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No. 12 - 23

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

Term 2013

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**UNITED STATES OF AMERICA,**

Petitioner,

-- against --

**WILLIAM BARNES,**

Respondent.

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**

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**BRIEF FOR PETITIONER**

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Counsel for Petitioner

## **QUESTIONS PRESENTED**

- I. Under Federal Rule of Evidence 804(b)(6), does the forfeiture-by-wrongdoing exception apply to a co-conspirator who could reasonably foresee the future wrongdoing and did not take any affirmative action to withdraw from the conspiracy?
- II. Under Federal Rule of Evidence 701, is an officer's testimony regarding the translation of coded language admissible if his conclusions are based on his perception of information obtained solely from his investigation in this case?
- III. Under Federal Rule of Evidence 501, can a journalist privilege be recognized if the Supreme Court previously expressly denounced such a privilege, and if so, should it be a qualified privilege when every circuit that has recognized a journalist privilege has made it a qualified privilege?

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## **OPINIONS BELOW**

The opinion of the Court of Appeals is reported at *United States v. William Barnes*, Cr. No. 12-647 and the opinion of the District Court is reported at Cr. No. 11-76.

## **STANDARD OF REVIEW**

The review of the United States Court of Appeals for the Fourteenth Circuit Court's denial of the government's motion, regarding legal conclusions concerning the Rules of Evidence or the Constitution, is de novo. *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001); *United States v. Rivera*, 412 F.3d 562, 566 (4th Cir. 2005).

## **STATEMENT OF THE CASE**

### **Statement of Facts**

Respondent William Barnes has been the owner and operator of Big Top Circus ("Circus") since 2000. (R. 21). Prior to 2000, the Circus was owned and operated by the defendant's father, Ben Barnes, as a highly profitable enterprise. (R. 21). The Circus was known for its one of a kind elephant show and was highly successful until Barnes took control. (R. 21). By July 2011, the once successful elephant show was facing imminent and inevitable bankruptcy. (R. 21). Unwilling to face bankruptcy, Barnes devised a scheme to gain as much profit as possible out of the business before the Circus collapsed. (R. at 21). First, he convinced other circuses to bring their elephants to his property by offering them the ability to "winter" their elephants at his Circus. (R. 21). After he had the elephants, Barnes intended to slaughter them and sell their valuable ivory. (R. 21).

To aid him in carrying out his plot, Barnes sought the assistance of two others. (R. 21). First, in July 2011, Barnes solicited Alfred Anderson ("Anderson"), his collaborator in a sham charity called "Boerum 4 Animals," to join in his plan to exploit the other circuses by killing the

elephants and to bring in additional manpower. (R. 21). The conspiracy was soon expanded to include James Reardon (“Reardon”), just on the basis that he would participate in the killing of the elephants. (R. 21). Reardon was not informed of the full nature of the conspiracy until November 2011. (R. 21).

In an attempt to legitimize the conspiracy to kill the herd of elephants, Barnes planned a holiday spectacular and invited a reporter, Kara Crawley (“Crawley”), from the Boerum Times to visit the Circus. (R. 22). Crawley received access to the entire Circus, including the elephant caging areas. (R. 22). During a visit, Crawley encountered an employee who wished to reveal information regarding Barnes’ illegal plan for the elephants. (R. 22). The employee allowed Crawley to videotape his or her interview without any alterations to protect his or her identity. (R. 22). The employee was aware that all of the information he or she revealed would be published in Crawley’s exposé. (R. 22). The employee informed Crawley that he or she directly overheard Barnes discuss his desire to poach the elephants and sell the valuable parts for a profit. (R. 22). On December 1, 2011, Crawley published the article exposing the deadly plan for the Circus’ elephants. (R. 22).

Prior to the publishing of Crawley’s exposé, Barnes and his co-conspirators began putting their scheme into action. (R. 22). On October 2, 2011, Barnes contacted a licensed firearms dealer, Weapons Unlimited, to purchase automatic weapons to kill the elephants. (R. 22). Barnes unknowingly spoke to Jason Lamberti, an undercover agent, in order to purchase unregistered and fully automatic weapons. (R. 22). Agent Lamberti received enough information to obtain a warrant to tap Barnes’ telephone line beginning on October 4, 2011. (R. 23). The government intercepted Barnes’ conversations through December 1, 2011, which culminated in Barnes’ arrest. (R. 23).

Through the wiretapped conversations, the government learned that Barnes was involved in a conspiracy with Reardon and Anderson to murder the elephants and harvest their ivory. (R. 23). Agent Narvel Blackstock, the agent originally assigned to the case, intercepted and transcribed the conversations. (R. 23). Unfortunately, Agent Blackstock passed away and Agent Thomas Simandy (“Agent Simandy”) was assigned to the case to take Blackstock’s place. (R. 23). Agent Simandy gained an intimate knowledge of the case by reviewing all of the transcripts of the conversations between the co-conspirators and speaking with Agent Lamberti from ATF and Alan Klestadt from Copters Corporation about the case. (R. 23). Agent Lamberti informed Agent Simandy that on October 2, 2011 he had a conversation with Barnes regarding the purchase of automatic weapons. (R. 23). Additionally, Mr. Klestadt told Agent Simandy that on October 6, 2011 Barnes contacted Copters Corporation to arrange for the one-day rental of a helicopter for December 15, 2011. (R. 23). By applying common sense to the information he obtained in this investigation, Agent Simandy translated the coded language. (R.13).

In November 2011, the recorded conversations revealed that a member of the conspiracy, Reardon, discussed his serious doubts about the scheme, especially because of its illegality. (R. 24). Immediately following the conversation with Reardon, Anderson called Barnes to inform him about the security risk that had developed in Reardon. (R. 24). During the phone call on November 15, 2011, Anderson stated to Barnes “Listen, I made a mistake with Reardon” and a few seconds later, “Let’s get rid of him.” (R. 18). Then on November 29, 2011, Anderson called Barnes. (R. 18). Anderson once again expressed his concern about Reardon stating “We’re out of time. We need him out of the picture” and “I’m gonna take care of him.” (R. 18). Barnes acknowledged the comments, yet failed to call and alert law enforcement. (R. 18).

