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WITNESS HISTORY AS JURIES BECOME HISTORY: HOW THE ELEVENTH CIRCUIT ALLOWED THE OPINIONS OF LAY WITNESSES TO OVERTAKE THE DUTY OF THE JURY IN *UNITED STATES v. JAYYOUSI*

Abstract: On September 19, 2011, in *United States v. Jayyousi*, the U.S. Court of Appeals for the Eleventh Circuit held that an FBI agent's testimony regarding his post-hoc review of investigation materials was admissible as lay opinion testimony under Rule 701 of the Federal Rules of Evidence. In so holding, the Eleventh Circuit joined a minority of courts in adopting the most liberal interpretation of the Rule 701 perception and helpfulness requirements. This Comment argues that the Eleventh Circuit erred in adopting the most liberal interpretation of Rule 701 and that only by adopting the strictest interpretation can the courts continue to show due reverence for our jurors.

INTRODUCTION

The right to a trial by jury is fundamental to the American justice system.¹ So, too, is the right to confront one's witnesses and obtain witnesses in one's favor.² But cases involving the admissibility of opinion testimony by lay witnesses under Rule 701 of the Federal Rules of Evidence require the courts to determine which of these two revered principles should prevail.³ In 2011, in *United States v. Jayyousi*, the U.S. Court of Appeals for the Eleventh Circuit held that the U.S. District Court for the Southern District of Florida did not abuse its discretion in allowing

¹ See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.")

² See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .").

³ See FED. R. EVID. 701; *infra* notes 64–87 and accompanying text (discussing how more liberal interpretations of Rule 701 limit the autonomy of the jury to draw its own conclusions).

a Federal Bureau of Investigation (FBI) agent to testify as a lay witness.⁴ In so holding, the Eleventh Circuit aligned itself with those circuits that endorse a liberal interpretation of Rule 701, choosing the right to present witnesses over the right to have juries decide cases with autonomy.⁵

This Comment evaluates the Eleventh Circuit's holding in *Jayyousi* in light of the alternate interpretations of Rule 701 prevalent in other circuits.⁶ It further considers how the holding in *Jayyousi* affects the rule's purposes.⁷ Part I gives an overview of the opinion testimony at issue in *Jayyousi* and summarizes the Eleventh Circuit's ruling.⁸ Part II contextualizes *Jayyousi*'s holding within the broader circuit court debate on the requirements of Rule 701.⁹ Finally, Part III argues that by loosening the standard for which a witness satisfies Rule 701, the Eleventh Circuit has encroached upon the preeminent autonomy of the jury.¹⁰

I. *JAYYOUSI*: THE ELEVENTH CIRCUIT INTERPRETS RULE 701

On April 16, 2007, in the U.S. District Court for the Southern District of Florida, three defendants—Kifah Jayyousi, Adham Hassoun, and Jose Padilla—faced charges relating to their alleged support for Islamist violence overseas.¹¹ The defendants maintained that their actions from October 1993 to November 2001 amounted to nothing more than providing humanitarian aid to oppressed Muslims.¹² The government, however, contended that the defendants formed a support cell and conspired to send money, recruits, and equipment overseas to groups that were known to use violence to further radical Islamist beliefs.¹³

⁴ United States v. Jayyousi, 657 F.3d 1085, 1104 (11th Cir. 2011), *cert. denied*, 133 S. Ct. 29 (June 25, 2012) (No. 11-1194).

⁵ See *id.*; *infra* notes 40–46 and accompanying text (discussing the most liberal interpretation of Rule 701, adopted by the Eleventh Circuit in *Jayyousi* and followed by the Fifth and Tenth Circuits).

⁶ See *infra* notes 34–96 and accompanying text.

⁷ See *infra* notes 34–96 and accompanying text.

⁸ See *infra* notes 11–33 and accompanying text.

⁹ See *infra* notes 34–67 and accompanying text.

¹⁰ See *infra* notes 68–96 and accompanying text.

¹¹ *Jayyousi*, 657 F.3d at 1091. The defendants were charged with a violation of 18 U.S.C. §§ 956(a)(1) and 2339(A). *Jayyousi*, 657 F.3d at 1091; see 18 U.S.C. § 956(a)(1) (2006) (“Whoever, within the jurisdiction of the United States, conspires . . . to commit at any place outside the United States . . . the offense of murder, kidnapping, or maiming . . . shall . . . be punished . . .”); *id.* § 2339A(a) (“[W]hoever provides material support or resources . . . knowing or intending that they are used in preparation for, or in carrying out, a violation of . . . § 956 . . .”).

¹² *Jayyousi*, 657 F.3d at 1093.

¹³ *Id.* at 1092.

