No. 23-7605

IN THE

SUPREME COURT OF THE UNITED STATES

RODRIGO ALVAREZ-QUINONEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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INTRODUCTION

The Government does not dispute that the circuit courts of appeals are split on the question of whether under Federal Rule of Evidence 701, law enforcement officers may give lay opinion testimony based on information obtained from an investigation. Rather, it maintains certiorari is unwarranted, because the opinion testimony in issue in this case would be admissible in all the circuits, and thus the split is immaterial to the disposition of this case. Alternatively, the Government argues that assuming *arguendo* admission of the testimony was error, it was harmless.

The Government's principal argument turns on a misreading of the apposite cases. Its harmless error argument overlooks key elements of the record.

I. THE LAY OPINION TESTIMONY ADMITTED IN THIS CASE PURSUANT TO NINTH CIRCUIT AUTHORITY WOULD HAVE BEEN EXCLUDED UNDER HOLDINGS OF THE FIRST, SECOND, FOURTH, SIXTH AND EIGHTH CIRCUIT COURTS OF APPEALS, WHICH EXCLUDE LAY OPINION TESTIMONY BASED ON KNOWLEDGE OF AN INVESTIGATION

The government maintains that the Second Circuit's decision in *United States v. Garcia*, 413 F.3d 201, 212 (2nd Cir. 2005) was consistent with the admission of Agent Provenzale's opinion testimony, because it was based on an investigation of which he had "direct knowledge" Brief for the United States in Opposition (hereinafter "Opposition Brief "), p. 20.

Yet, the witness in *Garcia* also participated in and had direct knowledge of the investigation on which he relied. *See United States v. Garcia*, *supra*, 413 F.3d at 207. The reason *Garcia* held this failed to satisfy the personal perception requirement of Rule 701 is that it rejected the proposition, advanced by the Government, that percipient knowledge of an

investigation and its products constitutes percipient knowledge of the object of the investigation, i.e. of the matter about which the witness would opine. *Id*. at 212-213. The *Garcia* court explained:

> [W]hen an agent relies on the "entirety" or "totality" of information gathered to offer a "lay opinion" as to a person's culpable role in a charged crime, he is not presenting the jury with the unique insights of [a witness's] personal perceptions. Thus, in such circumstances, **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. (internal citation omitted) (bold added).

Thus, under *Garcia,* Provenzale's opinion, based, as the Ninth Circuit found, on his "overall knowledge of the investigation and the facts gleaned therefrom," would have been inadmissible. App. 4a-5a.

The Government also overlooks a second reason Provenzale's opinion would have been excluded under *Garcia*, which is that it also was not "helpful" to the jury, because it was based upon tape recordings of telephone conversations that never were presented to the jury. *See United States v. Garcia*, *supra*, 413 F.3d at 213-214 (lay opinion testimony under Rule 701 "does not tell [jurors] that unspecified information, which may or may not be received in evidence, establishes a defendant's guilt"). Moreover, Agent Provenzale testified that his opinion also was based on unspecified reports produced by unidentified sources, thereby establishing another reason it would have not been found to have been helpful under *Garcia.* E.R. 232.

The Government also maintains *Garcia* is distinguishable on the grounds that the opinion there at issue asserted the defendant's culpability, specifically, his partnership with a person in

his receipt of a controlled substance (*United States v. Garcia*, *supra*, 413 F.3d at 209-210), whereas Provenzale's opinion identified petitioner as the speaker on telephone calls. Opposition Brief, p. 20. *Garcia* establishes no exception for the admission of lay opinion testimony that fails to satisfy the requirements of Rule 701, where it is offered for purposes of identification, rather than to show culpability. Indeed, inasmuch as petitioner's identity as the speaker on the telephone calls in issue was the only material question in the case, i.e. establishing his identity established his guilt of the charged offenses, the Government's distinction has no significance. *See United States v. Vazquez-Rivera,* 665 F.3d 351, 357, 360 (1st Cir. 2011).

The Government argues the First Circuit's decision in *United States v. Vazquez-Rivera,* 665 F.3d 351 (1st Cir. 2011) was consistent with the admission of Officer Provenzale's opinion testimony, because: 1) Provenzale was familiar with petitioner's voice based on having listened to recordings, having read transcripts of the calls, and his "knowledge of electronic surveillance and other evidence that tied petitioner to the phone…. [and, 2] his opinion was not based on the insight of other investigators who were not present at trial." Opposition Brief, p. 18.