On November 28, 2011 Reardon called his friend Daniel Best to explained the conspiracy and his fear that Anderson may harm him. (R. 24). Reardon informed Best that he invited Anderson to his home to speak about the conspiracy on November 29, 2011. (R. 24). Presumably worried, Best went to Reardon's home. (R. 24). As he arrived, he witnessed Anderson running out of the house. (R. 24). Shortly after, Anderson was arrested and confessed to murdering Reardon to prevent him from exposing the conspiracy. (R. 24). Then on December 1, 2011 Barnes was taken into federal custody based on the accumulated evidence of his involvement and planning of the elephant hunt conspiracy. (R. 24).

### **Procedural History**

On December 4, 2011, the respondent was indicted and charged with conspiracy to deal unlawfully in firearms under 18 U.S.C. § 371 and 922(a)(1)(a), conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C § 43 and 371, and conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 371 and 1538. (R. 3-4). Before trial, the government filed a pre-trial motion to introduce out-of-court statements made by the late James Reardon to a Mr. Daniel Best, as an exception to the hearsay rules under Rule 804(b)(6). (R. 6). The second motion was filed by a third party, Crawley, to quash a subpoena for her testimony based on journalist privilege. (R. 6). The final motion was filed by the government to introduce the testimony of Agent Thomas Simandy as a lay witness under Rule 701. (R. 6).

On May 1, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions, and on May 2, 2012, the District Court ruled in favor of the defense on two motions and in favor of Crawley on the third motion. (R. 16). The United States filed an interlocutory appeal pursuant to 18 U.S.C. § 3731 in the United States Court of Appeals

for the Fourteenth Circuit. (R. 20). On July 12, 2012, the Appellate Court for the Fourteenth Circuit affirmed the decision of the District Court on all three issues. (R. 20). The court found that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis; (2) that a journalist's privilege exists and is absolute; and (3) under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible. (R. 20). The Government filed a petition for a writ of certiorari, and the United States Supreme Court granted the petition on October 1, 2012. (R. 36).

### **SUMMARY OF THE ARGUMENT**

Contrary to the 14th Circuit's opinion: (1) the forfeiture-by-wrongdoing exception to hearsay under Federal Rule of Evidence 804(b)(6) does apply to a co-conspirator; (2) a journalist privilege does not exist under Federal Rule of Evidence 501, and if it does, it should be a qualified privilege that the facts of this case do not trigger; and (3) an officer's testimony translating coded language is admissible lay opinion under Federal Rule of Evidence 701.

First, the forfeiture-by-wrongdoing exception encompassed in Rule 804(b)(6) can be applied to all members of a criminal conspiracy. The respondent is attempting to shield himself from liability from the actions of his co-conspirator that were foreseeable and a direct benefit to the conspiracy. The forfeiture-by-wrongdoing exception was created to prevent criminals from profiting from the unlawful actions resulting in the unavailability of witness' against them. Although the respondent did not have the specific intent to murder Reardon, he was well aware of Anderson's plan to silence him. Additionally, the respondent took no affirmative steps to remove himself from the conspiracy or prevent Anderson from taking illegal action against Reardon to protect the conspiracy. The law is clear that members of a criminal conspiracy may be held liable for any actions taken by other members that were committed in furtherance of the conspiracy. Thus, the statements made by Reardon to Daniel Best are permissible hearsay

statements through the forfeiture by wrongdoing exception because Reardon's unavailability was procured for the direct benefit and in furtherance of the criminal conspiracy.

Secondly, no journalist privilege exists under Rule 501. This Court has expressly rejected the notion of a journalist privilege. The press has flourished without such privilege and the public interest in ascertaining the truth in its tribunals is overwhelming. Additionally, should this Court find a journalist privilege, it should be a qualified privilege in light of clear legislative intent and federal common law. Every circuit that has recognized a journalist privilege has made it a qualified privilege. Finally, the facts of this case would not trigger a qualified journalist privilege. The public has an especially large interest in the court learning all that it can about the respondent given the heinousness of the alleged crimes. Further the evidence of this case shows that the unknown source of the information has little reason to expect confidentiality of his identity or information that he conveyed. Thus, no journalist privilege should be recognized under Rule 501, and if it is, it should be a qualified privilege that the facts of this case do trigger.

Third, Agent Simandy's testimony is admissible lay opinion under Rule 701 because it meets all of the necessary elements. First, Agent Simandy is only testifying to his perception of what he learned from talking with Agent Lamberti and Mr. Klestadt, who spoke with the respondent, and by reviewing various transcripts. In addition, Agent Simandy's testimony is helpful for the jury because he is translating coded language; thus, making it relevant. Finally, Agent Simandy did not use specialized knowledge in making his determinations, as he had no experience with animal cruelty cases. Rather, Agent Simandy arrived at his conclusions by thoroughly reviewing the information obtained during this case and applying basic reasoning skills. Thus, this court should find Agent Simandy's testimony admissible under Rule 701.

For these reasons, the decision of the United States Court of Appeals for the Fourteenth Circuit should be reversed on all issues.

## ARGUMENT

### **I. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT’S DECISION TO EXCLUDE HEARSAY STATEMENTS BECAUSE THE FORFEITURE-BY-WRONGDOING EXCEPTION IS APPLICABLE TO THE RESPONDENT THROUGH CO-CONSPIRATOR LIABILITY.**

The confrontation clause of the Sixth Amendment is an essential component of all criminal trials, but that right is far from absolute. *United States v. Houlihan*, 92 F. 3d 1271, 1279 (1st Cir. 1996) (emphasis added); *see also Puleio v. Vose*, 830 F.2d 1197, 1205-07 (1st Cir. 1987); *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (a well-founded exception has traditionally existed that testimonial statements may be admitted if the government can show that “(a) the witness is unavailable and (b) the defense had a prior opportunity to cross-examine.”); *Taylor v. United States*, 414 U.S. 17, 20 (1973) (defendant waived his right to confrontation when he silenced a witness by exploiting their intimate relationship); *Mattox v. United States*, 156 U.S. 237, 243-4 (1895) (asserting that the existence of the dying declaration as a hearsay exception cannot be disputed). Additionally, courts consistently permit statements that if not admitted would allow “a party to profit from his own wrongdoing.” *Reynolds v. United States*, 98 U.S. 145, 148 (1878). Thus, an exception exists that permits unconfrosted statements when a defendant has procured the unavailability of a witness, known as the forfeiture-by-wrongdoing exception.