To support its theory, the government used intercepted telephone calls between defendants, faxes between Islamist support groups and the defendants, and financial records.¹⁴ During the trial, the jurors were provided with binders containing the English translation of each intercepted phone call, along with the speakers and date of each call.¹⁵ The government supplemented these documents with testimony from numerous FBI language specialists and FBI agents.¹⁶

Over the defendants' objections, the government called FBI agent John Kavanaugh as a lay witness to help interpret the intercepted telephone calls and the defendants' possible use of code words.¹⁷ In May 2002, following the defendants' arrests, Kavanaugh was assigned to the defendants' case.¹⁸ Kavanaugh's primary assignment was to review pre-collected phone calls to discern which calls needed transcribing.¹⁹ Many of the calls required translation into English first, which was done by another FBI agent, as Kavanaugh neither spoke nor read Arabic.²⁰ Based on his experience in the defendants' case and his previous involvement in twenty terrorist-related cases, Kavanaugh testified that he believed the defendants were using code words within their communications.²¹ Kavanaugh opined that the defendants used "football" and "soccer" as code for jihad, "sneakers" for support, "going on a picnic" for travel to jihad, and "married" for martyrdom, among other proposed code words.²² At the end of a four-month trial, the jury found the defendants guilty.²³

The defendants appealed to the Eleventh Circuit, arguing that the district court had abused its discretion in allowing Kavanaugh's opinion testimony.²⁴ The defendants argued that the Kavanaugh's testimony failed to satisfy the three requirements of Rule 701 of the Federal Rules of Evidence.²⁵ For opinion testimony from a lay witness to be admissi-

¹⁴ *Id.* at 1093.

¹⁵ *Id.* at 1122 (Barkett, J., dissenting).

¹⁶ *Id.* at 1093–96 (majority opinion).

¹⁷ *Id.* at 1095. The term "lay witness" describes a witness providing testimony that is governed by Rule 701, as distinct from an "expert witness" who provides testimony governed by Rule 702. *See* FED. R. EVID. 701; FED. R. EVID. 702; *infra* note 26 and accompanying text.

¹⁸ *Jayyousi*, 657 F.3d at 1095.

¹⁹ *Id.* at 1095; *id.* at 1122 (Barkett, J., dissenting).

²⁰ *Id.* at 1122 (Barkett, J., dissenting).

²¹ *Id.* at 1095 (majority opinion).

²² *Id.*

²³ *Id.* at 1091–92.

²⁴ *Jayyousi*, 657 F.3d at 1102.

²⁵ *Id.* at 1102; *see* FED. R. EVID. 701.

ble, Rule 701 mandates that the testimony be (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.”²⁶ Accordingly, the defendants argued that Kavanaugh’s testimony was not “rationally based on the witness’s perception” because he was not present during any of the intercepted phone calls.²⁷ Further, the defendants posited that Kavanaugh’s testimony was not “helpful to clearly understanding the witness’s testimony or to determining a fact in issue” because Kavanaugh based his testimony on documents admitted into evidence.²⁸

In its decision, the Eleventh Circuit held that Rule 701 was satisfied pursuant to the court’s interpretation of the Rule’s requirements and, thus, the district court had not abused its discretion in allowing Kavanaugh to testify as a lay witness.²⁹ The court reasoned that a lay witness could base opinion testimony strictly on review of documents even when the witness neither participated in nor observed in real time the activity about which he testified.³⁰ First, the court noted that Rule

²⁶ FED. R. EVID. 701. Rule 701 governs opinion testimony when the “witness is not testifying as an expert.” *Id.* Conversely, Rule 702 governs expert testimony. FED. R. EVID. 702. Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Id.

²⁷ *Jayyousi*, 657 F.3d at 1102; *see* FED. R. EVID. 701(a).

²⁸ *Jayyousi*, 657 F.3d at 1102, 1103; *see* FED. R. EVID. 701(b).

²⁹ *Jayyousi*, 657 F.3d at 1104; *see* FED. R. EVID. 701.

³⁰ *Jayyousi*, 657 F.3d at 1102. The court cited to both *United States v. Hamaker* and *United States v. Gold* to support its holding that a lay witness could base opinion testimony strictly on review of pre-recorded and pre-collected documents. *Id.* (citing *United States v. Hamaker*, 455 F.3d 1316, 1331–32 (11th Cir. 2006) and *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984)). In 2006, in *Hamaker*, the Eleventh Circuit held that a financial analyst who “simply reviewed and summarized over seven thousand financial documents” was properly admitted as a lay witness under Rule 701. 455 F.3d at 1331–32; *see* FED. R. EVID. 701. The court reasoned that the testimony proffered by the financial analyst regarding his experience in analyzing the defendants’ financial records satisfied Rule 701(a). *Hamaker*, 455 F.3d at 1331–32; *see* FED. R. EVID. 701(a). In 1984, in *Gold*, the Eleventh Circuit held that a president of a large eyewear company was properly admitted as a lay witness under Rule 701 to testify that the volume of eyewear sales at another large eyewear company was excessive. 743 F.2d at 817; *see* FED. R. EVID. 701(a).

701(a) was satisfied because the testimony proffered by Kavanaugh was based on his review of the investigation's documents and was thus "rationally based on [his] perception."³¹ Second, the court reasoned that the "helpful" requirement of Rule 701(b) was satisfied because the jury was unfamiliar with the complexities of terrorism activities and the defendants' phone calls would not be "perfectly clear" without Kavanaugh's testimony.³² Third, the court stated that Rule 701(c) was satisfied because Kavanaugh based his testimony strictly on his experience on the defendants' case, and it therefore was not based on "scientific, technical, or other specialized knowledge within the scope of Rule 702."³³

II. RULE 701: THREE CONFLICTING INTERPRETATIONS AMONG CIRCUIT COURTS

In deciding *Jayyousi*, the Eleventh Circuit joined a growing circuit split in which all but two circuits have chosen to follow one of three interpretations of Rule 701's requirements.³⁴ Although the circuits have disagreed on the proper application of the rule, they agree on its twin aims: to provide the jury with only necessary information from those whose experiences qualify them to share, and to protect the rightful domain of the jury to draw its own conclusions.³⁵

³¹ *Jayyousi*, 657 F.3d at 1103; see FED. R. EVID. 701(a).

