousi never used code, Pet. App. 28a, and who only briefly referred to conversations involving Dr. Jayyousi that included "double talk," *see infra* p. 12.

In the end, the Government's response only confirms the importance of the question presented. In order to defend the extreme ruling below, the Government is forced to adopt an interpretation of Rule 701 so broad that it wipes away the defining characteristic of lay opinion testimony: that the witness testify about something he personally perceived, and not on the basis of post-hoc analysis. The Government's position dramatically undermines the role of expert testimony by allowing lay witnesses to opine on historical facts without complying with the safe-

guards of expert testimony. And it creates a profound potential for prejudice – realized here – when a witness may opine that a defendant engaged in illegal acts by simply sifting through evidence and asserting that innocuous statements are actually culpable ones. This Court should grant certiorari to resolve whether such lay testimony is permissible under Rule 701 and hold that it is not.

ARGUMENT

I. The Government Cannot Justify Its Interpretation of Rule 701.

The Government defends an interpretation of Rule 701 that is as extreme as it is incorrect. The Government acknowledges that the witness in this case had no first-hand knowledge of the conversations he opined about. But it claims – based on cases from one side of a circuit split that it all but acknowledges – that the testimony was proper because the agent did have first-hand knowledge of the translated transcripts of those conversations.

The Government's interpretation reads the requirement of "first-hand knowledge" right out of Rule 701. As numerous cases have held, first-hand knowledge requires the witness to have personally perceived the underlying events in question, not merely to have read about them later. *See, e.g.*, *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001); *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 204 (4th Cir. 2000). If ex post review is sufficient to provide first-hand knowledge, then the requirement is meaningless, because any-

one could obtain such knowledge simply by reviewing records of an event.

The Government's view defeats the purpose of Rule 701, which is to provide the jury with the type of eye-witness account that cannot be replicated after-the-fact. *See, e.g.*, 4 Joseph M. McLaughlin et al., *Weinstein's Federal Evidence* 701.02 (2d ed. 2011). A police officer who testifies that "I spoke with the defendant, and he appeared nervous and evasive" has first-hand perceptions to offer the jury. A different officer who reads a transcript of that conversation (let alone a translation of that transcript years later), and opines that the defendant seemed nervous and evasive does not.

The Government's response is that Agent Kavanaugh's testimony is admissible because he did not purport to offer an opinion about what Dr. Jayyousi actually said, but merely an opinion about what the translated transcript meant. BIO at 12. ("Agent Kavanaugh did not pretend firsthand knowledge of anything he did not personally observe. Instead, he testified about the records and recordings that he had personally examined."). That distinction is illusory. The transcripts that Agent Kavanaugh examined contained Dr. Jayyousi's words, and the opinions Agent Kavanaugh rendered were explicitly about what he believed Dr. Jayyousi meant when he used those words. When Agent Kavanaugh testified that when Dr. Jayyousi said "tourism," he meant "jihad," the jury understood – and was surely intended to understand – that Agent Kavanaugh was giving an opinion about what Dr. Jayyousi meant.

It is surely no answer to say, as the Government does, that Agent Kavanaugh's opinions were subject to cross-examination, BIO at 12, or that Agent Kavanaugh was not allowed to opine that Dr. Jayyousi was agreeing to "violent" jihad, BIO at 6. Rule 701 does not say that lay opinion not based on first-hand perception is subject to cross-examination or to balancing for prejudice; it says that such testimony is inadmissible.

Nor is the Government correct that limiting Rule 701 testimony to opinions based on events the lay witness actually witnessed will lead to "nonsensical" results. Leaving aside the fact that several circuits have adopted precisely this view, *see infra*, the Government's concern is unfounded. While the question of whether a witness actually personally perceived an event might present the occasional close case, this case is not a close one. As the court below held, and the Government here concedes, Agent Kavanaugh did not personally observe the conversations about which he opined – all he personally perceived were translated transcripts and recordings largely in a language he does not speak.

In reality, it is the Government's interpretation that leads to nonsensical results. Not only is it nonsensical to treat a witness who reads historical facts as having first-hand knowledge of those facts, but, as we explained in the Petition, such testimony threatens to undermine the distinction between lay opinion and expert opinion under Rule 702. The Government does not answer this point, but the tension the Government's view creates is obvious. An expert is allowed to opine on events she did not personally

perceive precisely because her analysis is subject to rigorous procedural and methodological safeguards. But none of those safeguards constrain a lay witness who, on the Government's account, may opine about what a defendant actually meant simply by reviewing a transcript of what he said.

