Nos. 12-1009 and 12-8840

In the Supreme Court of the United States

FRANK IACABONI, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR GIANELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a law-enforcement officer's opinions about the meaning of cryptic language in intercepted co-conspirator communications were admissible under Federal Rule of Evidence 701.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29)[1] is reported at 687 F.3d 439.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2012. Petitions for rehearing en banc were denied on November 15, 2012 (Pet. App. 51-52; 12-8840

[1] Unless otherwise noted, citations to the petition appendix refer to the appendix in No. 12-1009.

Pet. App. 16a). The petitions for writs of certiorari were filed on February 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Iacaboni was convicted on one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); two counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955; one count of conspiracy to commit arson, in violation of 18 U.S.C. 371; one count of arson, in violation of 18 U.S.C. 844(i); one count of using fire or an explosive to commit a felony, in violation of 18 U.S.C. 844(h)(1); one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951; and one count of attempted extortion, in violation of 18 U.S.C. 1951. Pet. App. 28-29. Petitioner Gianelli was convicted on hundreds of counts, including the same counts as petitioner Iacaboni (except for one illegal gambling business count), as well as counts for transmission of wagering information, in violation of 18 U.S.C. 1084; money laundering conspiracy, in violation of 18 U.S.C. 1956(h); money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(1) and (B)(1); conspiracy to commit extortionate collection of credit, in violation of 18 U.S.C. 894(a)(1); and extortionate collection of credit, in violation of 18 U.S.C. 894(a)(1). Pet. App. 28-29. Iacaboni was sentenced to 183 months of imprisonment, to be followed by three years of supervised release, and Gianelli was sentenced to 271 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 6. The court of appeals affirmed. Pet. App. 1-29.

1. For more than five years, petitioners and others were members of a criminal organization headed by

Gianelli. Pet. App. 2; Gov't C.A. Br. 6-7. The organization ran three separate illegal gambling businesses: a video-poker business, a football-betting business, and a sports book. Pet. App. 2; Gov't C.A. Br. 6-7 & n.4. The organization also engaged in a number of related illegal activities, including money laundering, usurious lending, and extortionate collection of credit. Pet. App. 2; Gov't C.A. Br. 6-7. These activities were enhanced by association with organized-crime figures, including members of the New England Family of La Cosa Nostra. Gov't C.A. Br. 8.

On one occasion, petitioners conspired with others to commit arson. Gov't C.A. Br. 8-18. Gianelli was part owner of a sports bar. Pet. App. 10. After Gianelli's relationship with his co-owners soured, petitioners participated in a plan to set fire to a pizza restaurant adjacent to another business of those co-owners. *Ibid.*; Gov't C.A. Br. 13. One of Gianelli's subordinates hired arsonists, and he regularly discussed the scheme's progress with Gianelli. Pet. App. 10; Gov't C.A. Br. 14. The subordinate also discussed the plan with Iacaboni, who tried to line up a potential alternative arsonist. Pet. App. 10; Gov't C.A. Br. 15. State police, who had been wiretapping the communications, foiled the arson plot. Pet. App. 11; Gov't C.A. Br. 16-17.

2. Petitioners and other defendants were named in a several-hundred count indictment, charging (among other things) gambling, racketeering, money-laundering, and arson-related crimes. Pet. App. 3. Gov't C.A. Supp. App. 1-111. At trial, the government presented extensive testimony and wiretap evidence about the group's overall operations, specific acts by the group's members, and the role of each person within the group. Pet. App. 4.

The conversations intercepted by the wiretaps "were cryptic," because "[f]or years on end, the defendants deliberately spoke in unintelligible terms, surely to hamper prosecution of their crimes." Pet. App. 11, 15. The government planned to call federal agents familiar with the conversations—chiefly, Special Agent Mattheu Kelsch of the Bureau of Alcohol, Tobacco, Firearms and Explosives—to testify about their interpretations of some of the statements. *Id.* at 11. Petitioners filed a motion to preclude Special Agent Kelsch from "offering his opinion—whether it be as an expert or as a lay person—as to the meaning of certain intercepted telephone calls." Pet. C.A. App. 541. Petitioners argued that neither Federal Rule of Evidence 701 (which addresses lay opinion testimony) nor Federal Rule of Evidence 702 (which addresses expert opinion testimony) "permits the type of opinion evidence which the prosecution intends to elicit from Special Agent Kelsch." *Id.* at 542.