³² *Jayyousi*, 657 F.3d at 1103 (quoting *United States v. Awan*, 966 F.2d 1415, 1430–31 (11th Cir. 1992)). In holding that Kavanaugh's testimony was admissible because the defendants' phone calls would not be "perfectly clear" without the testimony, the Eleventh Circuit relied upon *United States v. Awan. Id.* In 1992, in *Awan*, the Eleventh Circuit held that an undercover agent was permitted to testify on the meaning of code words within a recorded conversation of which he was a member. 966 F.2d at 1430–31. The court reasoned that the code words were not "perfectly clear" without the agent's testimony, and thus his testimony was "helpful to a clear understanding" under Rule 701(b). *Id.*; see FED. R. EVID. 701(b).

³³ See FED. R. EVID. 701(c); *Jayyousi*, 657 F.3d at 1103–04.

³⁴ See *infra* notes 37–67 and accompanying text. Only the Sixth Circuit and the District of Columbia Circuit have not weighed in on this issue. See *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011), *cert. denied*, 133 S. Ct. 29 (June 25, 2012) (No. 11-1194); *United States v. El-Mezain*, 664 F.3d 467, 513–15 (5th Cir. 2011); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *United States v. Rollins*, 544 F.3d 820, 831–32 (7th Cir. 2008); *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 225–27 (3d Cir. 2008); *United States v. Freeman*, 498 F.3d 893, 906 (9th Cir. 2007); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1222–23 (10th Cir. 2007); *United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006); *United States v. Garcia*, 413 F.3d 201, 212–15 (2d Cir. 2005); *United States v. Peoples*, 250 F.3d 630, 640–41 (8th Cir. 2001); *Keller v. United States*, 38 F.3d 16, 31 (1st Cir. 1994); *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

³⁵ See FED. R. EVID. 701; *Jayyousi*, 657 F.3d at 1102; *Zepeda-Lopez*, 478 F.3d at 1222–23; *LaPierre*, 998 F.2d at 1465; FED. R. EVID. 701 advisory committee's note. The advisory

This Part demonstrates how the Eleventh Circuit's interpretation of Rule 701 is the only reading in which Kavanaugh's opinion testimony as a lay witness would be admissible.³⁶ Section A discusses the most liberal interpretation of Rule 701, adopted by the Eleventh Circuit in *Jayyousi* and followed in the Fifth and Tenth Circuits.³⁷ Section B discusses a stricter approach to interpreting Rule 701, adopted by the Seventh and Ninth Circuits.³⁸ Finally, Section C addresses the strictest interpretation of Rule 701, adopted by the First, Second, Third, Fourth, and Eighth Circuits.³⁹

A. *The Jayyousi Approach: A Liberal Interpretation of Rule 701*

With its decision in *Jayyousi*, the Eleventh Circuit joined the Fifth and Tenth Circuits in adopting the most liberal interpretation of the Rule 701(a) requirement that lay testimony be "rationally based on the witness's perception."⁴⁰ These circuits have held that an agent's partici-

committee's note to Rule 701 explains that the limitation within 701(a) is the "familiar requirement of *first-hand knowledge or observation*." FED. R. EVID. 701(b) advisory committee's note (emphasis added). The note also explains that the limitation within 701(b) is such that the testimony is "helpful in resolving issues." *Id.* The advisory committee note further asserts that if "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for [701(b)]." *Id.*; see also Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551, 562–65 (2012) (explaining the requirements and the application of Rule 701). Learned Hand articulated the twin aims of allowing opinion witnesses:

The Verdict of a Jury and Evidence of a Witness are very different things, in the truth and falsehood of them; a Witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Juryman swears to what he can infer and conclude from the Testimony of such Witnesses by the act and force of the Understanding, to be the Fact inquired after . . . The distinction cannot be put more plainly.

Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 44–45 (1901) (quoting *Bushell's Case*, [1670] 124 Eng. Rep. 1006 (C.P.) 1009 (internal quotation marks omitted)); see Poulin, *supra*, at 557 n.11.

³⁶ See *Jayyousi*, 657 F.3d at 1103–04; *infra* notes 37–67 and accompanying text. This Comment designates the Eleventh Circuit's interpretation of Rule 701 as the most "liberal" in that its interpretation is the only one that would allow lay testimony from a witness who had no real-time observation of the subject matter, thus allowing more lay testimony as compared to other circuits. See FED. R. EVID. 701; *Jayyousi*, 657 F.3d at 1103–04; *infra* notes 37–67 and accompanying text.

³⁷ See *infra* notes 40–46 and accompanying text.

³⁸ See *infra* notes 47–56 and accompanying text.

³⁹ See *infra* notes 57–67 and accompanying text.

