Nos. 11-1194, 11-1198 and 11-9672

In the Supreme Court of the United States

KIFAH WAEL JAYYOUSI, PETITIONER

v.

UNITED STATES OF AMERICA

ADHAM AMIN HASSOUN, PETITIONER

v.

UNITED STATES OF AMERICA

JOSE PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting, under Federal Rule of Evidence 701, a law-enforcement officer's lay opinions about the meaning of coded language in records of intercepted communications, when those opinions were based on his extensive examination of the records over the course of a five-year investigation.

2. Whether the district court erred in applying the terrorism enhancement, Sentencing Guidelines § 3A1.4, when calculating petitioner Hassoun's advisory sentencing range.

3. Whether the court of appeals erred in concluding that the district court's sentence for petitioner Padilla was substantively unreasonable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-120a)[1] is reported at 657 F.3d 1085.

[1] Citations to the petition appendix refer to the appendix in 11-1194.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2011. A petition for rehearing was denied on November 15, 2011. Pet. App. 184a-185a. On January 31, 2012, Justice Thomas granted an extension of time within which to file petitions for writs of certiorari to and including March 14, 2012. On March 2 and March 5, 2012, Justice Thomas granted further extensions of time within which to file the petitions to and including April 13, 2012. The petitions were filed on April 2, 2012. 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 Southern District of Florida, petitioners were convicted on one count of conspiring to murder, kidnap, or maim persons overseas, in violation of 18 U.S.C. 956(a)(1); one count of conspiring to provide material support (or to conceal the nature or source of material support) for a conspiracy to murder, kidnap, or maim persons overseas, in violation of 18 U.S.C. 371; and one count of materially supporting a conspiracy to murder, kidnap, or maim persons overseas, in violation of 18 U.S.C. 2339A. Pet. App. 2a-3a. The district court imposed prison sentences of 152 months for petitioner Jayyousi, 188 months for petitioner Hassoun, and 208 months for petitioner Padilla, each to be followed by 20 years of supervised release. *Id.* at 3a. The court of appeals affirmed petitioners' convictions, but remanded for resentencing of Padilla. *Id.* at 1a-120a.

1. Petitioners are three individuals who, while residing in the United States, "formed a support cell linked to radical Islamists worldwide," including al-Qaeda,

"and conspired to send money, recruits, and equipment overseas to groups that [they] knew used violence in their efforts to establish Islamic states." Pet. App. 38a. Each petitioner played a different role in the cell.

Jayyousi, the president of an ostensibly charitable organization, "oversaw the purchase of satellite phones, walkie talkies and encrypted radios to send to Chechnya to aid the Muslims in their armed conflict." Pet. App. 11a, 41a. He was in contact with al-Qaeda and its violent proxy organizations; received a fax personally signed by Osama bin Laden; published a newsletter that recruited mujahideen (Islamic militants) and solicited donations for jihad (Islamic holy war); and arranged fundraisers for mujahideen. Gov't C.A. Br. 7; Pet. App. 22a-23a, 41a.

Hassoun, a preacher at a South Florida mosque, recruited mujahideen to fight overseas. Pet. App. 10a-11a; Gov't C.A. Br. 5-6. He represented six different mujahideen groups inside and outside the United States; belonged to a violent Lebanese affiliate of al-Qaeda; and had ties to another al-Qaeda affiliate that had published a 7000-page terrorism manual. *Id.* at 6. Hassoun (as well as Jayyousi) "spoke expressly about [his] desire to impose Sharia [strict Islamic law], toppling existing governments in the process." Pet. App. 67a.

Padilla attended Hassoun's mosque and became a "recruit for jihad training." Pet. App. 41a; see Gov't C.A. Br. 6. He traveled overseas to attend a training camp in Afghanistan operated by al-Qaeda. Gov't C.A. Br. 6-7; Pet. App. 38a-41a. The purpose of the training camp "was to train individuals in weapons and war tactics for military jihad." Pet. App. 38a.