The purpose of the Federal Rule of Evidence 804(b)(6) forfeiture-by-wrongdoing exception is to give the courts the power to “deal with abhorrent behavior which strikes at the heart of the system of justice itself.” Fed. R. Evid. 804(b)(6) advisory committee’s note; *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982). Without the forfeiture exception defendants

would have an “intolerable incentive to bribe, intimidate, or even kill the witnesses against them.” *United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990). This exception was addressed in *Giles v. California*, where the court articulated the requirements of the rule. 554 U.S. 353, 357 (2008) (clarifying that a criminal’s wrongful conduct must be designed to prevent a witness from testifying). However, *Giles* did not address the application of the forfeiture-by-wrongdoing exception to criminal conspiracies and the holding does not preclude its application. *Id.*

In criminal conspiracies, all members of the conspiracy can be held liable for the actions of all other members. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946). A co-conspirator can only escape liability if he takes an affirmative step to remove himself from the conspiracy. *United States v. Thornburgh*, 645 F.3d 1197, 1204 (10th Cir. 2011). As such, the forfeiture-by-wrongdoing exception should be extended to all members of a conspiracy that take no affirmative steps, in accordance with co-conspirator liability. *United States v. Cherry*, 217 F.3d 811, 821(10th Cir. 2000). Here, the respondent was involved in the criminal conspiracy with Anderson. Additionally, Barnes failed to take the necessary affirmative steps to remove himself from the conspiracy or to stop the conspiracy from going forward. Thus, the respondent should be subject to the forfeiture-by-wrongdoing exception.

A. The Forfeiture-By-Wrongdoing Exception Should be Applied to Criminal Conspiracies.

The forfeiture-by-wrongdoing exception permits the introduction of testimony of an individual who was intentionally made unavailable by the defendant in order to prevent the declarant’s testimony. *Giles*, 554 U.S. at 358. In accordance with the Sixth Amendment, an accused shall enjoy the right “to be confronted with the witnesses against him, yet if they are absent by his procurement, or when enough has been proven to cast upon him the burden of

showing, and he, having full opportunity therefore, fails to show, that he has not been instrumental in concealing them.” *Reynolds*, 98 U.S. at 158. In order for the forfeiture-by-wrongdoing exception to apply, the defendant’s actions must fulfill the three-part test created by the courts. *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). The three-part test is:

(1) The defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.

*Id.* at 241. The exception was clarified through the Supreme Court’s ruling in *Giles v. California*’s holding which specified that the wrongful conduct must be designed to prevent a witness from testifying to remain in accordance with the Confrontation Clause.<sup>1</sup> 554 U.S. at 556. The wrongful conduct in regards to this exception includes the most heinous offense of murdering a witness and has further been extended to include intimidation, bribery and physical violence. *United States v. Carlson*, 547 F.2d 1346, 1358-59 (8th Cir. 1976); *State v. Mechling*, 633 S.E.2d 311, 326 (W. Va. 2006); *People v. Geraci*, 649 N.E.2d 817, 823-24 (N.Y. 1995). Moreover, the wrongdoer’s motive does not have to solely be to remove the witness; multiple motivations are permissible. *Houlihan*, 92 F.3d at 1279. Therefore, the forfeiture-by-wrongdoing exception’s application to conspiracies would not violate the Sixth Amendment Confrontation Clause.

*i. The holding by the Supreme Court in Giles v. California did not materially alter the forfeiture-by-wrongdoing exception.*

The Supreme Court addressed the forfeiture-by-wrongdoing exception in *Giles v. California* and clarified that the exception is applicable when “the defendant engaged in conduct designed to prevent the witness from testifying.” 554 U.S. at 360. Although the lower court tried

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<sup>1</sup> Clearly, Anderson would be liable under the forfeiture-by-wrongdoing exception, following the test laid out in *Gray* and *Giles*, since he murdered Reardon with the goal of preventing him from working with law enforcement and exposing the conspiracy, and Reardon is in fact unavailable as a witness.

to narrow the forfeiture-by-wrongdoing exception, the holding in *Giles* should not be considered a material alteration of the forfeiture-by-wrongdoing exception, “merely an imposition of an evidentiary requirement.” *United States v. Dinkins*, 691 F.3d 358, 383 (4th Cir. 2012); (finding that the decision in *Giles* “merely clarified existing precedent and affirmed that the intent requirement of Rule 804(b)(6) is sufficient to prevent any violation of the Confrontation Clause.”) The forfeiture-by-wrongdoing exception test, as explained in *Gray*, already included an element requiring that the defendant engaged in the wrongful conduct to prevent a witness from testifying. 405 F.3d at 241.

The facts in *Giles* are consistent with applying the forfeiture-by-wrongdoing exception to conspiracies. 554 U.S. at 356. In *Giles*, the defendant was not a member of a conspiracy. *Id.* Rather, he murdered his girlfriend with no intention of preventing her from testifying at a proceeding. *Id.* at 357. Thus, the murder was the end result of a personal altercation involving jealousy and rage, and not an intention to remove a witness. *Id.* at 357. Further, the lower court admitted that its reading of *Giles* goes against “traditional principles of vicarious liability,” further proving that the Fourteenth Circuit inaccurately interpreted *Giles*. (R. 27). There is no evidence in the opinion by the Court in *Giles* that it intended for the forfeiture exception to not be applicable to co-conspirator liability.

Murdering someone to prevent him from testifying in court is the exact type of action the forfeiture-by-wrongdoing exception was created to prevent. In accordance with the purpose of the forfeiture-by-wrongdoing exception, to prevent “abhorrent behavior,” there must be a broad reading of the elements of the exception. Permitting evidence of the intentionally-made unavailable witness in such circumstances is essential to deter criminals from threatening or killing potential witnesses against them. This case is a clear example of the type of criminal

conduct the forfeiture-by-wrongdoing exception was intended to prevent. The actions of Anderson were designed to prevent Reardon from testifying against the entire conspiracy and therefore no member of the conspiracy should benefit from his murder. As stated by the dissent of the 14<sup>th</sup> circuit, the majority reads the holding in *Giles* too literally, and based on the foregoing analysis, their reasoning is misstated.