The district court declined to completely bar the challenged testimony. Pet. App. 11-12. The court stated that it was inclined to permit Special Agent Kelsch "to testify with respect to specific matters that may be within his expertise as someone who knows about arson and arson investigations." *Id.* at 11. The court explained that "[i]f the questions are directed specifically to specific responses or portions of the conversations and they related to matters that I believe are not entirely clear to lay persons, I will allow such testimony." *Ibid.* But the court made clear that it would not "allow more general questions," such as "What is happening in that conversation[?]" *Ibid.* The court did not explicitly state whether the permissible portions of the testimony would be admissible under Rule 701, as lay opinion, or Rule 702, as expert opinion. The court had previously

stated, with respect to another witness, that "I don't qualify experts in my court; I don't say the witness is now qualified as an expert." 3/11/2009 Tr. 11.

During Special Agent Kelsch's testimony, petitioners objected to certain questions, sometimes citing the expert-witness rule, Fed. R. Evid. 702. See, *e.g.*, Pet. App. 66-67, 68, 72-73; see also Gov't C.A. Br. 59. The focus of Special Agent Kelsch's disputed testimony concerned the arson plot. Pet. App. 9-10. The district court permitted Special Agent Kelsch to offer a number of interpretations of statements in the recorded conversations, but it "several times sustained objections to questions that appeared to call for unduly speculative or generalized interpretations." *Id.* at 12-13. Petitioners also sporadically objected to similar testimony by other government agents, but their objections to Special Agent Kelsch's testimony were "representative and, at least as to some, better preserved" for appellate review. *Id.* at 9.

After the close of evidence, the district court instructed the jury that "[y]ou've heard testimony from persons sometimes described as experts" and that the jury was free to disregard an expert's opinion. 4/16/2009 Tr. 21-22. Ultimately, the jury convicted petitioners "of nearly all of the charges" against them, "acquitting each defendant on between one and four counts." Pet. App. 4.

3. The court of appeals affirmed. Pet. App. 1-29. As relevant here, it concluded that the district court had not abused its discretion in admitting Special Agent Kelsch's opinion testimony. *Id.* at 9-22.

The court of appeals observed that "[p]olice officers commonly help interpret conversations by translating jargon common among criminals, either as experts" under Rules 702 and 703 "or as lay witnesses offering

'opinion' testimony" helpful to resolving a disputed factual issue under Rule 701. Pet. App. 13. The court of appeals evaluated Special Agent Kelsch's testimony under Rule 701. *Id.* at 14-22. Although the court of appeals deemed it "linguistically possible" to consider Special Agent Kelsch's testimony as "expert testimony," the court reasoned that such a label "would lend undue credibility to it and increase the risk of reliance on information not properly before the jury as data on which 'experts in the particular field would reasonably rely.'" Pet. App. 14 (quoting Fed. R. Evid. 703).

The court of appeals determined that Special Agent Kelsch's testimony, "while not the most traditional lay opinion," "formally meets the requirements of Rule 701." Pet. App. 15. The court reasoned that the testimony was "rationally based on his perception of the conversations," *ibid.* (citation and brackets omitted); "'helpful' in the rule 701 sense broadly understood," *ibid.*; "and yet not based on expert knowledge," *ibid.* On the helpfulness point in particular, the court noted that Special Agent Kelsch "had investigated Gianelli's operations for years, had bec[o]me familiar with the voices of the major participants, had interviewed witnesses related to the investigation, and had reviewed materials seized from the defendants." *Id.* at 14-15. "That his understanding of the oblique statements in the wiretaps might be helpful," the court continued, "is an understatement; some of the defendants' wiretapped statements could be entirely unintelligible to the jury absent some context-based interpretation." *Id.* at 15.

The court of appeals acknowledged potential "dangers," which had "been explored in various contexts in other cases," in admitting law-enforcement testimony interpreting cryptic conversations. Pet. App. 15 & n.2.