The Government is equally incorrect in contending that Agent Kavanaugh's testimony satisfied the helpfulness requirement of Rule 701(b). Following the reasoning of the Eleventh Circuit, the Government contends that Agent Kavanaugh's testimony was helpful because his testimony otherwise "would have been quite confusing." BIO at 14. But lay opinion testimony does not become "helpful" simply because it relieves the jury of having to review evidence. Instead, as the Second Circuit has explained, were that to be the case, "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 the evidence, but tell them what inferences to draw from it." *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004).

Agent Kavanaugh's generic statements that he believed "tourism" meant "jihad" based on "everything he learned in this investigation," Pet App. 12a, 86a, or because 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, are precisely the type of opinion testimony that is not helpful under the rule. They substituted mere advocacy for actual

expert opinion or factual evidence, and they were improperly admitted.

II. Contrary to the Government's Assertion, the Courts of Appeals Are Squarely Divided on the Question Presented.

Coupled with its extreme view of Rule 701, the Government makes the remarkable assertion that that there is no "square" conflict over these issues in the courts of appeals. That is wrong. Agent Kavanaugh's testimony would not have been admitted in the First, Second, Third, Fourth, and Eighth Circuits.

To begin, the Government acknowledges, in a footnote, that the Eighth Circuit has held that a law enforcement officer's testimony about a conversation 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." BIO at 16 n.2 (quoting *Peoples*). The Government argues however, that there is no conflict because *Peoples* involved materially different facts. Not so. The agent in that case developed an opinion of the true meaning of conversations in which she was not a participant based on her after-the-fact study of "recorded telephone and visitation conversations." *Peoples*, 250 F.3d at 639-40. "She asserted that during the course of her investigation she had uncovered hidden meanings for apparently neutral words; for example, she testified that when one of the defendants referred to buying a plane ticket for Ross, he in fact meant killing Ross." *Id.* at 640. The

Eighth Circuit held that these and similar opinions were inadmissible because "Agent Neal lacked first-hand knowledge of the matters about which she testified. Her opinions were based on her investigation after the fact, not on her perception of the facts." *Id.* at 641.

This holding is precisely on point and in conflict with the Eleventh Circuit's view that Agent Kavanaugh's "investigation after the fact" entitled him to opine about what Dr. Jayyousi meant. The Government is correct that the agent in that case offered *additional* opinions that were of a different character than those here, but that does not change the fact that Eighth Circuit did not allow the case agent to testify about what the defendant meant based on post-hoc review.[1]

Likewise, the Fourth Circuit's decision in *United States v. Johnson*, 617 F.3d 286 (2010), is also in direct conflict. At issue in that case were the meanings of certain allegedly coded conversations among the defendants. The Government contends here that the case is distinguishable because the case agent was not allowed to give lay opinion testimony about what the defendants meant based on his "credentials and training." BIO at 18. Again, while that is true, it ig-

---

[1] The Government emphasizes that the witness in that case was characterized as providing "snippets of argument" and stated that her testimony was being offered on behalf of the "government" as well. BIO at 16. That does not change the fact that the Government defended the testimony as proper Rule 701 testimony, and the Eighth Circuit expressly rejected it under the Rule because it was not based on personal perception. *See Peoples*, 250 F.3d at 640-41.

nores the fact that the Fourth Circuit *also* refused to allow the testimony based on what it characterized as the agent's "second hand" review of post wire-tap interviews and statements by co-defendants. The agent's post-hoc review did not "qualif[y] as the foundational personal perception needed under Rule 701" in the eyes of the Fourth Circuit, even though it did so in Eleventh Circuit here. *Id.* at 292-93.

Similarly, the Government offers no persuasive harmonizing reading of the Second Circuit's decision in *Garcia*. *Garcia* pithily states that Rule 701(a) stands for the proposition that "you had to be there," and allows opinion testimony only when it "affords the jury an insight into an event that was uniquely available to an eyewitness." 413 F.3d at 212. Rule 701(a) accordingly allows a witness to a transaction to testify that in his opinion, a "particular participant, 'X,' was the person directing the transaction" based on observations that other participants were "defer[ring] to X," whereas a non-witness could not present that opinion. *Id.* at 211. Where an agent relies on information outside of his personal perception, however, he has nothing unique to offer the jury, and "the investigatory results reviewed by the agent—if admissible—can only be presented to the jury for it to reach its own conclusion." *Id.* at 212.