*ii. The forfeiture-by-wrongdoing exception is applicable to a defendant even if the individual who procured the witnesses' absence had multiple motivations.*

The forfeiture-by-wrongdoing exception is applicable even when an individual has multiple motivations for procuring the declarant's unavailability. *Thomas*, 916 F.2d at 651. As long as a defendant had some intent to prevent the witness from testifying, the forfeiture-by-wrongdoing exception will still apply even if the defendant had additional motivations for harming the witness. *Id.* at 651. Hearsay statements have been permitted when a defendant was "motivated in part by a desire to silence the witness." *Houlihan*, 92 F.3d at 1279. In *Houlihan*, the court found that the intent to "deprive the prosecution of testimony need not be the actor's sole motivation." *Id.* at 1279; *United States v. Dhinsa*, 243 F.3d 635, 657 (2d Cir. 2001). Additionally, the court reasoned, "we can discern no reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a potential witness." *Houlihan*, 92 F.3d at 1279. (rejecting the argument that charges must have already been lodged to implicate the waiver-by-misconduct doctrine).

The Fourth Circuit allowance of the forfeiture-by-wrongdoing exception to apply in cases of "mixed motives" for murder is consistent with Supreme Court precedent and "the functional needs of our criminal justice system." *United States v. Jackson*, No. 11-4858, 2013 WL 204690, at \*4-5 (3d Cir. Jan. 18, 2013). Additionally, the D.C. Circuit held that "imposing an exclusive-intent requirement would have the 'perverse' consequence of allowing criminals to murder

informants and thereby prevent admission of the informants' statements—just so long as the criminal could show that the intent was retaliation.” *United States v. Martinez*, 476 F.3d 961, 966 (D.C. Cir. 2007). A defendant should not receive a benefit from the confrontation clause solely because they are able to “demonstrate another evil motive for his conduct.” *People v. Banos*, 100 Cal. Rptr. 3d 476, 493 (Cal. Ct. App. 2009).

The reasoning put forth in *Houlihan*, *Thomas*, and *Jackson* makes clear that the courts have not interpreted the holding in *Giles* as placing additional limitations on the forfeiture-by-wrongdoing exception. All three cases permitted hearsay statements so long as the party seeking application of the exception can prove that the defendant had some intention of preventing the witness from testifying. *Houlihan*, 92 F.3d at 1279; *Thomas*, 916 F.2d at 651; *Jackson*, 2013 WL 204690, at \*4-5. Further, the cases made clear that the trial does not need to be underway nor do charges have to be filed for the court to infer that silencing a witness or future witness was one of the wrongdoer's goals.

Here the lower court has read *Giles* as requiring an exclusive intent requirement. (R. 27). However, as stated in *Martinez*, such reading would allow criminals to murder witnesses and not suffer the consequences of their wrongdoing. The mixed motive approach further proves that the Fourteenth Circuit's narrow reading of the forfeiture-by-wrongdoing exception does not follow existing precedent. Based on the appropriate broad reading of the forfeiture-by-wrongdoing exception, the holding in *Giles* does not place limitations on applying the forfeiture-by-wrongdoing exception to conspiracies.

**B. The Forfeiture-by-Wrongdoing Exception Is Applicable To The Respondent Through Co-Conspirator Liability.**

The Supreme Court has established that “an overt act of one partner in crime may be the act of all without any new agreement specifically directed to that act.” *Pinkerton*, 328 U.S. at

646; *United States v. Kissel*, 218 U.S. 601, 608 (1910). “Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective.”

*Pinkerton*, 328 U.S. at 646. The respondent, as the ringleader of the conspiracy, should not be given the opportunity to benefit from the murderous actions of his co-conspirator.

- i. *The murder of James Reardon was procured by a member of the conspiracy and in furtherance of the conspiracy.*

Under *Pinkerton*, the Supreme Court established a rule permitting a defendant to be held liable for the acts committed by his or her co-conspirator that were within the scope and in furtherance of the conspiracy and that were foreseeable to the defendant. 328 U.S. at 646; *United States v. Sandoval-Curiel*, 50 F.3d 1389, 1392 (7th Cir. 1995) (holding that a co-conspirator's statements were admissible against the defendant as a statement against penal interest).

Similarly, the forfeiture-by-wrongdoing exception to Federal Rule of Evidence 804(b)(6) can be expanded to all members of a criminal conspiracy if:

- (1) He or she participated directly in planning or procuring the defendant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.

*Cherry*, 217 F.3d at 821. Within the context of the forfeiture-by-wrongdoing exception, acquiescence encompasses “wrongdoing that, while not directly caused by a defendant co-conspirator, is nevertheless attributable to that defendant because he accepted or tacitly approved the wrongdoing.” *Dinkins*, 691 F.3d at 384; citing *United States v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002) (the court found that applying the forfeiture-by-wrongdoing exception to co-conspirator liability “strikes the appropriate balance between the competing interests involved.”) *United States v. Ashley*, 606 F.3d 135, 142-43 (4th Cir. 2010)(defendant was charged with the

murder of a government witness through co-conspirator liability even though he did not directly participate, he only helped plot the murder).

The Fourth Circuit found the forfeiture-by-wrongdoing exception applicable to all co-conspirators. *Dinkins*, at 384. In *Dinkins*, the court extended co-conspirator liability to a defendant who had been incarcerated during the commission of the murder. *Id.* The court asserted that *Dinkins* remained an active and participating member of the conspiracy and therefore forfeited his confrontation right against any statements made by the witness that was made unavailable in furtherance of the conspiracy. *Id.* The court concluded, “[T]raditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis.” *Id.*

The Eleventh Circuit expanded co-conspirator liability to situations where the substantive offense “differs from the precise nature of the ongoing conspiracy, but facilitates the implementation of its goals.” *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996) (a co-conspirator in a drug conspiracy, who played more than a minor role in the conspiracy, was found guilty for the reasonably foreseeable, yet originally unintended crime of murder committed by the other conspirators); see also *United States v. Broadwell*, 870 F.2d 594, 603 (11th Cir. 1989) (defendant was convicted of kidnapping on the basis of evidence that he knew the other members of the conspiracy were kidnapping the victim).