2. Over the course of a multiyear investigation, the federal government intercepted numerous phone conversations (many of which were in Arabic) involving pe-

titioners and their co-conspirators. Pet. App. 8a-9a. The speakers were aware that the calls might be monitored, and they therefore often used code words, sometimes even expressly acknowledging that they were speaking in code. *Id.* at 12a-13a, 23a-24a. For example, they used the words "football," "soccer," "tourism," and "trade" to refer to jihad; "tourist" to refer to a mujahideen freedom fighter; "going on the picnic" to refer to travel to jihad; "married" to refer to martyrdom; "open up a market" (or open up a "branch") to refer to creating a group supporting jihad; "school over there to teach football" to refer to a place to train in jihad; "full sponsorship" to refer to income for room and board at a training camp; "students" to refer to the Taliban; "joint venture" to refer to a group of mujahideen; "open the door" to refer to opportunity to go to jihad; "sneakers" to refer to support; "screws" to refer to bullets; "eggplant" to refer to a rocket-propelled grenade launcher; and other fruit and vegetable names to refer to other types of weapons. *Ibid.* Federal agents spent years studying and decoding these communications. *E.g.*, *id.* at 31a-32a.

After the investigation was completed, a federal grand jury in the Southern District of Florida returned a superseding indictment charging petitioners, along with two co-defendants, with one count of conspiring to murder, kidnap, or maim persons overseas, in violation of 18 U.S.C. 956(a)(1); one count of conspiring to provide material support (or to conceal the nature or source of material support) for a conspiracy to murder, kidnap, or maim persons overseas, in violation of 18 U.S.C. 371; and one count of materially supporting a conspiracy to murder, kidnap, or maim overseas, in violation of 18 U.S.C. 2339A. Pet. App. 1a-2a.

3. The government's case-in-chief included documentary and physical evidence—such as written communications to petitioners from militant groups, records of petitioners' financial activities, and a "mujahideen registration form" bearing Padilla's fingerprints—as well as numerous witnesses. Pet. App. 5a-29a. Two of the witnesses—Dr. Rohan Gunaratna, an expert on al-Qaeda and associated groups and on international terrorism more generally, and FBI Agent John Kavanaugh—offered testimony about the content of petitioners' communications, including interpretations of petitioners' code words (*e.g.*, that the term "tourism" referred to jihad). *Id.* at 12a-28a. The two witnesses' "interpretation of the code words' meanings w[ere] similar" to one another in almost every respect. *Id.* at 24a.

Petitioners objected at trial to the testimony of both of these witnesses, Pet. App. 30a-46a, but in this Court they contest only the admission of Agent Kavanaugh's testimony about the meaning of the code words. The district court admitted that testimony under Federal Rule of Evidence 701, which states that

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [the expert-witness rule].

See Pet. App. 30a. The district court reasoned that there should be "some latitude for this agent to be able to talk about some of the information that he has learned from this case," subject to petitioners' ability to object

to any specific testimony that fell "outside the 701 realm." *Id.* at 181a-182a. The court also emphasized that the defense would be able 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." *Id.* at 182a.

The district court limited the scope of Agent Kavanaugh's testimony by forbidding him "to characterize the specific nature of words such that it invades either the actual legal fact that 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." Pet. App. 181a. The court explained that "for example," it would be "appropriate for this witness to discuss how he came to the conclusion that a particular word meant jihad," but "inappropriate for this witness to say that something was meant to be violent jihad." *Ibid.*

4. The jury found petitioners guilty on all counts. Pet. App. 3a. At sentencing, the district court applied the 12-level terrorism sentencing enhancement under Section 3A1.4 of the advisory Sentencing Guidelines. *Id.* at 63a. That enhancement applies if the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism." Sentencing Guidelines § 3A1.4(a). The Guidelines adopt the statutory definition of the term "federal crime of terrorism," which includes the violation of any of various listed federal criminal statutes, including the material-support statute that petitioners violated, when the violation 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); see Sentencing Guidelines § 3A1.4(a), comment. (n.1). The district court observed, among other things, that "[t]here was * * *

ample evidence introduced at trial that [petitioners] Jayyousi and Hassoun wished to impose Sharia throughout the Middle East and remove governments in the process." Pet. App. 66a.