⁴⁰ See FED. R. EVID. 701(a); *Jayyousi*, 657 F.3d at 1102–03; *El-Mezain*, 664 F.3d at 513–15; *Zepeda-Lopez*, 478 F.3d at 1221–22.

pation in an investigation, even when such participation consists of entirely post-hoc review of pre-collected information, is sufficient to satisfy the perception requirement of Rule 701(a).⁴¹ Thus, when a witness draws on his or her experience within such an investigation to form opinions, this fulfills the 701(a) requirement that opinions be “rationally based on the witness’s perception.”⁴²

Furthermore, these circuits have established a very low threshold to fulfill the Rule 701(b) “helpful” requirement.⁴³ These courts have held that Rule 701(b) is satisfied even when the parties provide the juries with all the relevant recorded information and transcripts about which the witness is opining.⁴⁴ As such, even when the jury seems to have the same resources as the witness to determine the significance of evidence, these circuits have determined that such testimony is still helpful when the subject would not otherwise be “perfectly clear” to the jury.⁴⁵ Additionally, these circuits have held that allowing such testimony does not amount to “little more than choosing up sides” as prohibited by the advisory committee notes to Rule 701(b).⁴⁶

B. *The Middle-of-the-Road Approach: A Stricter Interpretation of Helpful Requiring “First-Hand” Knowledge*

As compared to the court in *Jayyousi*, the Seventh and the Ninth Circuit Courts have applied a stricter interpretation to the Rule 701

⁴¹ See *El-Mezain*, 664 F.3d at 513–14 (holding that FBI agents’ lay testimony based solely on their after-the-fact experiences from investigating wiretapped conversations and previously recorded videos satisfied Rule 701(a)); *Jayyousi*, 657 F.3d at 1102–03 (holding that an FBI agent’s review of the transcripts of pre-recorded and pre-collected phone calls satisfied Rule 701(a)); *Zepeda-Lopez*, 478 F.3d at 1215–16, 1221 (holding that an FBI agent’s lay testimony based solely on his studying of video recordings multiple times satisfied Rule 701(a) and allowed him to testify on the visual identification of the defendant).

⁴² See FED. R. EVID. 701(a); *El-Mezain*, 664 F.3d at 514; *Jayyousi*, 657 F.3d at 1102–03; *Zepeda-Lopez*, 478 F.3d at 1221.

⁴³ See FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1103–04; *Zepeda-Lopez*, 478 F.3d at 1222.

⁴⁴ See FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1103; *Zepeda-Lopez*, 478 F.3d at 1222 (holding that an FBI agent’s testimony, opining that the defendant appeared in a video recording, was “helpful” under 701(b) despite the fact that the same video recording was played before the jury and the jury was able to see the defendant in court throughout the trial).

⁴⁵ See *Jayyousi*, 657 F.3d at 1103 (“We have held that a lay witness may provide interpretations of code words when the meaning of these words ‘[is] not ‘perfectly clear’ without [the witness’s] explanations’” (alteration in original) (quoting *United States v. Awan*, 966 F.2d 1415, 1430–31 (11th Cir. 1992))); *Zepeda-Lopez*, 478 F.3d at 1222.

⁴⁶ FED. R. EVID. 701 advisory committee’s note; see *Jayyousi*, 657 F.3d at 1103; *Zepeda-Lopez*, 478 F.3d at 1222.

requirements.⁴⁷ These circuits interpret Rule 701(a) to allow witnesses to testify based on knowledge discerned from post-hoc review of pre-recorded information only when the witness can couple such review with some first-hand observation of the subject.⁴⁸ The witness can only satisfy the requisite 701(a) perception requirement of “first-hand knowledge or observation” when the witness had some personal observations to supplement the witness’s general perceptions derived during the investigation period.⁴⁹

Additionally, the Seventh and Ninth Circuits have applied a stricter interpretation of the 701(b) requirement than that of the court in *Jayyousi*.⁵⁰ Both circuits have held that in order for a witness’s testimony to satisfy Rule 701(b), the witness cannot opine on the meaning of clear statements or matters that are within the jurors’ abilities to determine for themselves.⁵¹ The Ninth Circuit in particular has reasoned that to allow a witness to opine on these matters would invade the role

⁴⁷ Compare *Jayyousi*, 657 F.3d at 1102–03 (11th Cir.), with *Rollins*, 544 F.3d at 831–32 (7th Cir.), and *Freeman*, 498 F.3d at 906 (9th Cir.).

⁴⁸ See FED. R. EVID. 701(a); *Rollins*, 544 F.3d at 831–33 (holding that an FBI agent’s lay testimony about code words within defendants’ phone calls satisfied Rule 701 because it was rationally based on both his real-time listening of intercepted phone calls and surveillance of defendants, as well as his personal and long-standing experience on the investigation); *Freeman*, 498 F.3d at 904–05 (holding that a Drug Enforcement Administration (DEA) agent’s lay testimony about drugs and drug-dealing satisfied Rule 701 because it was rationally based on both his real-time surveillance during the investigation as well as his interpretations of pre-recorded conversations).

⁴⁹ FED. R. EVID. 701 advisory committee’s note; see FED. R. EVID. 701(a); *Rollins*, 544 F.3d at 831–33; *Freeman*, 498 F.3d at 904–05.

⁵⁰ See FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1103; *Freeman*, 498 F.3d at 904–05; *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993); *United States v. Jackson*, 688 F.2d 1121, 1124–26 (7th Cir. 1982).