Yet, one of the grounds on which the *Vazquez-Rivera* court based its decision that admission of the agent's opinion identifying the defendant as the perpetrator of the offense in issue violated Rule 701 was that the agent had no personal knowledge of the defendant's identity. *United States v. Vazquez-Rivera, supra,* 665 F.3d at 358. Indeed, in *Vazquez-Rivera* the First Circuit fully concurred in the *Garcia* court's rejection of the notion that an officer's personal knowledge of matter secured through an investigation satisfied the personal perception requirement of Rule 701. *See id*. at 358-359. As noted, Provenzale's opinion fails this test.

In addition, as did the Second Circuit in *Garcia*, in *Vazquez-Rivera* the First Circuit cited as a second reason for finding the officer's lay opinion testimony inadmissible, that there was a possibility the agent's opinion was based on some evidence that had not been presented to the jury. *Id*. at 361. The court found this defect particularly disqualifying since identification was the ultimate issue in the case. *Id*. at 357-358, 361 (citing 4 J. Weinstein & M. Berger, Weinstein's Federal Evidence, §701.05 (Joseph M. McLaughlin, ed., Matthew Bender 2nd ed. 2011)). As noted, Agent Provenzale's opinion testimony was based on such evidence, and, as in *Vazquez-Rivera*, his identification went to the ultimate issue in the case. *See* E.R. 245-258. For this reason also, under *Vazquez-Rivera* Provenzale's opinion would not have been admitted.

Respondent asserts that the First Circuit cases decided subsequent to *Vazquez-Rivera*, *United States v. Rose*, 802 F.3d 114 (1st Cir 2015), *cert. denied*, 578 U.S. 1026 (2016) and *United States v. Valdivia*, 680 F.3d 33 (1st Cir 2012), *cert. denied*, 568 U.S. 994 (2012), suggest the First Circuit would not have excluded Officer Provenzale's testimony. The cases do not support that inference.

Indeed, neither of these cases addresses *Vazquez-Rivera* and, as respondent acknowledges, they turned on whether the opinion testimony in issue constituted impermissible "overview" testimony. *United States v. Rose*, *supra*, 802 F.3d at 120-121. *Vazquez-Rivera* did not reach that question. *See United States v. Vazquez-Rivera, supra,* 665 F.3d at 361. Moreover, in contrast to *Vazquez-Rivera* and to this case, neither in *Rose* nor in *Valdivia* was there reason to believe the lay opinion testimony was based on matter that had not been presented, and thus was

not helpful, to the jury.[1] *See United States v. Rose*, *supra*, 802 F.3d at 120; *United States v. Valdivia*, *supra*, 680 F.3d at 47-48.

In addition, the opinion testimony in issue *Rose* did not, as in *Vasquez-Rivera* and in this case, go to the ultimate issue in the case, but merely constituted a portion of the evidence corroborating the direct evidence of the defendants' guilt. *See United States v. Rose*, *supra*, 802 F.3d at 124-125. In *Valdivia,* contrary to the Government's summary, the opinion testimony did not identify the defendant, but rather described the scope of a drug smuggling conspiracy based on the witness's "independent investigation" of the defendant's role in that conspiracy, in addition to his review of wiretap recordings and telephone records. *United States v. Valdivia, supra,* 680 F.3d at 47-48. Thus, *Valdivia* also differs significantly from *Vazquez-Rivera* and this case in that the opinion was informed, at least in part, by personal perception.

Neither *Rose* nor *Valdivia*, therefore, provides reason to believe *Vazquez-Rivera* does not correctly recite the law of the First Circuit nor that Provenzale's opinion testimony would be admissible in the First Circuit.

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1. In a three sentence footnote, the *Rose* court did hold that the law enforcement officer's opining on the speaker's identity and interpretation of the context of statements contained in recordings obtained through an investigation constituted personal knowledge and was helpful to the jury under Federal Rules of Evidence 701 and 702. *United States v. Rose, supra,* 802 F.3d at 121 n. 3. As noted, in contrast to *Vazquez-Rivera*, the officer's opinion did not turn on facts that had not been presented to the jury. Neither does the record indicate, as in *Vazquez-Rivera*, that it was the witness's reliance on facts gleaned from the investigation, rather than his interpretation of the recorded statements based on his representation of being "conversant in the drug-distribution 'lingo' from prior investigations" that was in issue. *See id*. at 120. The latter concern could explain the court's having also addressed Rule 702. *See, e.g, United States v. Dukagjini,* 326 F.3d 45, 55-56 (2nd Cir. 2002) (noting the problem of distinguishing expert testimony defined by Rule 702, from lay opinion testimony defined by Rule 701).