The district court sentenced Jayyousi and Hassoun to 152-month and 188-month terms of imprisonment, respectively. Pet. App. 3a. The district court originally calculated an advisory Guidelines range of 360 months to life for Padilla, but later adjusted his offense level, lowering the range to 235-293 months. *Id.* at 68a. The court selected 250 months as the possible term of imprisonment, but varied downward an additional 42 months to reflect a previous period of federal detention, arriving at a final sentence of 208 months. *Ibid.*

5. Petitioners appealed, and the government cross-appealed Padilla's sentence. The court of appeals affirmed petitioners' convictions in all respects, affirmed Jayyousi's and Hassoun's sentences, and vacated Padilla's sentence and remanded for resentencing. Pet. App. 1a-120a.

a. As relevant here, the court of appeals concluded that the district court had not abused its discretion in admitting Agent Kavanaugh's lay-opinion testimony about petitioners' use of code words. Pet. App. 30a-37a. The court of appeals first determined that the testimony satisfied Rule 701's requirement that the testimony be "rationally based on the perception of the witness," because "[w]hile investigating this case for five years, Agent Kavanaugh read thousands of wiretap summaries plus hundreds of verbatim transcripts, as well as faxes, publications, and speeches," and "listened to the intercepted calls in English and Arabic." *Id.* at 31a-32a. The court rejected petitioners' argument that a witness must contemporaneously observe or participate in a conversa-

tion in order to satisfy the "perception of the witness" requirement, reasoning that the requirement did not preclude Agent Kavanaugh from testifying about "the meanings of code words that he learned through his examination of voluminous documents." *Id.* at 34a.

The court of appeals additionally determined that Agent Kavanaugh's code-word testimony satisfied Rule 701's requirement to be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Pet. App. 34a-35a. The court reasoned that "a lay witness may provide interpretations of code words when the meaning of those words is not perfectly clear without the witness's explanations." *Ibid.* (internal quotation marks and citation omitted). The court explained that "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"; that 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"; and that his testimony "linked the defendants' specific calls to checks, wire transfers, and other discrete acts of material support that put the code words into context." *Id.* at 35a (internal quotation marks omitted).

Finally, the court of appeals determined that the testimony satisfied Rule 701's requirement that it "not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Pet. App. 35a-36a. The court noted that the district court had "limited the agent's testimony to facts he learned in his investigation of the defendants" and observed that the "record confirms that Agent Kavanaugh based his testimony

about the meaning of the code words on his experience from this particular investigation." *Id.* at 36a.

b. Addressing challenges to petitioners' sentences, the court of appeals first affirmed the district court's application of the terrorism sentencing enhancement to Jayyousi and Hassoun. Pet. App. 63a-68a. It noted that the district court had "found that the crimes charged are among the specified statutes that could give rise to a 'federal crime of terrorism'" and had 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 64a-65a; see *id.* at 65a-66a (quoting district court at length). The court of appeals saw no error in those findings, noting, among other things, that the "record demonstrates that the defendants' support activities were intended to displace 'infidel' governments that opposed radical Islamist goals." *Id.* at 67a.

The court of appeals did, however, find error in Padilla's sentence. Pet. App. 68a-77a. Citing this Court's decision in *Gall* v. *United States*, 552 U.S. 38 (2007), the court of appeals reviewed the sentence for both procedural and substantive reasonableness under a "deferential abuse of discretion standard of review." Pet. App. 69a. The court found no procedural error, *id.* at 70a, but it concluded that the sentence was substantively unreasonable, *id.* at 71a-77a. The court reasoned that the sentence "does not adequately reflect [Padilla's] criminal history, does not adequately account for his risk of recidivism, was based party on an impermissible comparison to sentences imposed in other terrorism cases, and was based in part on inappropriate factors," such as a focus on whether Padilla's conduct in conspiring to cause harm outside the United States had involved tar-

geting the United States itself. *Id.* at 71a-72a; see *id.* at 75a. The court rejected the contention that vacating the sentence "usurped the authority of the trial judge," explaining that "the district court committed a clear error of judgment" and that "looking at sentencing decisions through the prism of discretion is not the same thing as turning a blind eye to unreasonable ones." *Id.* at 76a-77a (internal quotation marks and brackets omitted).

c. Judge Barkett dissented on the issues of Agent Kavanaugh's testimony and the reasonableness of Padilla's sentence. Pet. App. 78a-120a. In her view, Agent Kavanaugh's testimony about the meaning of code words was neither "rationally based on [his] perception" nor "helpful to a clear understanding of [his] testimony or the determination of a fact in issue." *Id.* at 79a-97a. And she believed that the vacatur of Padilla's sentence failed to give sufficient deference to the district court's sentencing decision. *Id.* at 105a-119a.