⁵¹ See FED. R. EVID. 701(b); *LaPierre*, 998 F.2d at 1465 (holding that a police officer’s testimony in identifying the defendant in a surveillance photo was not helpful to the jury as the officer’s knowledge of the defendant was based entirely on review of the photos and, therefore, the jury was equally equipped to make an independent determination on whether the defendant was in the photos); *Jackson*, 688 F.2d at 1123, 1125–26 (holding that a witness’s identification of the defendant in surveillance photos was helpful to the jury because the witness had previous encounters with the defendant and positively identified the defendant from the surveillance photos prior to his arrest). For example, in *United States v. Freeman*, the Ninth Circuit held that a Los Angeles Police Department detective’s testimony was helpful to the jury in its interpretation of otherwise ambiguous statements, but it determined that the detective’s repetition of and speculation on clear statements were inadmissible. 498 F.3d at 904–05. Specifically, the court determined that the detective’s testimony, in which he stated that the defendant’s statement of, “I’m going to bring that to you” was regarding money, was admissible because the original statement was ambiguous; conversely, the detective’s testimony interpreting “particulars” to mean “details” was inadmissible because it was interpreting a clear statement. *Id.*

of the jury by forcing the determination of liability to come from the witness stand rather than the jury box.⁵²

Analyzing *Jayyousi* under this stricter interpretation, Kavanaugh's testimony would fail to satisfy both 701(a) and 701(b).⁵³ Kavanaugh based his testimony exclusively on post-hoc review of pre-recorded information and had no corresponding experience of "first-hand knowledge or observation" as required by these circuits.⁵⁴ In Kavanaugh's testimony, he opined on the meaning of phone calls, transcripts of which were provided to the jury.⁵⁵ Given that jurors had the same resources and abilities as Kavanaugh to determine for themselves if the defendants were using code words, Kavanaugh's testimony would fail to satisfy Rule 701(b) under this stricter interpretation.⁵⁶

C. *The Strictest Approach: Tightening the Interpretation of Rule 701*

The majority of circuit courts—the First, Second, Third, Fourth, and Eighth Circuits—apply the strictest approach of Rule 701.⁵⁷ These circuits have reasoned that Rule 701(a) can only be satisfied when the witness has participated in or observed the subject of his testimony in real time.⁵⁸ As such, these circuits follow the reasoning that "post-hoc

⁵² *LaPierre*, 998 F.2d at 1465; see FED. R. EVID. 701(b).

⁵³ See FED. R. EVID. 701; *Jayyousi*, 657 F.3d at 1102–03; *Freeman*, 498 F.3d at 904–05; *Jackson*, 688 F.2d at 1124–26.

⁵⁴ See FED. R. EVID. 701(a); *Jayyousi*, 657 F.3d at 1102–03; *Rollins*, 544 F.3d at 831–32; *Freeman*, 498 F.3d at 904–05; FED. R. EVID. 701 advisory committee's note.

⁵⁵ *Jayyousi*, 657 F.3d at 1122 (Barkett, J., dissenting).

⁵⁶ See FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1103–04 (majority opinion); *Freeman*, 498 F.3d at 904–05; *LaPierre*, 998 F.2d at 1465; *Jackson*, 688 F.2d at 1124–26.

⁵⁷ See FED. R. EVID. 701; *Johnson*, 617 F.3d at 293 (4th Cir.); *Hirst*, 544 F.3d at 225–27 (3d Cir.); *Perkins*, 470 F.3d at 156 (4th Cir.); *Garcia*, 413 F.3d at 212–15 (2d Cir.); *Peoples*, 250 F.3d at 640–41 (8th Cir.); *Keller*, 38 F.3d at 31 (1st Cir.).

⁵⁸ See FED. R. EVID. 701(a); *Johnson*, 617 F.3d at 293 (holding that an agent's lay testimony was not admissible under Rule 701(a) because his opinion about intercepted phone calls was based on after-the-fact interviews he had with suspects); *Hirst*, 544 F.3d at 226 (holding that a security guard employer's testimony was not admissible under Rule 701(a) because he did not witness the event first-hand and only drew on second-hand information and unrelated experiences); *Perkins*, 470 F.3d at 153–54, 156 (holding that the testimonies of two police officers who observed the defendant kicking a citizen in real time were admissible under Rule 701(a), but the testimonies of two other officers who were not present and were only relying on the original officers' details were inadmissible under Rule 701(a)); *Garcia*, 413 F.3d at 212–13 (holding that a DEA agent's lay testimony was not admissible under Rule 701(a) because his opinion was not limited to his own personal observations, as he drew on the totality of the investigation as observed and reported by all agents participating in the investigation); *Peoples*, 250 F.3d at 640–41 (holding that an FBI agent's lay testimony was not admissible under Rule 701(a) because her opinions were based entirely on after-the-fact review of recorded conversations and, therefore, she had no real first-hand perception of the

assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.⁵⁹ Thus, these circuits have reasoned that the “perception” upon which a witness can draw, under Rule 701(a), cannot be based on the totality of the investigation after the fact.⁶⁰ Instead, these circuits interpret Rule 701(a) to allow the witness to testify only on the witness’s original observation of the facts as they occurred.⁶¹

Additionally, these circuits interpret that Rule 701(b) is only satisfied when the testimony addresses an opinion on an area of fact or knowledge that the jurors would not be able to discern for themselves.⁶² As such, these circuits interpret Rule 701(b) to mean that a lay witness cannot testify on an issue or opinion that the jury is fully capable of extracting from the evidence itself.⁶³ These circuits have held that to allow a lay witness to testify in this situation would not be “helpful” under Rule 701(b) but would, instead, disrupt the autonomy of the jury by essentially telling the jury the decision it should reach.⁶⁴