In the case at hand it is clear a conspiracy existed between the respondent and Anderson. The conspiracy began in 2011 when the respondent became aware of the dire financial situation of the Circus and reached out to Anderson and Reardon for assistance in completing his scheme. (R. 21). In accordance with *Pinkerton*, members of a conspiracy should be held accountable for the wrongdoing of the other members that are acting to benefit the entire conspiracy. 328 U.S. at

646. Anderson believed that Reardon had become an immediate threat to the success of the conspiracy to kill and sell the elephants. (R.18). Anderson expressed his concerns to the respondent, two days prior to respondent's arrest, including his belief that Reardon needed to be removed before he went to the police. (R. 19). In a recorded conversation, Anderson told the respondent "We're out of time. We need him out of the picture." (R. 19). At that moment the respondent became aware of Anderson's desire to permanently remove Reardon as a threat to the completion of their conspiracy.

Although the murder was not originally intended by the co-conspirator's, under the analysis in *Mothersill*, as long as the crime was reasonably foreseeable then liability can be imputed to all remaining co-conspirators. The actions taken by Anderson were reasonably foreseeable to the respondent and done in furtherance of the conspiracy, specifically to prevent law enforcement from learning about the conspiracy. (R. 19). Additionally, following the analysis in *Ashley* and the analysis of the lower court's dissent, the respondent could have been charged with the murder of Reardon through co-conspirator liability. (R. 33). Furthermore, the respondent directly benefits from the unavailability of Reardon, who made statements that implicated the respondent as the ringleader of the conspiracy. The forfeiture-by-wrongdoing exception was created to strip criminal defendants of the benefits from criminal acts against witnesses. The respondent was aware of the fact that Anderson planned to "get rid of" Reardon and made no attempts to stop Anderson or remove himself from the conspiracy, therefore the forfeiture-by-wrongdoing exception should extend to the respondent. (R. 18).

- ii. *The respondent made no affirmative attempt to remove himself from the conspiracy prior to the death of James Reardon.*

In order to remove oneself from the actions of the conspiracy, a co-conspirator must assert a clear affirmative action. *Cherry*, 217 F.3d at 819. Co-conspirators will be liable for the

acts of the other members of the conspiracy unless the defendant is able to show that “he or she has done some act to disavow or defeat the purpose of the conspiracy.” *Cherry*, 217 F.3d at 818; *United States v. Thornburgh*, 645 F.3d 1197, 1204 (10th Cir. 2011) (defendant wrote a letter to one co-conspirator, but not the other members, and the court found the letter to be insufficient to prove withdrawal from the conspiracy); *United States v. Gonzalez*, 596 F.3d 1228, 1234 (10th Cir. 2010) (evidence, including the defendant’s failure to attend an important meeting and moving to a different state, was insufficient to be considered an affirmative act of withdrawal from the conspiracy). To meet this requirement, there must be evidence of affirmative action on the part of the defendant to establish a withdrawal from the conspiracy. *Thornburgh*, 645 F.2d at 1204, citing *Hyde v. United States*, 225 U.S. 347, 369 (1912).

In *Hyde*, the Supreme Court concluded that withdrawal is an affirmative defense, placing the burden of proof of the defendant. *Id.* at 369; *United States v. Garcia*, 721 F.2d 721, 725 (11th Cir. 1983). The affirmative steps by the defendant must be substantial and inconsistent with the objects of the conspiracy. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464 (1978) (holding that to satisfy the requirements of withdrawal the co-conspirator must “either communicate those acts in a manner reasonably calculated to reach his co-conspirators or disclosed the illegal scheme to law enforcement authorities.”); see also *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir. 1987) (clarifying that even if a defendant takes affirmative steps to withdrawal from the conspiracy, the decision to disavowal from the conspiracy must be communicated to his co-conspirators). Additionally, a “mere cessation of activity in the conspiracy is not sufficient to establish withdrawal.” *Hyde*, 225 U.S. at 369; *United States v. Badolato*, 701 F.2d 915, 921 (11th Cir. 1983).

Respondent did not take the affirmative steps necessary to remove himself from the conspiracy. Respondent became aware of Anderson's intentions during their phone conversation on November 15, 2011. (R. 18). The lower courts place significant weight on the respondent's statement to Anderson, "I don't want anything to do with this" shortly before Anderson murdered Reardon. This statement should not be considered an affirmative attempt to remove himself from the criminal conspiracy. The Supreme Court in *Hyde* stated that even a cessation of activity is not sufficient for withdrawal. In this case there is no evidence that respondent had any intention of calling off the elephant hunt. The respondent made no attempt to remove himself from the conspiracy or to end the conspiracy. Even if the respondent had considered ending the conspiracy, that action is not sufficient since he never shared those desires with his co-conspirator, Anderson, in accordance with the requirements of *U.S. Gypsum*. Additionally, in the statement prior, the respondent stated "[j]ust shut him up for a while," showing a specific desire to prevent Reardon from disrupting the conspiracy or informing the police of their plans. (R. 19). Furthermore, the respondent chose not to reach out to law enforcement to prevent Anderson from taking unlawful action against Reardon. Therefore, the respondent did not satisfy the burden established in this court's decision in *Hyde* and remained an active member of the ongoing conspiracy.

