No. 25-7182

In the
Supreme Court of the United States

DAVID JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Table of Contents

Table of Authorities

Introduction

In order to argue that the circuits are not split about whether Rule 611(a) summaries can be admitted into evidence, the government ignores the cases that diverge from the approach adopted by the Sixth Circuit. The government's identification of some purported intra-circuit confusion on the issue does not make the issue any less settled. On the contrary, to the extent that the circuits are ruling on the issue ad hoc, that only emphasizes the need for a uniform rule.

The government's assertion that the new Federal Rule of Evidence 107 makes this entire debate academic is likewise incorrect. Rule 107(b) prohibits the introduction of illustrative aids into evidence. Notwithstanding Rule 107, therefore, prosecutors like the government here will still need to rely on Rule 611(a) in order to send reports like Agent Kunkle's slide deck back to the jury room. This petition presents the question of whether they can.

Argument

I. The circuits are split.

Instead of contending that the circuits have all agreed on a single, uniform approach to the admission of what amount to demonstrative illustrations under Rule 611(a), the government asserts that the circuits have adopted a "case-by-case" approach. Resp. 11. For example, notwithstanding the unequivocal language in cases like *United States v. Buck*, 324 F.3d 786, 790–91 (5th Cir. 2003), which held that a Rule 611(a) summary is a "pedagogical aid" that "should not [be] admitted as an exhibit or taken to the jury room," the government asserts that other cases from other Fifth Circuit panels have not always toed the same line. *Id.* at 790–91. The government says the same thing about the state of the law in the Seventh Circuit, notwithstanding the assertion in *United States v. White*, 737 F.3d 1121 (7th Cir. 2013), that a government summary exhibit that "was admitted as substantive evidence and allowed to go into the jury room" "could not have been admitted as a Rule 611(a) pedagogical summary." *Id.* at 1136. Likewise for the Eighth and Tenth Circuits. The government argues in each instance that the circuits have not ruled consistently on the issue of whether Rule 611(a) allows summaries to be admitted into evidence.

But arguing that the circuits apply inconsistent, ad hoc reasoning to Rule 611(a) only underscores the need for uniformity. Although the government tries to ignore the cases that demonstrate the divergence between the circuits, their language is not in doubt. *See, e.g., id.*; *see also Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 708 (7th Cir. 2013) ("We would not allow a lawyer to accompany the jury into the deliberation room to help the jurors best view and understand the evidence in the light most favorable to her client. The same goes for objects or documents used only as demonstrative exhibits during trial."). If—as the government suggests—the circuit courts cannot agree even internally on how to approach the interplay between Rule 611(a) and Rule 1006, that only underlines the need for this Court to weigh in on the issue, not to sit it out.

II. Resolution of the question presented would affect this case and others, notwithstanding new Rule 107.

The government tries to downplay the relevance of the question presented in this petition in several ways, none of which is convincing.

First, trying to sidestep the analysis under Rule 611(a), the government argues that Agent Kunkle's report was properly admitted under Rule 1006. Resp. 15. But that is not what the Sixth Circuit held; it squarely reasoned that the report was admitted as a secondary-evidence summary under Rule 611(a), not a Rule 1006 summary. That is no surprise, because the information on a Rule 1006 summary may not be "embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise." *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998). Those sorts of embellishments are precisely what Agent Kunkle's report includes; indeed, that is the whole reason why the government wanted to introduce them. The government cannot sweep the Sixth Circuit's Rule 611(a) error under the rug by pivoting to Rule 1006.

Second, the government contends that the writ should be denied because new Rule 107 recently changed the rules of the game. But the addition of Rule 107 did not amend Rule 611(a). And in any event, Rule 107 specifically provides that, absent consent or a finding of good cause, "[a]n illustrative aid is not evidence and must not be provided to the jury during deliberations." Fed. R. Evid. 107(b). Prosecutors who seek to admit demonstrative, pedagogical aids into evidence must therefore look to Rule 611(a) to do so. The question whether Rule 611(a) can be used to end-run Rule 1006 will therefore persist regardless of the addition of Rule 107.

Third, the government contends that the admission of Agent Kunkle's report was harmless, such that resolution of this issue makes no difference in this case. That is wrong, too. Not only should the underlying cell phone records never have been admitted against Johnson in the first place, *see Chatrie v. United States*, 146 S. Ct. 2193, 2199 (2026), but the government fails to grapple with the actual procedural history of this case. When the jury in Johnson's first trial specifically asked for Agent Kunkle's report to help it arrive at a verdict, the district court refused to provide the report because it had not been admitted into evidence. That jury could not reach a decision; it failed to convict Johnson. At the second trial, by contrast, the second jury was given the very thing that the first jury asked for and did not receive: Agent Kunkle's report. And the second jury convicted Johnson. For the government to argue that Agent Kunkle's report could not possibly have made a difference blinks at reality. It already had.

Conclusion

The Court should grant the petition.

Respectfully submitted,

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