Analyzing *Jayyousi* under the strictest interpretation, Kavanaugh’s testimony would fail to satisfy the Rule 701 requirements.⁶⁵ Kavanaugh’s testimony would clearly fail to satisfy Rule 701(a) because he did not observe any of the defendants’ conversations in real time and only read translated transcripts of phone calls years after they occurred.⁶⁶ Further, Kavanaugh’s testimony would fail to satisfy Rule

facts); *Keller*, 38 F.3d at 31 (holding that a witness’s lay testimony regarding a longshoreman’s accident was not admissible under Rule 701(a) because the witness did not see or hear the accident and based testimony only on inferences).

⁵⁹ *Johnson*, 617 F.3d at 293; see FED. R. EVID. 701(a); *Hirst*, 544 F.3d at 226; *Garcia*, 413 F.3d at 212–13; *Peoples*, 250 F.3d at 641.

⁶⁰ See FED. R. EVID. 701(a); *Johnson*, 617 F.3d at 293; *Garcia*, 413 F.3d at 212–13; *Peoples*, 250 F.3d at 641.

⁶¹ See FED. R. EVID. 701(a); *Johnson*, 617 F.3d at 293; *Garcia*, 413 F.3d at 212–13; *Peoples*, 250 F.3d at 641.

⁶² See FED. R. EVID. 701(b); *Hirst*, 544 F.3d at 227; *Garcia*, 413 F.3d at 215; *United States v. Grinage*, 390 F.3d 746, 750–51 (2d Cir. 2004); *Peoples*, 250 F.3d at 641–42.

⁶³ See FED. R. EVID. 701(b); *Hirst*, 544 F.3d at 226 (holding that an employer’s testimony relating to the probability of an event happening “provided the jury with little more than a self-serving, conclusory opinion as to what result it should ultimately reach”); *Grinage*, 390 F.3d at 750–51 (holding that a case agent’s interpretation of the defendant’s phone calls, which were played for the jury and described as “common sense” interpretations by the government, amounted to summary testimony that, “rather than being helpful to the jury, . . . usurped the jury’s function”).

⁶⁴ See FED. R. EVID. 701(b); *Hirst*, 544 F.3d at 226–27; *Grinage*, 390 F.3d at 750–51.

⁶⁵ See FED. R. EVID. 701; *Jayyousi*, 657 F.3d at 1103–04; *Johnson*, 617 F.3d at 293; *Garcia*, 413 F.3d at 212–13; *Peoples*, 250 F.3d at 640–41.

⁶⁶ See FED. R. EVID. 701(a); *Jayyousi*, 657 F.3d at 1122 (Barkett, J., dissenting); *Johnson*, 617 F.3d at 293; *Garcia*, 413 F.3d at 212–13; *Peoples*, 250 F.3d at 640–41.

701(b) because he interpreted the same transcripts that the jury was able to scrutinize, and therefore did not address an area of fact or knowledge that the jury was not able to obtain on its own.⁶⁷

III. JAYYOUSI AND RULE 701: THE ELEVENTH CIRCUIT FRUSTRATES THE JURY'S AUTONOMY

By adopting the most liberal interpretation of Rule 701 the Eleventh Circuit in *Jayyousi* improperly interfered with the autonomy of the jury to reach its own conclusions.⁶⁸ Under the alternative interpretations of Rule 701, Kavanaugh's testimony would not have been admissible as lay witness testimony given his lack of personal participation and experience with the defendants' activities.⁶⁹ As such, the majority of circuits only would have allowed Kavanaugh to testify if the government could satisfy the expert witness requirements under Rule 702.⁷⁰ Given the persuasiveness of expert testimony, its requirements are more difficult to satisfy.⁷¹ Rule 702, therefore, mandates that such testimony must be the product of "reliable principles or methods."⁷² As such, the *Jayyousi* court should not have allowed the government to skirt the tougher expert witness requirements of Rule 702 by admitting Kavanaugh as a lay witness under Rule 701.⁷³ Instead, the Eleventh Circuit

⁶⁷ See FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1122 (Barkett, J., dissenting); *Hirst*, 544 F.3d at 226–27; *Grinage*, 390 F.3d at 750–51.

⁶⁸ See FED. R. EVID. 701; *United States v. Jayyousi*, 657 F.3d 1085, 1103–04 (11th Cir. 2011), *cert. denied*, 133 S. Ct. 29 (June 25, 2012) (No. 11-1194).

⁶⁹ See *supra* notes 53–56 and accompanying text; *supra* notes 65–67 and accompanying text.

⁷⁰ See FED. R. EVID. 701(c); FED. R. EVID. 702; *supra* notes 53–56 and accompanying text; *supra* notes 65–67 and accompanying text.

⁷¹ See FED. R. EVID. 701; FED. R. EVID. 702; FED. R. EVID. 701 advisory committee's note; FED. R. EVID. 702 advisory committee's note; see also KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE §§ 13–18 (6th ed. 2006) [hereinafter MCCORMICK ON EVIDENCE] (describing generally the strict requirements of admissibility for expert testimony under Rule 702, particularly in comparison to the requirements of admissibility for lay opinion testimony under Rule 701).