**II. THERE IS NO JOURNALIST PRIVILEGE UNDER RULE 501 AND EVEN IF THERE IS, SUCH PRIVILEGE IS A QUALIFIED PRIVILEGE NOT TRIGGERED BY THE FACTS OF THIS CASE.**

To recognize evidentiary privileges, courts employ Federal Rule of Evidence 501 by interpreting common law principles in the light of reason and experience. Once recognized, evidentiary privileges can either be absolute or qualified. *Compare Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (recognizing an absolute privilege with the psychotherapist-patient relationship),

with *United States v. Larouche Campaign*, 841 F.2d 1176, 1182 (1st Cir 1988) (recognizing a journalist privilege as a qualified evidentiary privilege). An absolute evidentiary privilege precludes the requesting party from obtaining the information held by the privileged party regardless of the specific circumstances of the case. *See Jaffee*, 518 U.S. at 17. By contrast, a qualified privilege is determined on a case-by-case basis after a careful consideration of the various interests at stake. *See Larouche Campaign*, 841 F.2d at 1182.

Rule 501 does not recognize any journalist privilege because the interests served by such privilege are outweighed by the public's interest in ascertaining the truth in its tribunals. Further, if a journalist privilege is recognized by this Court, legislative intent and federal common law demand that it be a qualified privilege. Finally, because the interests for disclosure of the information in this case outweigh the interests served by the privilege, the qualified privilege does not apply.

A. There Is No Journalist Privilege Under 501 Because It Fails To Satisfy The Framework Devised In *Jaffee*.

When determining whether to recognize a privilege, a court should keep close in mind the “fundamental maxim that the public... has a right to every man's evidence.” *United States v. Bryan*, 339 U.S. 323, 331 (1950) Additionally, this Court has recognized that “there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” *Id.* Thus, in order for a privilege to be justified, a public good must outweigh the usual leading principle of employing “all rational means for ascertaining the truth.” *Trammel v. United States*, 445 U.S. 40, 50 (1980).

In *Jaffee*, this Court for the first time recognized an evidentiary privilege under Rule 501—the psychotherapist privilege. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996). In reaching this

conclusion, this Court created a framework that: 1) weighed the public and private interests served by recognizing the privilege against the benefits of denying the privilege, and 2) considered whether recognition of the privilege was in light of “reason and experience.” *Jaffee*, 515 U.S. at 9-14. Because a journalist privilege fails the considerations in this framework, Rule 501 does not recognize a journalist privilege.

- i. The benefits of obtaining the truth strongly outweigh the interests served by creating a journalist privilege.*

The distinct nature of the psychotherapist-patient relationship was crucial in this Court’s recognition of an evidentiary privilege for it under Rule 501. *See Jaffee* 518 U.S. at 11. In highlighting the private interests served by the privilege, the Court explained that for psychotherapy, successful treatment is dependent on an atmosphere of trust. *Id.* at 10. The Court aggregated this rationale to illustrate the public interest—that is, the “mental health of our citizenry.” *Id.* at 11. Unfortunately, there was little attention given to the benefits resulting from a denial of the privilege. *See id.* at 11-2. The Court explained that such benefits of a denial, namely the discovery of desirable evidence in search of the truth, are of little concern because such evidence would be “unlikely to come into being” without a privilege. *Id.* at 12. The Court cited no authority for this hypothesis, yet it served as the foundation for its argument in favor of the psychotherapist-patient privilege. *See id.*

This Court has already rejected the idea of a journalist privilege after balancing the relevant interests pursuant to the framework described in *Jaffee*. *See Branzburg v. Hayes*, 408 U.S. 665, 697 (1972). Though it was written a few years before the enactment of Rule 501, the reasoning in *Branzburg* for denying the journalist privilege remains sound and instructive.<sup>1</sup> This

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<sup>2</sup> To be sure, some have tried to argue that *Branzburg*’s opinion is limited to a grand jury proceeding. However, the plain language of *Branzburg* proves otherwise. 408 U.S. at 690-91 (“...we perceive no basis for holding that the public interest in law enforcement...is insufficient to override the...burden on news gathering...in the course of a

Court had no problem articulating the public benefits of denying a journalist privilege—the deterrence of the commission of crimes in the future through the pursuit and prosecution of those crimes reported to the press. *See id.* at 705; *see also United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). Additionally, this Court directly addressed the argument claiming that a refusal to find a journalist privilege will inhibit the freedom of the press. *Branzburg*, 408 U.S. at 698-99. It countered, “From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished.” *Id.* Further, the Court explained that journalists are “far from helpless” to protect themselves from substantial harm because the First Amendment will protect them from investigations conducted in bad faith. *Id.* at 707. Accordingly, this Court has already considered and rejected the journalist privilege with thoughtful reasoning and sound policy.

Here, the enactment of Rule 501 did nothing to alter the *Branzburg* rationale behind the rejection of a journalist privilege. Despite this, the lower court has attempted to analogize *Jaffee*, relating to a psychotherapist-patient relationship, to the present case concerning journalists. The drastic differences between the two relationships, however, make such efforts futile. With the psychotherapist-patient relationship, the patient almost never wants the conversations to be divulged. Conversely, when a person shares information with the press, he does so with the full knowledge that at least some of that information will be publicized. Because one expects a journalist to publicize much of the information given to him, the private interests served by a journalist privilege are miniscule relative to the psychotherapist-patient relationship. Moreover, as discussed in *Branzburg*, the public is better served by denying the privilege because such denial facilitates the judicial machine and its deterrence of crime. 408 U.S. at 705. Therefore,

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valid grand jury investigation *or criminal trial.*”; *see also United States v. Smith*, 135 F.3d 963, 971 (5th Cir.) (“[S]urely the public has as great an interest in convicting its criminals as it does in indicting them”).

under the *Jaffee* framework, public and private interests are better served by denying the journalist privilege.

- ii. *Reason and experience are at odds with the recognition of a journalist privilege under Rule 501.*

After weighing the interests served by recognizing or denying a privilege, this Court looks to whether “reason and experience” under Rule 501 support a finding of the privilege in question. *Jaffee*, 518 U.S. at 12-4. In determining that recognition of a psychotherapist-patient privilege was in light of reason and experience, this Court pointed to the various forms of the privilege found in state law. *Id.* However, a state’s recognition of an evidentiary privilege “does not compel an analogous privilege” at the federal level. *United States v. Gillock*, 445 U.S. 360, 368 (1980). The Court added that recognition was appropriate because “a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules.” *Jaffee*, 518 U.S. at 14; *cf. Gillock*, 445 U.S. at 14 (rejecting a legislative privilege in part because it was not one of the nine enumerated privileges in the Advisory Committee’s draft). Thus, in order to recognize a privilege under Rule 501, it must be supported by reason and experience.