The Government maintains that the Fourth Circuit's holding in *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010) that the lay opinion testimony was inadmissible under Rule 701 is distinguishable from this case, because, in contrast to Agent Provenzale, the testifying agent in *Johnson* "could not offer testimony regarding what the surveillance in that case had uncovered and had not even listened to all of the relevant calls in question." Opposition Brief, p. 15 (internal quotes and citation omitted).[2] It thereby omits the portion of *Johnson*'s holding that shows Provenzale's testimony indeed would not have been admissible in the Fourth Circuit:

> Furthermore, Agent Smith admitted that he did not participate in the surveillance during the investigation, but rather gleaned information from interviews with suspects and charged members of the conspiracy *after* listening to the phone calls. **His post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701**.
>
> *United States v. Johnson*, *supra*, 617 F.3d at 293. (bold added).

In this case, Agent Provenzale's opining based on his review of reports in the case file and recordings of taped telephone calls is materially indistinguishable from the "post-hoc" assessments the Fourth Circuit held to be inadmissible in *Johnson.*

Respondent maintains that admission of Provenzale's testimony was consistent with the Sixth Circuit's holding in *United States v. Freeman*, 730 F.3d 590 (6th Cir. 2013), because of his knowledge of the investigation and review of the recorded telephone calls and transcripts thereof. Opposition Brief, pp.15-16. *Freeman*, in fact, asserts the opposite: "lay opinion testimony is permitted under Rule 701 because it has the effect of describing something that jurors could not

2. *Johnson* also was an appeal from a conviction for conspiracy to possess a controlled substance for distribution. *United States v. Johnson*, 617 F.3d at 288.

otherwise experience for themselves by drawing upon the witness's sensory and experiential **observations that were made as a first-hand witness to a particular event**." *United States v. Freeman*, *supra*, 730 F.3d at 595 (internal quotes and citation omitted) (bold added). Moreover, the court also found that lay opinion testimony is not "helpful" within the meaning of Rule 701, where it addresses a question the jury could have decided for itself. *Id*. at 597-599.

Thus, *Freeman* held admission of the officer's lay opinion testimony concerning the contents of recordings of telephone conversations, some of which were not admitted in evidence, to have violated Rule 701. *Id*. at 596-597. Both of the reasons underlying the court's holding in *Freeman* would have precluded admission of Agent Provenzale's lay opinion testimony in the Sixth Circuit.

Respondent distinguishes the Eighth Circuit's decision in *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001) on the grounds that the officer's testimony held inadmissible under Rule 701 in that case included opinions about the defendants' state of mind and their culpability. Opposition Brief, p. 16. The court's holding, however, did not turn on the content of the officer's testimony, but rather on the fact that it was not based on her personal perception:

> When a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred….
>
> Agent Neal lacked first-hand knowledge of the matters about which she testified. Her opinions were based on the investigation after the fact, not on her perception of the facts. Accordingly, the district court erred in admitting Agent Neal's opinions about the recorded conversations.
>
> *United States v. Peoples*, *supra*, 250 F.3d at 641.

Thus, under the rule operative in the Eighth Circuit, Agent Provenzale's investigation based opinion testimony also would have been excluded.

In summary, the Ninth Circuit's position, which authorized the admission of Agent Provenzale's lay opinion testimony based on his knowledge of matter from the investigation in this case is inconsistent with the position taken by the First, Second, Fourth, Sixth and Eighth Circuit courts of appeals. Accordingly, this case provides an effective vehicle through which this Court may resolve the conflict between the circuit courts of appeals on the application of Federal Rule of Evidence 701.

II. IT IS UNDISPUTED THAT AGENT PROVENZALE'S LAY OPINION IDENTIFYING PETITIONER AS A PARTY TO THE INTERCEPTED COMMUNICATIONS WAS CENTRAL TO THE PROSECUTION'S CASE

Respondent maintains that even if admission of Agent Provenzale's opinion testimony was error, it was harmless, because "there was more than sufficient evidence" to support his convictions. Opposition Brief, pp. 21-22. In order for an error to be harmless, however, it does not suffice to show sufficient evidence to convict absent the error. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) ("[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error"). It is necessary that there be "fair assurance…. that the judgment was not substantially swayed by the error." *Ibid*. Respondent adduces no basis for such assurance in this case.

Specifically, the Government does not dispute that the prosecutor relied heavily on Provenzale's opinion imputing nearly 40 of the intercepted communications to petitioner in urging the jury to convict. Neither does respondent deny that the defense consisted almost

entirely of challenging that imputation. Finally, respondent identifies no reason to believe Provenzale's opinion tying petitioner to those communications did not play a substantial role in persuading the jury to convict.

There is no basis, therefore, on which to find the error harmless.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his petition, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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