The Government fails to address these key passages from *Garcia*. Moreover, the Government's halfhearted attempt to distinguish *Garcia* on the facts fails; here, as in *Garcia*, the agent's testimony was explicitly based in part on his "investigation." The only factual difference between the cases is that the officer in *Garcia* based his opinions on first-hand

and second-hand knowledge, whereas Agent Kavanaugh had *no* first-hand knowledge of *any* events.

The Government does not even attempt to discuss other contrary cases from the First, Second, Third, and Fourth Circuits, *see* Petition at 17-18, except to say that they do not involve the interpretation of allegedly coded language by law enforcement officers. But those cases are perfectly clear about their rule of decision, and it is the one that decides this case. If lay opinion is "derived from . . . investigation and . . . analysis of the data," then it is inadmissible because it is not based on "first-hand knowledge." *Sinkovich*, 232 F.3d at 204. Agent Kavanaugh's opinions are not based on first-hand knowledge under the rule announced in those cases, and only this Court can clarify which side of this deep split is correct.

Finally, the Government also fails to account for the stark split of authority concerning the scope of Rule 702(b)'s helpfulness requirement. As explained in the Petition, the Second Circuit, joined by the First, has strongly rejected the argument, accepted below, that case agent testimony is "helpful" simply because it allows the jury to understand the import of the evidence in front of it. In the view of those circuits, "[t]he law already provides an adequate vehicle for the Government to 'help' the jury gain an overview of anticipated evidence as well as a preview of its theory of each defendant's culpability: the opening statement." *Garcia*, 413 F.3d at 214. By contrast, "[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," which is true whenever a witness without first-hand

knowledge opines about the meaning of documents in evidence. *United States v. Meises*, 645 F.3d 5, 16 (1st Cir. 2011); *Garcia*, 413 F.3d at 212.

Those circuits have also rejected the Eleventh Circuit's secondary rationale, which is that lay opinion testimony may be helpful because it is based on review of documents that are *not* in evidence. As detailed in the Petition, they have stated in no uncertain terms that such lay opinion testimony cannot be used to evade the prohibitions against hearsay or the protections of the Confrontation Clause. *See* Petition at 19-20 and n.7.

III. The Government Is Wrong to Contend That the Errors Below Were Harmless.

The Government contends that even if Agent Kavanaugh's days of opinion testimony were improperly admitted, that error was harmless. Perhaps because the Government only barely mentioned this possibility in its brief on appeal, Gov't C.A. Br. 40, the Eleventh Circuit declined to rest its opinion on this ground. That alone should remove harmless error from this Court's consideration, but even on the merits, harmless error does not stand as a barrier to this Court's review.

The Government's current harmless error theory – newly minted in opposition to the Petition – is that any error in admitting the Kavanaugh testimony was cured by the "overlapping" testimony of the Government's expert witness, Dr. Gunaratna. BIO at 19-21. This argument fails on multiple levels. First, Agent Kavanaugh's direct testimony lasted for *nine days*, far longer than any other Government witness,

including Dr. Gunaratna. As the Government admitted in the District Court, Agent Kavanaugh's opinion testimony was "very important to the Government's case." DE1115 at 152:20-21. The improper admission of such central testimony could not possibly leave an objective observer with "fair assurance" that the verdict was not substantially affected. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Second, Dr. Gunaratna's testimony was not remotely comparable to Agent Kavanaugh's. Dr. Gunaratna conceded that Dr. Jayyousi never used code words, as even the Eleventh Circuit recognized. Pet. App. 28a. The Government contends that this is immaterial because Dr. Gunaratna found that Dr. Jayyousi engaged in "double talk." But Dr. Gunaratna testified on cross that he could not recall whether Dr. Jayyousi ever used double talk, DE1157 at 113-14, and the Government is able to point only to a single passage on redirect where Dr. Gunaratna identified two conversations involving Dr. Jayyousi where double talk was supposedly used, BIO at 21, n.4 (citing DE1158 at 146-49). That single reference does not substantially overlap with or in any way vouch for Agent Kavanaugh's nine days of testimony on this subject.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. SWOR
3060 Penobscot Building
645 Griswold Street
Detroit, MI 48223
(313) 967-0200

MARSHALL DORE LOUIS
SINCLAIR, LOUIS, HEATH,
NUSSBAUM & ZAVERTNIK
169 East Flagler Street
Miami, FL 33131
(305) 374-0544

June 6, 2012

DAVID W. DEBRUIN
MATTHEW S. HELLMAN*
CHRISTOPHER J. DEAL
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com
** Counsel of Record*

ELIZABETH A. EDMONDSON
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600