Here, a finding of a journalist privilege under Rule 501 is neither supported by reason nor experience. As *Branzburg* pointed out, experience shows that the press has flourished without a journalist privilege. 408 U.S. at 698-99. Further, a close examination of how differently the states recognize the privilege reveals the inherent difficulty with it. *Compare* N.J. Stat. Ann. § 2A:84A-21 (West 1977), *with Conn. State Bd. Of Labor Relations v. Fagin*, 370 A.2d 1095, 1097 (Conn. Super. Ct. 1976). The states are far from agreement on the scope and administration of such a privilege. This inconsistency is ample evidence of the inherent troubles with a journalist privilege. Ironically, the authority cited by this lower court illustrates this well. The

New Jersey statute entitled “Newsperson’s privilege,” for example, provides journalists significant immunity from disclosing facts because its scope is very large in terms of both who and what is protected. § 2A:84A-21. Conversely, the Superior Court of Connecticut recognized a much weaker privilege. *Fagin*, 370 A.2d at 1097 (limiting its recognition of the journalist to civil cases where the public interest in non-disclosure outweighs the public and private interest in compelled testimony”). Finally, unlike the psychotherapist privilege, the journalist privilege was not among one of the nine original privileges recommended by the Advisory Committee. Thus, like the legislative privilege in *Gillock*, this Court should reject the notion of a journalist privilege under Rule 501.

B. Even If A Journalist Privilege Exists Under Rule 501, Such Privilege Should Be Qualified And Is Not Triggered By The Facts Of This Case.

Federal common law, legislative intent, and policy unanimously reject the recognition of an absolute evidentiary privilege under Rule 501. First, the pinnacle of common law cases regarding the journalist privilege is *Branzburg. Smith*, 135 F.3d at 968 (“Any discussion of the newsreporters’ privilege must start with an examination of *Branzburg*.”). All of the circuits that have interpreted *Branzburg* to recognize a journalist privilege have recognized a qualified privilege. *See Shoen v. Shoen*, 5 F.3d 1289, 1302 n. 5 (9th Cir. 1993). Additionally, clear legislative intent, and sound policy are consistent with this view. *See* Advisory Committee Notes; *see also* 28 U.S.C. § 2704. Therefore, if a journalist privilege is to be recognized, it should only be triggered on a case-by-case basis after careful consideration of the specific circumstances and various interests at stake.

Accordingly, should this Court recognize a journalist privilege under Rule 501, it should be a qualified privilege. Moreover, because the journalist seeking the privilege in this case possesses critical information and because the source of the information does not have a serious

interest in withholding his identity, Crawley would not be entitled to the qualified privilege and her motion to quash should be denied.

- i. The Journalist Privilege Should Be Qualified Because An Absolute Privilege Of Any Kind, Let Alone A Journalist Privilege, Seriously Undermines The Legislative Intent Of Rule 501 And 28 U.S.C. § 2704.*

An examination of the history of Rule 501 shows that its purpose was to prevent courts from creating overly broad evidentiary privileges—absolute privileges. *See* George E. Dix et al., McCormick on Evidence 354 (Kenneth S. Broun ed. 2006). As originally proposed by the Advisory Committee, the Federal Rules of Evidence enumerated nine specific evidentiary privileges.<sup>2</sup> Congress, however, did not approve of such rigid rules. *See id.* Instead of recognizing nine strict privileges, Congress enacted the more flexible Rule 501 so that privileges could be recognized on a case-by-case basis. *See* Fed. R. Evid. 501 advisory committee’s note to 1974 enactment (“Our action should be understood as reflecting the view that the recognition of a privilege...should be determined on a case-by-case basis.”). To reinforce this idea, Congress also enacted a statute which requires that “any Rule creating abolishing or modifying an evidentiary privilege” must be approved by Congress instead of the Court. *See* 28 U.S.C. §2074(b). These two statutes work together to make sure that the legislature, not the judiciary, develops the broader evidentiary privileges. *See* Dix, *supra*, at 354.

To recognize an absolute journalist privilege would completely ignore legislative intent. A holding that immunizes journalists per se without considering the specific facts of the case directly conflicts with the spirit of Rule 501 as a case-by-case consideration would be eliminated. Thus, if this Court recognizes a journalist privilege under Rule 501, it should be a qualified privilege.

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<sup>2</sup> The journalist privilege was not one of them.

- ii. *Federal common law compels recognition of a qualified journalist privilege over an absolute journalist privilege.*

This Court has generally stressed its reluctance to find absolute evidentiary privileges. *Herbert v. Lando*, 441 U.S. 153, 169 (1978) (outwardly rejecting an absolute privilege to the editorial process of a media defendant); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (even the President is not entitled to an absolute privilege despite his powerful interest in confidentiality). More specifically, with regard to a journalist privilege, all circuits recognizing it agree that it must be qualified in some way. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (to the extent *Branzburg* recognized a journalist privilege, it is a qualified privilege).

Even a superficial review of federal case law reveals the importance of qualifying the journalist privilege. In addition to this Court's reluctance to find absolute evidentiary privileges generally, no circuit court has subscribed to the idea of the absolute privilege. Qualifying an evidentiary privilege allows a court to take advantage of its intimate knowledge of the case at hand and make an equitable decision based on a weighing of the competing interests for and against disclosure. Such a case-by-case analysis ensures the precision required for such a delicate issue. Conversely, the rigid nature of an absolute privilege would lend itself to over and under-inclusivity, and thus unfairness.<sup>3</sup> Accordingly, if this court chooses to recognize a journalist privilege under Rule 501, it should be a qualified privilege.

- iii. *The facts of this case do not trigger the qualified journalist privilege because of the importance of the information being sought and the lack of interests served by withholding such information from trial.*

Courts have adopted a myriad of different ways to evaluate the interests in determining whether one is entitled to a qualified journalist privilege. In his concurrence in *Branzburg*, Justice

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<sup>3</sup> Although the reasoning behind an absolute privilege's over-inclusivity is obvious, its under-inclusivity is less apparent. It occurs as a result of the unclear definition of what constitutes a "journalist" for purposes of the privilege. Thus an absolute privilege could potentially bar a well-deserving journalist from the privilege if she does not qualify as a "journalist". See *Branzburg*, 408 U.S. at 703-04 (warning the difficulties of defining a "journalist").