But it reasoned that those dangers "vary (both in degree and kind) with the facts—as do the need for the testimony and the extent to which the witness' unique experience permits him to be helpful." *Id.* at 16. The court of appeals also noted the existence of potential "safeguards" that can sometimes alleviate the potential dangers, "including supervision by the judge, cautionary instructions, and above all cross-examination." *Id.* at 16-17. And it observed that when "the witness can explain the basis for his specific interpretations, decisions in other circuits have upheld admission of such testimony by law enforcement officers, especially in organized crime and terrorism cases." *Id.* at 17 (footnote omitted); see *id.* at 17 n.3 (citing cases).

The court of appeals concluded that "[i]n this case, the need for interpretation was clear, and there is no indication that the potential dangers harmfully manifested themselves." Pet. App. 17. It reasoned that the district court's preliminary ruling on Special Agent Kelsch's testimony "demonstrates that [the district court] gave the need for the testimony careful consideration and ruled that it must be limited to conversations that were unclear" and that the district court "sustained several objections * * * and gave a cautionary instruction at the end of the trial." *Ibid.* The court of appeals also reasoned that although Special Agent Kelsch had noted that his opinions drew on his knowledge of the investigation, he also stated that "the opinions were his own and that he was not purporting to represent collective knowledge," thereby "[m]inimizing" some of the potential dangers his testimony might have presented. *Id.* at 17-18 (internal quotation marks omitted). The court also focused on the "vigorous[]" cross-examination to which Special Agent Kelsch was subjected, observing

that Special Agent Kelsch typically responded not by "rely[ing] on broad appeals to the totality of the investigation," but instead by identifying the "sources of information" that supported his opinions. *Ibid.* The court of appeals reasoned that the jury was in a position to fairly evaluate the credibility of Special Agent Kelsch's testimony, noting in particular Special Agent Kelsch's "concessions that certain opinions were not derived from his arson expertise"; his acknowledgments of potential alternative explanations for some of the ambiguous statements in the intercepted conversations; and the availability of other evidence against which to measure the opinions he offered. *Id.* at 18-19.

With respect to witnesses other than Special Agent Kelsch, the court of appeals determined that petitioners had largely forfeited their objections "by citing no specific testimony" in controversy and that non-forfeited objections failed for the same reasons as their objections to Special Agent Kelsch's testimony. Pet. App. 19-20. "Looking finally to future cases," the court of appeals continued, "district judges faced with interpretive testimony" like Special Agent Kelsch's "ought to start, as the trial judge did here, by considering whether the testimony is meaningfully helpful to the jury, compared to the traditional device of saving the interpretive inferences for counsel in closing argument, and whether limitations can sufficiently mitigate the dangers." *Id.* at 21-22. The court of appeals recognized that "[t]he variety of concerns and variations in cases makes it difficult to lay down rules and appropriate for wide discretion on the part of the trial judge reviewed only for the clearest abuse." *Id.* at 22.

At the conclusion of its decision, the court of appeals observed that "in connection with a number of the issues

but especially the disputed testimony by Kelsch, we note that the government had a strong case which it was difficult for the defendants to counter." Pet. App. 27. After referencing some of the evidence against petitioners, the court found "no reason to believe here that innocent defendants have been convicted." *Id.* at 27-28.

ARGUMENT

Petitioners renew their contentions (Iacaboni Pet. 21-35; Gianelli Pet. 15-32) that the district court abused its discretion in admitting Special Agent Kelsch's testimony interpreting portions of the wiretapped conversations. This Court has recently denied review of petitions presenting questions effectively identical to petitioners'. See *Jayyousi* v. *United States*, 133 S. Ct. 29 (2012) (No. 11-1194); *Hassoun* v. *United States*, 133 S. Ct. 29 (2012) (No. 11-1198); *Padilla* v. *United States*, 133 S. Ct. 29 (2012) (No. 11-9672). And earlier this Term, the Court denied further review on that issue in this case, after one of petitioners' co-defendants filed a petition for a writ of certiorari. *Albertelli* v. *United States*, 133 S. Ct. 566 (2012) (No. 12-6542). The Court should follow the same course here.