ARGUMENT

Petitioners collectively reassert (Jayyousi Pet. 14-29; Hassoun Pet. 15-28; Padilla Pet. 25-30) their claim that the district court abused its discretion in admitting Agent Kavanaugh's code-word testimony; Hassoun contends (Pet. 28-32) that the district court erred in applying the terrorism sentencing enhancement; and Padilla argues (Pet. 10-25) that the court of appeals should have deferred to the sentence imposed by the district court. Petitioners' arguments lack merit, and no further review is warranted.

1. a. The court of appeals correctly determined that the district court did not abuse its discretion in admitting Agent Kavanaugh's code-word testimony under Federal Rule of Evidence 701. The testimony satisfied

all three of the Rule's requirements: 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).

First, Agent Kavanaugh's testimony was based on his own "perception," Fed. R. Evid. 701(a), because it was founded upon his firsthand review, over a period of five years, of the wiretap summaries, transcripts, faxes, publications, and speeches, and his listening to the intercepted calls. Pet. App. 31a-34a; see also Fed. R. Evid. 701 advisory committee's note (noting that the "perception" requirement "is the familiar requirement of firsthand knowledge or observation"). Petitioners do not contest that Agent Kavanaugh possessed firsthand knowledge of the records and recordings that he reviewed. Instead, they suggest (*e.g.*, Jayyousi Pet. 22-23) that Agent Kavanaugh's testimony was inadmissible unless he himself participated in, or at least contemporaneously observed, the communications to which those materials pertain. That argument, however, would impose a limitation that is nowhere to be found in the text of Rule 701. Nothing in the rule prohibited Agent Kavanaugh from offering a lay opinion about the materials he examined based upon the firsthand knowledge he gained as a result of that examination. 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' 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").

Jayyousi mistakenly analogizes (Pet. 4, 22) Agent Kavanaugh's testimony to someone reading a book and then asserting firsthand knowledge of the events the book describes. 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. Because his firsthand knowledge was limited to those materials, the government was required to, and did, separately prove that those materials accurately represented the content of petitioners' conversations. See Pet. App. 10a. Petitioners were free to challenge the weight that the jury should have given to Agent Kavanaugh's testimony by, for example, cross-examining him about relying on translations from a language he did not himself speak; attempting to cast doubt on the quality of the translations; or arguing that any inferences that he drew from the materials he examined would not be probative of petitioners' actual statements or conduct. But regardless of any arguments about weight or relevance, the critical point for Rule 701 purposes is that Agent Kavanaugh

possessed firsthand knowledge of the materials (*i.e.*, the records and recordings) about which he testified.

Petitioners' interpretation of Rule 701's "perception" requirement to preclude testimony like Agent Kavanaugh's would invite nonsensical results. Jayyousi appears to acknowledge (Pet. 22), for example, that Agent Kavanaugh could have satisfied the perception requirement if only he had "listen[ed] to [the conversations] in real-time." But petitioners offer no practical reason for distinguishing between, say, 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, Agent Kavanaugh "listened to the intercepted calls in English and Arabic," Pet. App. 32a; experienced the conversations in materially the same way that he would have had he listened in real time; and "rationally" based his testimony on his "perception" of the recordings and other materials he examined. Fed. R. Evid. 701(a).