⁷² See FED. R. EVID. 702; FED. R. EVID. 701 committee's note on 2000 amendment; MCCORMICK ON EVIDENCE, *supra* note 71, § 13; see also Poulin, *supra* note 35, at 577 (explaining the "advantage of deference" a party may obtain by designating a witness as an "expert witness" rather than as a "lay witness").

⁷³ See FED. R. EVID. 701(c); FED. R. EVID. 702; *Jayyousi*, 657 F.3d at 1102–05. Arguably, the court's decision in *Jayyousi* was contrary to the purpose of Rule 701, which attempts to prevent parties from offering would-be experts as lay witnesses to avoid satisfying the more stringent expert witness admissibility requirements under Rule 702. See FED. R. EVID. 701 committee's note on 2000 amendment (stating that "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through

should have followed the First, Second, Third, Fourth, and Eighth Circuits and applied a stricter interpretation to Rule 701 that would have protected against this danger to the jury.⁷⁴

Allowing a would-be expert witness to testify under the guise of a lay witness can be particularly dangerous to the autonomy of the jury.⁷⁵ Expert testimony is limited, by Rule 702, to experts with “scientific, technical, or some other specialized knowledge” who base their testimony on “sufficient facts or data” and apply “reliable principles and methods” to those facts.⁷⁶ Given society’s reverence for experts, a jury can be improperly swayed to agree with expert witnesses’ opinions rather than decide an issue for themselves.⁷⁷ This reliance on expert opinion is permitted, given the understanding that, under Rule 702, the expert witness is testifying on an issue that the jury is unequipped to discern for themselves.⁷⁸ In *Jayyousi*, however, Kavanaugh’s opinion was admitted as lay opinion testimony under Rule 701 and, therefore, without the Rule 702 safeguard that his testimony be based on “reliable principles and methods.”⁷⁹ Rather than forcing the government to satisfy the expert witness requirements of Rule 702, the Eleventh Circuit interpreted the Rule 701 requirements in a way that allowed Kavanaugh to testify as a lay witness.⁸⁰ In so doing, the Eleventh Circuit effectively allowed an expert witness to testify without fulfilling any of Rule 702’s protective admissibility requirements.⁸¹

Accordingly, the Eleventh Circuit’s liberal interpretation of the Rule 701(a) “perception” requirement, which allows witnesses like Ka-

the simple expedient of proffering an expert in lay witness clothing”); McCORMICK ON EVIDENCE, *supra* note 71, § 13.

⁷⁴ See FED. R. EVID. 701; FED. R. EVID. 702; *Jayyousi*, 657 F.3d at 1104; see also *supra* notes 57–67 and accompanying text (explaining these circuits’ approach).

⁷⁵ See *United States v. Grinage*, 390 F.3d 746, 750–51 (2d Cir. 2004); *United States v. Peoples*, 250 F.3d 630, 641–42 (8th Cir. 2001); FED. R. EVID. 701 committee’s note on 2000 amendment.

⁷⁶ See FED. R. EVID. 702; Ellen Melville, Comment, *Gating the Gatekeeper: Tamraz v. Lincoln Electric Co. and the Expansion of Daubert Reviewing Authority*, 53 B.C.L. REV. E. SUPP. 195, 199–202 (2012), http://bclawreview.org/e-supp/2012/16_melville.pdf (describing the requirements of Rule 702 in light of recent U.S. Supreme Court decisions).

⁷⁷ See *Grinage*, 390 F.3d at 750–51; *Peoples*, 250 F.3d at 642; Poulin, *supra* note 35, at 577. In 2001, in *United States v. Peoples*, the Eighth Circuit noted that the jurors, upon learning of the witness’s status as an FBI agent, could be inclined to “substitute her conclusions on the ultimate issue of the defendants’ guilt for their own,” and concluded that this lay testimony “invaded the province of the jury.” 250 F.3d at 642.

⁷⁸ See FED. R. EVID. 702.

⁷⁹ See FED. R. EVID. 701; FED. R. EVID. 702; *Jayyousi*, 657 F.3d at 1103–04.

⁸⁰ See FED. R. EVID. 701; FED. R. EVID. 702; *Jayyousi*, 657 F.3d at 1104.

⁸¹ See FED. R. EVID. 701; FED. R. EVID. 702; *Jayyousi*, 657 F.3d at 1104.

vanaugh to testify, improperly interferes with the autonomy of the jury to draw its own conclusions.⁸² This interpretation is contrary to both Rule 701's plain language, which requires that the testimony be based on the "witness's perception," and the corresponding advisory committee's note, which indicates that a witness' testimony must draw from "first-hand knowledge or observation."⁸³ A liberal interpretation of Rule 701(a) that requires no personal participation encourages witnesses to speculate and opine on issues for which the witness has no "first-hand knowledge or observation."⁸⁴ Such testimony will not put "the trier of fact in possession of an accurate reproduction of the event."⁸⁵ Instead, the trier of fact will only possess a hybrid account of what the witness determined after the fact coupled with speculation.⁸⁶ Accordingly, lay witnesses should only be able to testify regarding the actual real-time observations they had with the subject matter, and any post-hoc speculation should be left to the jury.⁸⁷

Furthermore, the court's liberal interpretation of the 701(b) requirement that testimony be "helpful to clearly understanding . . . a fact in issue" hinders and underestimates the capacity of the jury to draw conclusions from evidence.⁸⁸ The court provided each juror in *Jayyousi* with a binder of each call's transcript and each juror was able to listen to the corresponding call.⁸⁹ After hearing the calls and reading the transcripts, the jurors would have achieved the exact same level of "first-

⁸² See FED. R. EVID. 701; *Jayyousi*, 657 F.3d at 1103–04; *United States v. Garcia*, 413 F.3d 201, 213–14 (2d Cir. 2005); *Peoples*, 250 F.3d at 641–42.