1. The court of appeals correctly determined that the district court did not abuse its discretion in admitting Special Agent Kelsch's opinion testimony. The testimony satisfied all three of the requirements of Federal Rule of Evidence 701: it was "rationally based on the witness's perception"; it was "helpful to clearly understanding the witness's testimony or to determining a fact in issue"; and it was "not based on scientific, technical, or other specialized knowledge within the scope of

Rule 702 [the expert-testimony rule]." Fed. R. Evid. 701(a)-(c).[2]

First, Special Agent Kelsch's testimony was "rationally based on his perception of the conversations" about which he testified. Pet. App. 15 (internal quotation marks and brackets omitted); see Fed. R. Evid. 701(a). Petitioners do not dispute that Special Agent Kelsch personally listened to those conversations, and his testimony drew upon an "understanding of the oblique statements in the wiretaps" that he had acquired firsthand through his "immersion in the details of this investigation" over a period of "years." Pet. App. 14-15; see Fed. R. Evid. 701 advisory committee notes (the "perception" requirement "is the familiar requirement of first-hand knowledge or observation"). Contrary to petitioners' contentions (*e.g.*, Iacaboni Pet. 21-22; Gianelli Pet. 29), nothing in Rule 701 required, as prerequisite to admissibility, that Special Agent Kelsch himself have participated in or contemporaneously observed the communications. See, *e.g.*, *United States* v. *Rollins*, 544 F.3d 820, 831-832 (7th Cir. 2008) ("We find that the trial judge did not err in concluding that Agent McGarry's [testimony about code words] was rationally based on his first-hand perception of the intercepted phone calls about which he testified as well as his personal, extensive experience with this particular drug investigation."), cert. denied, 130 S. Ct. 3343 (2010); *United States* v. *Garcia*, 994 F.2d 1499, 1507 (10th Cir. 1993) ("Ramirez's opinion was based on listening to the conversations between coconspirators * * * . Therefore, [his] opinion that [a] reference to 'your old man'

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[2] Contrary to petitioners' contention (*e.g.*, Iacaboni Pet. 20-21), the court of appeals expressly addressed all three of Rule 701's requirements. See Pet. App. 15.

was a reference to Defendant met the first hand knowledge requirement of Fed. R. Evid. 701."); cf. *Black's Law Dictionary* 951 (9th ed. 2009) (defining "firsthand knowledge" by reference to "personal knowledge," defined in turn as "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said").

Petitioners' interpretation of Rule 701's "perception" requirement to preclude testimony like Special Agent Kelsch's would invite nonsensical results. Petitioners offer no practical reason for distinguishing between, for example, an agent in a surveillance van who listens to a wiretap in real time and an agent in that same van who listens on a tape delay. In this case, Special Agent Kelsch "had investigated Gianelli's operations for years, had bec[o]me familiar with the voices of the major participants, had interviewed witnesses related to the investigation, and had reviewed materials seized from the defendants." Pet. App. 14-15. But for the delay, he experienced the wiretapped conversations the same way that he would have if he had listened in real time, and he "rationally based" his testimony on his "perception" of the recordings and the other materials that he examined. Fed. R. Evid. 701(a). And petitioners were free to challenge the weight of Special Agent Kelsch's testimony by, for example, cross-examining him to show that any inferences he drew would not be probative of petitioners' actual statements or conduct.

Second, Special Agent Kelsch's testimony was "helpful" to the jury in "determining a fact in issue." Fed. R. Evid. 701(b). Contrary to petitioner Gianelli's assertion that the group "did not speak in code" (Gianelli Pet. 22), the court of appeals characterized the intercepted con-

versations as "cryptic" (Pet. App. 11) and containing "unintelligible terms, surely to hamper prosecution of their crimes" (*id.* at 15). As the court of appeals reasoned, to say that Special Agent Kelsch's "understanding of the oblique statements in the wiretaps might be 'helpful' to the jury is an understatement; some of the defendants' wiretapped statements could be entirely unintelligible to the jury absent some context-based interpretation." *Ibid.* The jury was free to disagree with Special Agent Kelsch's interpretations, and petitioners had the opportunity to contest those opinions by cross-examining him, presenting opposing testimony, or simply arguing to the jury that the opinions were unfounded. *Id.* at 18. But Special Agent Kelsch's testimony would have been quite confusing, and much less "helpful," had he been forced to present petitioners' cryptic conversations to the jury without any attempt at interpretation at all. See, *e.g.*, *United States* v. *Jayyousi*, 657 F.3d 1085, 1103 (11th Cir. 2011) (finding it "helpful" to have testimony interpreting code words and "link[ing]" conversations to "checks, wire transfers, and other discrete acts * * * that put the code words into context"), cert. denied, 133 S. Ct. 29 (2012); *Rollins*, 544 F.3d at 831 (finding it "helpful" to have testimony about code-word meanings "from the investigator who became intimately familiar with the unusual manner of communicating used by these conspirators"); *Garcia*, 994 F.2d at 1507 ("Ramirez's opinion that 'your old man' referred to Defendant was helpful to whether Defendant participated in the conspiracy given that the conversation was incriminating.").