Second, Agent Kavanaugh's testimony was "helpful to clearly understanding [his] testimony or to determining a fact in issue." Fed. R. Evid. 701(b). As the court of appeals reasoned, "Agent Kavanaugh's familiarity with the investigation allowed him to perceive the meaning of coded language that the jury could not have readily discerned," Pet. App. 34a; his explanation of code words "helped the jury understand better the defendant's conversations," *id.* at 35a; and he was able to link "specific calls to checks, wire transfers, and other discrete acts of material support that put the code words into context," *ibid.* Agent Kavanaugh was not, as petitioners would have it (*e.g.*, Jayyousi Pet. 25-27), invading the factfinding province of the jury or delivering a closing argument from the witness stand. Rather, he interpreted the nonobvious meaning of various pieces of evi-

dence based on his extensive examination of the records of petitioners' conversations. The jury was free to disagree with Agent Kavanaugh's opinions about the code words, 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. But Agent Kavanaugh's testimony would have been quite confusing, and much less "helpful," had he been forced to present petitioners' coded conversations to the jury without any attempt at interpretation at all. See, *e.g.*, *Rollins*, 544 F.3d at 831 (considering it "helpful" to have testimony about codeword 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, Agent Kavanaugh'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 code used by a particular set of defendants. Fed. R. Evid. 701 advisory committee's note (discussing *United States* v. *Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), cert. denied, 523 U.S. 1131 (1998)). Dr. Gunaratna provided that sort of expert testimony in this case. Pet. App. 23a-24a. But, as all members of the court of appeals panel agreed (*id.* at 34a-36a (majority); *id.* at 81a (dissent)), it is also possible for a lay person, without drawing upon any prior specialized knowledge,

to develop sufficient familiarity with the way a certain group of people communicates as to offer a lay opinion on that issue. See, *e.g.*, *Rollins*, 544 F.3d at 832 (admitting agent's lay testimony about code words when "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). The district court here limited Agent Kavanaugh's testimony to "facts he learned in his investigation of the defendants," Pet. App. 36a, and it therefore was not expert testimony. See *United States* v. *El-Mezain*, 664 F.3d 467, 513-514 (5th Cir. 2011) (finding no error in admission of non-expert testimony where "the agents' opinions were limited to their personal perceptions from their investigation of this case").

b. Contrary to petitioners' contentions (Jayyousi Pet. 14-20; Hassoun Pet. 16-23; Padilla Pet. 25-27), no square conflict exists on the application of Rule 701 to testimony about code words that would warrant this Court's review. The cases cited by petitioners present materially different facts and do not demonstrate that another court of appeals would necessarily have reached a different result on the facts of this case.

In *United States* v. *Peoples*, 250 F.3d 630 (2001), the Eighth Circuit reversed a district court's ruling allowing a law-enforcement agent to testify not only about the meaning of code words used in the defendants' conversations, but also the agent's "opinions about what the defendants were thinking during the conversations, phrased as contentions supporting [the agent's] conclu-

sion, 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 district court). The court of appeals in this case identified no similar problems with respect to Agent Kavanaugh's testimony. See Pet. App. 12a-20a, 30a-37a.[2]

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 (em-

[2] Petitioners point out (*e.g.*, Jayyousi Pet. 19) that the Eighth Circuit in *Peoples* stated that 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 at 641. But the Eighth Circuit did not face, and had no occasion to address, testimony that is offered only as opinion about the materials the agent actually studied, is limited to deciphering code words, does not purport to opine on "what the defendants were thinking," and is not presented as "the contentions of the government" or "'snippets of early argument from the witness stand.'" *Id.* at 640. Indeed, the Eighth Circuit made clear that law-enforcement investigation may at least sometimes provide the basis for lay-opinion testimony, as another section of the opinion upheld the admission of a police officer's "opinion * * * regarding the relationship among * * * four robberies" that he had "formed in the course of his investigation of one of the robberies." *Id.* at 639.

phasis 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. *Ibid.* (agent "testified at great length about his background and expertise as a drug investigator" and 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), *id.* at 750, would not necessarily apply to the narrower testimony of Agent Kavanaugh in this case, which was limited to his case-specific investigation, Pet. App. 36a, and which involved the translation of actual code words that would otherwise have confused the jury.[3]

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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 Eleventh 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

And 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 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 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 Agent Kavanaugh here, the agent in *Johnson* "could not offer testimony regarding what the surveillance [in that case had] uncovered," *id.* at 290, and had not "even listen[ed] to all of the relevant calls in question," *id.* at 293.