⁸³ See FED. R. EVID. 701; *Jayyousi*, 657 F.3d at 1103–04; FED. R. EVID. 701 advisory committee's note.

⁸⁴ FED. R. EVID. 701(a) advisory committee's note; see FED. R. EVID. 701(a); *Jayyousi*, 657 F.3d at 1102–03; *United States v. El-Mezain*, 664 F.3d 467, 513–14 (5th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1221 (10th Cir. 2007).

⁸⁵ See FED. R. EVID. 701 advisory committee's note.

⁸⁶ See *El-Mezain*, 664 F.3d at 513–14; *Jayyousi*, 657 F.3d at 1102–03; *Zepeda-Lopez*, 478 F.3d at 1221.

⁸⁷ See FED. R. EVID. 701; *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *Garcia*, 413 F.3d at 214–15; *Peoples*, 250 F.3d at 641; see also Hand, *supra* note 35, at 44–45 (explaining that a witness is limited in his or her testimony only to "what hath fallen under his senses").

⁸⁸ See FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1125–26 (Barkett, J., dissenting) (stating that the Eleventh Circuit, in 2002, in *United States v. Cano*, "concluded that a witness's testimony about the meaning of facts already before the jury is inadmissible lay opinion specifically because the testimony 'merely delivered a jury argument from the witness stand'" (quoting *United States v. Cano*, 289 F.3d 1354, 1363 (11th Cir. 2002))); FED. R. EVID. 701(b) advisory committee's note (stating that if "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule").

⁸⁹ *Jayyousi*, 657 F.3d at 1122 (Barkett, J., dissenting).

hand knowledge or observation” as Kavanaugh.⁹⁰ In this way, Kavanaugh had no more personal experience with these calls than the jury, and, therefore, he was no more qualified than the jury to speculate on the use of code words.⁹¹ Allowing Kavanaugh to testify on issues that the jury would be able to discern for themselves amounts to “little more than choosing up sides,” as prohibited by Rule 701(b).⁹² “Choosing up sides” has a place in a lawyer’s closing arguments, but allowing lay witnesses to testify on such opinions would encourage verdicts to be decided on the witness stand rather than in the jury box.⁹³ Moreover, if the court only accepted that Kavanaugh was more qualified to interpret code words given his involvement in other terrorist-related investigations, such testimony would be based on “specialized knowledge” and prohibited by Rule 701(c).⁹⁴

Consequently, the *Jayyousi* court should have interpreted Rule 701 according to the strictest standard.⁹⁵ Only by mandating that a witness participated in the conversation or observed the conversation in real time can the court ensure that the witness’s testimony leads to an “accurate reproduction of the event” that aids the jury in reaching a decision, but does not decide for it.⁹⁶

CONCLUSION

In *Jayyousi*, the Eleventh Circuit held that the district court had not abused its discretion in allowing the lay opinion testimony of an FBI agent. In so holding, the Eleventh Circuit joined a minority of circuit courts in interpreting Rule 701 in its most liberal form. This interpretation allows lay witnesses to testify even when their testimony draws only on post-hoc review of pre-collected information. In interpreting Rule 701 in this way, the court has failed to account for the impact such lay

⁹⁰ See *id.*; FED. R. EVID. 701 advisory committee’s note.

⁹¹ See FED. R. EVID. 701(a); *Jayyousi*, 657 F.3d at 1122 (Barkett, J., dissenting); *Grinage*, 390 F.3d at 750–51; *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

⁹² FED. R. EVID. 701(b) advisory committee’s note; see FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1125–26 (Barkett, J., dissenting) (citing *Cano*, 289 F.3d at 1363); FED. R. EVID. 701 advisory committee’s note; see also Poulin, *supra* note 35, at 564 (“[A]n opinion is not helpful if it simply tells the jury what inferences to draw or summarizes the party’s case.”).

⁹³ FED. R. EVID. 701(b) advisory committee’s note; see FED. R. EVID. 701(b); *Jayyousi*, 657 F.3d at 1126 (Barkett, J., dissenting); *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 227 (3d Cir. 2008); *Garcia*, 413 F.3d at 214.

⁹⁴ See FED. R. EVID. 701(c); FED. R. EVID. 702; *Jayyousi*, 657 F.3d at 1095.

⁹⁵ See *supra* notes 57–67 and accompanying text; *supra* notes 68–94 and accompanying text.

⁹⁶ FED. R. EVID. 701 advisory committee’s note; see FED. R. EVID. 701; *supra* notes 57–67 and accompanying text.

testimony can have on the jury and has, therefore, opened the door for the witness stand to trump the jury box when it comes to reaching a verdict. Accordingly, circuit courts should adhere to a more stringent reading of Rule 701 so that the autonomy of the jury can be protected.

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