Third, Special Agent Kelsch's testimony was "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid.

701(c). The use of code words can, of course, be the subject of expert testimony, as when someone relies on his "extensive experience" with other people engaged in similar activities to opine about the jargon used by a particular set of defendants. Fed. R. Evid. 701 advisory committee notes (discussing *United States* v. *Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), cert. denied, 523 U.S. 1131 (1998)); see Pet. App. 13 (noting that police officers sometimes offer such expert testimony). But, as the court of appeals recognized, Pet. App. 13-14, a lay person, without drawing upon any prior specialized knowledge, may develop sufficient familiarity with the way a certain group of people communicates to offer a lay opinion on that issue. See, *e.g.*, *Jayyousi*, 657 F.3d at 1104 (admitting an agent's lay testimony based "on his experience from this particular investigation"); *Rollins*, 544 F.3d at 832 (admitting an agent's lay testimony about code words when it was "not based on any specialized knowledge gained from his law enforcement training and experience," but instead on "the particular things he perceived from monitoring intercepted calls" and other case-specific investigative activities); see also *United States* v. *Miranda*, 248 F.3d 434, 441 (5th Cir.) (similar), cert. denied, 534 U.S. 980 (2001), and 534 U.S. 1086 (2002); *United States* v. *El-Mezain*, 664 F.3d 467, 513-514 (5th Cir. 2011) (finding no error in the admission of non-expert testimony when "the agents' opinions were limited to their personal perceptions from their investigation of this case"), cert. denied, 133 S. Ct. 525 (2012).

2. Contrary to petitioners' contentions (Iacaboni Pet. 23-33; Gianelli Pet. 17-24), no square conflict exists on the application of Rule 701 to testimony about cryptic conversations or code words that would warrant this

Court's review. As the court of appeals in this case concluded, after surveying decisions in other circuits, the inquiry into the permissibility of testimony like Special Agent Kelsch's is heavily fact-dependent. Pet. App. 15-17 & nn.2-3; see *id.* at 22. The cases cited by petitioners in which testimony was excluded present different facts and do not demonstrate that another court of appeals would have reached a different result on the facts of this case.

a. In *United States* v. *Grinage*, 390 F.3d 746 (2004), the Second Circuit reversed the admission of testimony by a federal agent interpreting telephone calls (sometimes "line by line") in which, according to the agent himself, "the participants were *not* using code." *Id.* at 748 (emphasis added); see *id.* at 750-751. The agent also acknowledged that he had "assumed that [a particular conversation] was about drugs because of his knowledge regarding [one of the participant's] activities," notwithstanding his lack of "personal knowledge at that time that [the participant] was a drug dealer." *Id.* at 749. And both the agent and the prosecutor framed the agent's testimony as relying not only on his case-specific investigations, but also on his experience as a drug investigator more generally. *Id.* at 750 (noting that the agent "testified at great length about his background and expertise as a drug investigator," and the prosecutor "told the jury that 'the agent has the background to make interpretations'"). The Second Circuit's conclusion that the agent's testimony in *Grinage* was not "helpful" within the meaning of Rule 701(b), *ibid.*, would not necessarily apply to the narrower testimony of Special Agent Kelsch in this case, which involved "disputed interpretations * * * peculiar to these defendants and depended largely on Kelsch's immersion in the details of

this investigation." Pet. App. 14 (emphasis added). Indeed, the court of appeals effectively distinguished *Grinage* by describing it, in a parenthetical, as a case that "exclud[ed] * * * testimony where the witness said it rested on knowledge of the entire investigation." *Id.* at 17 n.3.[3]