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 (Jayyousi Pet. 16-20; Hassoun Pet. 16-23; Padilla Pet. 25-27) 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 code

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[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.

words used in conspirators' conversations. See, *e.g.*, *United States* v. *Vázquez-Rivera*, 665 F.3d 351, 359-364 (1st Cir. 2011) (testimony about defendant's role in certain Internet communications and the results of investigation conducted by someone else); *United States* v. *Meises*, 645 F.3d 5, 15-17 (1st Cir. 2011) (testimony about defendants' roles in a drug conspiracy); *United States* v. *Perkins*, 470 F.3d 150, 155-156 (4th Cir. 2006) (hypothetical testimony about reasonable use of force); *United States* v. *Dukagjini*, 326 F.3d 45, 52-59 (2d Cir. 2003) (expert, not lay-opinion, testimony about meaning of wiretapped conversations), cert. denied, 541 U.S. 1092 (2004); *United States* v. *Glenn*, 312 F.3d 58, 66-67 (2d Cir. 2002) (testimony by drug dealer about defendant carrying a gun); *United States* v. *Cruz*, 285 F.3d 692, 700 n.4 (8th Cir. 2002) (testimony about photo identification); see also Jayyousi Pet. 20 n.8 (acknowledging that certain courts of appeals have not directly addressed the relevant issue); Hassoun Pet. 21 (similar). 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.

c. In any event, this case is an unsuitable vehicle for addressing the application of Rule 701 to a law-enforcement agent's testimony about code words. Any error in admitting Agent Kavanaugh's testimony (the only testimony that petitioners challenge in this Court) would be harmless in light of Dr. Gunaratna's overlapping, and presently unchallenged, expert code-word testimony.

The court of appeals observed that the two witnesses' translations of the code words were "similar." Pet. App. 24a. The sole exception noted by the court of appeals was that Dr. Gunaratna's testimony went even further

than Agent Kavanaugh's. Specifically, Dr. Gunaratna "opined that when the defendants used the word jihad, they meant the violent or armed jihad, whereas [Agent Kavanaugh] did not specify if the word jihad meant violent or peaceful jihad." *Ibid.*; see also note 4, *infra*.

The overlap of the code-word testimony provides a "fair assurance" that Agent Kavanaugh's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 765, 776 (1946). Even in the absence of a translation by Agent Kavanaugh, the jury is unlikely to have concluded, for example, that Hassoun's statement about 70 people in a "joint venture" who got "married completely," Pet. App. 18a, referred to a group wedding. See *id.* at 23a (noting Dr. Gunaratna's opinion that "'to be married' referred to going to paradise or martyrdom"). Nor would the jury have overlooked the substantial additional evidence, apart from the code-word testimony—such as the records of Padilla's enrollment in a mujahideen training camp— that confirmed petitioners' guilt. See *id.* at 5a-12a.

The dissenting judge in the court of appeals (the only one who needed to address the issue) acknowledged the possibility that any error in admitting Agent Kavanaugh's testimony "might be considered harmless." Pet. App. 79a n.1. Contrary to her suggestion that "the government ma[de] no substantial argument or showing" of harmlessness, *ibid.*, the government in fact raised and argued the issue in its appellate brief, see Gov't C.A. Br. 40. And petitioners offer little support for their assertion (Jayyousi Pet. 24, 28-29; Hassoun Pet. 27-28; Padilla

Pet. 30) that any error was prejudicial.[4] The issue whether the district court abused its discretion by admitting the code-word testimony of two witnesses, rather than just one, does not warrant this Court's review.

2. Hassoun alone contends (Pet. 28-32) that the district court erred in applying the terrorism sentencing enhancement, Sentencing Guidelines § 3A1.4. That fact-bound contention lacks merit and does not warrant further review.