In *United States* v. *Dicker*, 853 F.2d 1103 (1988), the Third Circuit held that a district court had erred in allowing testimony opining on the meaning of recorded conversations that "were perfectly clear without [the witness's] 'interpretations.'" *Id.* at 1108-1111. The court expressly distinguished cases in which "courts

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[3] Another Second Circuit case cited by petitioners, *United States* v. *Garcia*, 413 F.3d 201 (2005), likewise provides no support for their contention that the Second Circuit would have decided this case differently from the First Circuit. In *Garcia*, a federal agent testified about the role that the defendant had played in a particular drug conspiracy. *Id.* at 208-211. In concluding that the agent's testimony should have been excluded, the Second Circuit observed that the testimony "drew on the total information developed by all the officials who participated in the investigation" and "[a]t no time did the government ask [the agent] to limit his conclusion to facts about which he had personal knowledge," *id.* at 212-213 (emphasis added); that the agent's opinion "did more than provide a 'summary' of [the defendant's] words and actions," and instead "told the jury that [he], an experienced DEA agent, had determined, based on the total investigation of the charged crimes, that [the defendant] was a culpable member of the conspiracy," *id.* at 213; and that "the government made no attempt to demonstrate that [the agent's] challenged opinion was informed by reasoning processes familiar to the average person in everyday life," instead allowing the agent to testify based on his training and on "experience * * * outside the ken of the average person," *id.* at 216. Those factors are absent here. Petitioners also err in relying on the Second Circuit's decision in *United States* v. *Dukagjini*, 326 F.3d 45 (2003), cert. denied, 541 U.S. 1092 (2004), which involved expert, not lay-opinion, testimony about the meaning of recorded conversations. *Id.* at 52-59.

have construed the helpfulness requirement of Fed. R. Evid. 701 and 702 to allow the interpretation by a witness of coded or 'code-like' conversations." *Id.* at 1108. That is what occurred in this case. See Pet. App. 15 (noting that "some of the defendants' wiretapped statements could be entirely unintelligible to the jury absent some context-based explanation").[4]

In *United States* v. *Johnson*, 617 F.3d 286 (2010), the Fourth Circuit held that Rule 701 did not permit an agent to interpret telephone calls based on his "training and experience"—for example, his "familiar[ity] with the street terms typically used by those involved in the drug trade"—without his being qualified as an expert witness. *Id.* at 289-290. See *id.* at 292-293. The Fourth Circuit concluded that "much of [the agent's] testimony was what should have been considered that of an expert, as he consistently supported his interpretations of the phone calls by referencing his experience as a DEA

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[4] Two other decisions cited by Gianelli (Pet. 23-24) similarly involved situations in which the recorded conversations were sufficiently clear without the testimony interpreting them. See *United States* v. *Sanchez-Sotelo*, 8 F.3d 202, 210-211 (5th Cir. 1993) (concluding that district court erred in admitting testimony that went "beyond the plain meaning of the recorded conversation," reasoning that Rule 701 "prohibits explanatory commentary where the language of the conversation would allow the jury to draw its own conclusions"), cert. denied, 511 U.S. 1023 (1994); *United States* v. *Marzano*, 537 F.2d 257, 268 (7th Cir. 1976) (concluding that district court did not err in precluding interpretation testimony when the "jury was as able as [the witness] to determine [the statements'] meaning"), cert. denied, 429 U.S. 1038 (1977), abrogation on other grounds recognized in *United States* v. *Loniello*, 610 F.3d 488, 496 (7th Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011). Moreover, both the Fifth and Seventh Circuits have, like the court of appeals here, upheld the admission of law-enforcement testimony interpreting coded communications. See *El-Mazain*, 664 F.3d at 513-515; *Rollins*, 544 F.3d at 830-833.

agent, the post-wiretap interviews he conducted, and statements made to him by co-defendants." *Id.* at 293. The Fourth Circuit emphasized that the government had "elicited testimony on [the agent's] credentials and training, *not his observations* from the surveillance employed in th[e] case." *Ibid.* Unlike Special Agent Kelsch here (see Pet. App. 14-15), the agent in *Johnson* had not "even listen[ed] to all of the relevant calls in question." 617 F.3d at 293.[5]

In *United States* v. *Ganier*, 468 F.3d 920 (2006), the Sixth Circuit held that testimony by an Internal Revenue Service forensic computer specialist, about the results of a forensic analysis that he had conducted to determine what searches had previously been run on certain computers, was expert testimony of which the defendant was entitled to notification under Federal Rule of Criminal Procedure 16(a)(1)(G). *Id.* at 924-927. Unlike Special Agent Kelsch's testimony here, which simply offered interpretations of cryptic conversations based on familiarity with their contents, the testimony at issue in *Ganier* "would require [the agent] to apply knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson." *Id.* at 926.