Hassoun asserts (Pet. 29) that "the district court *never* made" a finding that his actions were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," as necessary to meet the statutory defi-

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[4] Hassoun's prejudice argument relies in substantial part on his assertion of a different evidentiary error that he does not challenge in this Court and overlooks the testimony of Dr. Gunaratna. See Hassoun Pet. 28-29. Jayyousi does address Dr. Gunaratna, but fails to account for the entirety of Dr. Gunaratna's testimony. Jayyousi asserts that Dr. Gunaratna's testimony was "diametrically opposed" to Agent Kavanaugh's because Dr. Gunaratna "'discerned no code talk'" by Jayyousi. Jayyousi Pet. 24 (quoting Pet. App. 28a). Dr. Gunaratna's testimony, however, drew a terminological distinction between two different types of disguised communications: "code" (a formal, high-secrecy type of disguised communication between members of a radical Islamist group) and "double talk" (a less formal, somewhat less secretive type of disguised communication between supporters of an Islamist group). See, *e.g.*, 6/26/07 Tr. 11; 7/9/07 Tr. 112-113. Although Dr. Gunaratna testified that Jayyousi did not use "code," he testified that Jayyousi did participate in conversations involving "double talk." 7/9/07 Tr. 113-114; 7/10/07 Tr. 146-149. In particular, Dr. Gunaratna testified that Jayyousi used the term "preparations" to mean "prepare to wage violent jihad"; used the term "first area" to mean "Afghanistan and Pakistan"; and was party to a conversation in which the term "tourism" was used to mean "to go and fight." 7/10/07 Tr. 146-149.

nition of "Federal crime of terrorism" that is incorporated by reference into the Sentencing Guidelines. 18 U.S.C. 2332b(g)(5)(A); see Sentencing Guidelines § 3A1.4(a), comment. (n.1). The court of appeals, however, correctly observed that the district court did, in fact, make such a finding. Pet. App. 64a-65a ("The district court also found that the defendants' activities were calculated to influence, affect, or retaliate against government conduct.").

The district court first concluded that such a finding was encompassed "within the jury verdict," which was based on charges that Hassoun participated in a 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." Pet. App. 65a-66a (quoting district court). Hassoun's fact-specific disagreement with the district court's interpretation of the jury verdict (Pet. 29-30) does not warrant further review, and, in any event, the district court did not base its conclusion solely on the jury verdict. Rather, it additionally observed that "ample evidence" was "introduced at trial" that Hassoun "wished to impose Sharia throughout the Middle East and remove governments in the process"; "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." Pet. App. 66a (quoting district court). The court of appeals echoed that observation, noting that "[t]he record demonstrates that the defendants' support activities were intended to displace 'infidel' governments that opposed radical Islamist goals" and that "Hassoun spoke

expressly about [his] desire to impose Sharia, toppling existing governments in the process." *Id.* at 67a.

Cases cited by Hassoun (Pet. 30-31), in which courts have examined particular records and found insufficient support for the terrorism enhancement, do not demonstrate that those courts would reach a similar conclusion on this record. Moreover, even if there were a circuit conflict on the application of the terrorism enhancement, this Court typically does not review Guidelines-application issues, because the Sentencing Commission itself is charged with "review[ing] the work of the [federal] courts" concerning the Guidelines and making appropriate clarifying or corrective changes (including retroactive changes) to resolve any "conflicting judicial decisions." See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). Because the Commission could eliminate or qualify the Guidelines' incorporation of the statutory definition of a "Federal crime of terrorism," it has ample authority to resolve any issues that may arise in the application of that definition.

3. Finally, Padilla contends (Pet. 10-25) that the court of appeals impermissibly second-guessed the district court's sentencing decision and claims that the circuits apply conflicting standards when reviewing sentences for substantive reasonableness. That claim warrants no further review.

As this Court's decisions make clear, a sentence imposed by a district court is subject to review by a court of appeals not only for procedural error, but also for substantive reasonableness. In particular, this Court has instructed that, after determining that a sentence is "procedurally sound," a court of appeals "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*

v. *United States*, 552 U.S. 38, 51 (2007). The reviewing court cannot presume that a sentence outside the advisory Guidelines range is unreasonable; must give "due deference to the district court's decision that the [sentencing factors listed in 18 U.S.C. 3553(a)], on a whole, justify the extent of [any] variance" from the Guidelines range; and may not reverse a sentence simply because it "might reasonably have concluded that a different sentence was appropriate" had it been in the district court's position. 552 U.S. at 51. But if the court of appeals, applying that deferential standard, concludes that the district court imposed a substantively unreasonable sentence, it may set that sentence aside. "In sentencing, as in other areas, district judges at times make mistakes that are substantive"; "[a]t times, they will impose sentences that are unreasonable"; and "[c]ircuit courts exist to correct such mistakes when they occur." *Rita* v. *United States*, 551 U.S. 338, 354 (2007).