In *United States* v. *Peoples*, 250 F.3d 630 (2001), the Eighth Circuit reversed a district court's ruling allowing

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[5] Petitioners' reliance on *United States* v. *Perkins*, 470 F.3d 150 (4th Cir. 2006), is similarly misplaced. In that case, two officers offered "opinions that [the defendant's] use of force was inappropriate * * * in response to hypothetical questions based on second-hand accounts" of the defendant's conduct, which they did not personally observe. *Id.* at 156. The court concluded that "[s]uch opinion testimony does not satisfy Rule 701's personal knowledge requirement." *Ibid.*

a law enforcement agent to testify not only about the meaning of code words used in the defendants' conversations, but also about the agent's "opinions about what the defendants were thinking during the conversations, phrased as contentions supporting [the agent's] conclusion, repeated throughout her testimony, that the defendants were responsible for [the victim's] murder." *Id.* at 640. The agent had testified, for example, that she "believe[d]" the defendant was in the victim's home "to actually murder [the victim] at the time." *Ibid.* During the agent's testimony, the prosecutor had referred to the agent's statements both as the agent's own contentions "and as the contentions of the government." *Ibid.* And the district court had admitted the testimony "not as evidence," but instead as "'snippets of early argument from the witness stand.'" *Ibid.* (quoting the district court). The court of appeals in this case identified no similar problems with respect to Special Agent Kelsch's testimony. Pet. App. 11-19.

Finally, in *United States* v. *Wilson*, 605 F.3d 985 (per curiam), cert. denied, 131 S. Ct. 841, and 131 S. Ct. 843 (2010), the D.C. Circuit concluded that a defendant could not rely on Rule 701 to introduce the testimony of a former drug dealer, who "had no firsthand experience with" the defendant's own drug crew, about taped phone conversations relating to the defendant. *Id.* at 1026. The court reasoned that the proffered testimony, which "was to have been based entirely on [the witness's] experience as a drug dealer elsewhere," was admissible only as expert testimony. *Ibid.* The court recognized that, in contrast, a "witness with firsthand experience of a particular drug operation" would have been able to "testify under Rule 701." *Id.* at 1025. As discussed above, Special Agent Kelsch in this case was testifying

based on his firsthand experience, not simply "past personal experience with other, similar * * * operations." *Ibid.*

b. None of the above-discussed cases demonstrates a conflict in the circuits on the facts of the present case. And additional cases cited by petitioners to support their assertion of a circuit conflict do not directly present the question whether a law-enforcement officer may offer lay-opinion testimony about the meaning of cryptic conversations between co-conspirators. See Iacaboni Pet. 23-24 (discussing cases arising in the civil context). They thus provide neither a clear indication that other courts of appeals would have decided this case differently nor a sound basis for granting certiorari.

As the decision below recognized, Pet. App. 16, 22, Rule 701 issues like the one presented here are inherently fact-specific. Petitioners' own claims (Iacaboni Pet. 32-35; Gianelli Pet. 24-30) of an intra-circuit conflict reinforce the point. If an intra-circuit conflict in fact existed, the proper course would be for the court of appeals, rather than this Court, to resolve it. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); see Pet. App. 51-52 (denying rehearing en banc); Gianelli Pet. App. 16a (same). But what the cited decisions actually illustrate is the fact-intensive nature of the inquiry. The result reached in this particular case does not warrant this Court's review.

3. In any event, this case would be an unsuitable vehicle for addressing the question presented. The court of appeals effectively concluded that any error on the question presented was harmless. The court expressly noted that "in connection with a number of the issues but especially the disputed testimony by Kelsch," the

government "had a strong case which it was difficult for the defendants to counter." Pet. App. 27. The court's determination that it had "no reason to believe here that innocent defendants have been convicted," *id.* at 27-28, suggests that the court would have found any error on this issue to be non-prejudicial.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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