The court of appeals properly performed that role here. It recognized the necessity to apply a "deferential abuse of discretion standard of review," Pet. App. 69a (citing *Gall*, 552 U.S. at 41), and concluded that "the district court committed a clear error of judgment" in its evaluation of the sentencing factors in this case, *id.* at 77a (citation, internal quotation marks, and brackets omitted). Specifically, the court of appeals reasoned that the district court's imposition of a "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," *id.* at 72a; that the district court failed to recognize that "Padilla poses a heightened risk of future dangerousness due to his al-Qaeda training," *id.* at 73a; that the district court inappropriately compared Padilla to other criminals "who had either been con-

victed of less serious offenses, lacked extensive criminal histories, or had pleaded guilty," *id.* at 74a; that the district court "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" when the statute of conviction focused on harm "outside the United States," *id.* at 75a; and that the district court "abused its discretion" by looking to Padilla's pretrial confinement to justify varying his "minimum Guidelines sentence downward by 42 percent, a period more than three and one-half times his period of actual pretrial confinement," *id.* at 76a.

Contrary to Padilla's suggestion (Pet. 15-18, 23-24), nothing in this Court's precedents prohibited the court of appeals from reaching those conclusions and vacating his sentence as a result. Padilla characterizes the court of appeals' analysis solely as a "re-weighing of sentencing factors" (Pet. 15), but in reality, the court of appeals simply reviewed the district court's balancing of factors in assessing the substantive reasonableness of a sentence. This Court's cases contemplate that reviewing courts will assess the reasonableness of the factors on which the district court relied. See *Gall*, 552 U.S. at 57-59 (finding that district court "quite reasonably attached great weight" to Gall's voluntary withdrawal from drug conspiracy and "self-motivated rehabilitation"). The Court in *Gall* reversed the Eighth Circuit's decision not because the court of appeals made such an evaluation, but because the court of appeals had failed to give "due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60. The court of appeals here, which expressly recognized the deferen-

tial standard of review, see Pet. App. 69a-71a, 76a-77a, made no similar error.[5]

Padilla is incorrect in asserting (Pet. 11-15) that other courts of appeals "do not consider the re-weighing of sentencing factors to be part of substantive unreasonableness review." He fails to cite any circuit decision that expressly so holds. And as the Eleventh Circuit recently observed, "the position that the weight a sentencing court gives to the § 3553(a) factors may not be reviewed has been rejected not only by this Court but also by all of our sister circuits that have addressed the issue." *United States* v. *Irey*, 612 F.3d 1160, 1193 (2010) (en banc), cert. denied, 131 S. Ct. 1813 (2011); see *id.* at 1193-1194 (citing decisions of ten other circuits). The courts of appeals recognize that an approach that permits a reviewing court to "consider whether [a] factor, as explained by the district court, can bear the weight assigned it under the totality of [the] circumstances" will "ensure[] that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions." *United States* v. *Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc), cert. denied, 556 U.S. 1268 (2009).

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[5] Padilla also errs in suggesting (Pet. 12-13) that the court of appeals' decision in this case conflicts with this Court's recent decision in *Setser* v. *United States*, 132 S. Ct. 1463 (2012). *Setser* assumed that reasonableness review applied to the decision whether a sentence should run consecutively or concurrently to another sentence, *id.* at 1472 n.7, and simply rejected any suggestion that the district court's decision in that case failed to consider any relevant factor known at the time of sentencing, *id.* at 1472-1473. The Court did not purport to elaborate on the nature of reasonableness review, let alone describe how a reviewing court should address the weight that the district court could permissibly give to the factors it *did* consider.

At bottom, Padilla simply disagrees with the court of appeals' substantive conclusion that the district court's sentence was unreasonably low. But a claim of fact-bound "misapplication of a properly stated rule of law" does not warrant this Court's review. Sup. Ct. R. 10. Review would be especially inappropriate in light of this case's interlocutory posture. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007). The court of appeals did not dictate a specific sentence for Padilla, but instead remanded for resentencing. That resentencing has not yet occurred, and when it does, it may be subject to further appellate proceedings.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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