Powell explained that a journalist would be entitled to the privilege upon a showing of the government's bad faith in trying to secure the information, such as if the information sought from the journalist "[bears] only a remote and tenuous relationship to the subject of the investigation." 408 U.S. at 710 (Powell, J., concurring). Several circuits have kept the privilege narrow, only recognizing it upon a showing of bad faith in law enforcement's request for the information. *Smith*, 135 F.3d at 969 (declining to construct a broad, qualified newsreporters' privilege in criminal cases); *In re Grand Jury Proceedings*, 5 F.3d 397, 402 (9th Cir. 1993) (holding that a qualified privilege does not mean "interest balancing," but rather an inquiry as to whether law enforcement has acted in good faith); *See Storer Commc'ns, Inc. v. Giovan*, 810 F.2d 584, 86 (6th Cir. 1987) (rejecting a balancing of interests other than questions of good faith); *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (rejecting privilege for reporters because there was no evidence that they were subpoenaed to harass them). However, some circuits have interpreted a broader qualified privilege. *Larouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (employing a three-part test to help balance the interests: 1) relevance of the information 2) alternative ways the information can be obtained, and 3) whether there is a compelling interest in the information). Thus, the circuits are in disagreement about how narrow the qualified privilege should be.

With the case at bar, the facts do not allow for a qualified interest even if the broad privilege in *Larouche* is adopted. First, the information being obtained is certainly relevant to the investigation. Crawley learned information that directly relates to this case—a conversation overheard by an employee at the Circus concerning a plan to kill the elephants for their ivory. (R. 10). This information pertains to all of the counts that the defendant has been charged with. Further, there are no other ways this information can be obtained. The record is silent as to

anyone else who could have overheard these conversations. Although Reardon's testimony would have been very useful, Anderson murdered him in an alleged effort to "keep him quiet." (R. 7). Therefore, Crawley's source is the only person known to have heard the respondent directly talking about the elephant hunting scheme. Finally, the government's compelling interest in obtaining the information lies in the serious nature of the crimes the respondent is being charged with: conspiracy to deal unlawfully in firearms, conspiracy to commit a crime of violence against an animal enterprise, and conspiracy to commit unlawful takings under the Endangered Species Act. (R. 3-4). Therefore, in a serious criminal case such as this one, the public has an even stronger interest in a disclosure of the information learned by Crawley.

Along the same vein, Crawley's interest in maintaining confidentiality is weak at best. First, the source told her about what he overheard with the full knowledge and understanding that it was to be published. (R. 10). Secondly, the information was actually published on December 1, 2011. (R. 11). Third, the source agreed to be videotaped, and had his or her face exposed on camera. (R. 10). In an attempt to justify her motion to quash, Crawley stated that the employee was concerned for his or her safety if the respondent found out about the revelations. *Id.* However, the Circus is a small business. (R. 1). Therefore, it would most-likely not be difficult for the respondent to find out who spoke to the Crawley. Thus, the granting of a journalist privilege is no more likely to protect Crawley's source. Because the facts of this case fail to satisfy even the broadest interpretations of the qualified journalist privilege, this court should deny Crawley's motion to quash the subpoena.

**III. AGENT SIMANDY IS PERMITTED TO TESTIFY UNDER FEDERAL RULE OF EVIDENCE 701 REGARDING THE ALLEGED CODE WORDS AND PHRASES BECAUSE HIS TESTIMONY IS BASED ON HIS PERCEPTION, HELPFUL TO A JURY, AND NOT BASED ON SPECIALIZED KNOWLEDGE.**

Rule 701, concerning opinion testimony by lay witnesses, has three elements: 1) that the testimony is “rationally based on the witness’s perception,” 2) that the testimony is “helpful to clearly understanding the witness’s testimony or to determining a fact in issue,” and 3) that the testimony is “not based on scientific, technical, or other specialized knowledge within the scope of [Rule 702].” Fed. R. Evid. 701. The main objective of the rule is to ensure that the fact finder is given an accurate reproduction of the event at issue. See Advisory Committee Notes. Because Agent Simandy’s testimony regarding the code words and phrases satisfies Rule 701, this Court should find it admissible.

- A. Agent Simandy’s testimony is rationally based on his perceptions because he had personal knowledge of the conversations in which he participated and the transcripts that he read.

The first element of Rule 701 requires only that the testimony be “rationally based on the witness’s perception.” Over time, a deepening circuit split has developed over whether this prong requires a lay witness’s participation or observation of the conversation at issue. Many courts have expressly rejected such a strict standard, holding that a lay witness need not have such participation. For example in *Jayyousi*, the Eleventh Circuit held that an officer was permitted to testify about coded language used in conversation by the defendants even though he did not have actual involvement in all of the conversations about which he testified. 657 F.3d 1085, 1102 (11th Cir. 2011); *United States v. Zepeda-Lopez*, 467 F.3d 1213, 1221 (10th Cir. 2011) (holding that the agent’s identification of the defendant’s voice based on his review of audio tapes is admissible); *United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011) (finding testimony

translating coded words in wiretapped conversations admissible even though it was based on after-the-fact participation).

Alternatively, some courts have precluded such testimony by reading requirements into the plain statutory language. For example the Eighth Circuit held that in order for the testimony to be admissible under Rule 701, the witness must have either: participated in the conversation, had personal knowledge of the facts being related in the conversation, or observed the conversation as it occurred.<sup>4</sup> *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001) (holding that an FBI agent's opinions regarding the meaning of words and phrases used were inadmissible because he did not participate in the conversations at issue); *see also United States v. Parsee*, 178 F.3d 374, 379 (5th Cir. 1999) (holding that the agent's participation in the conversations satisfied Rule 701(a)); *see also United States v. Saulter*, 60 F.3d 270, 276 (7th Cir. 1995) (holding that first-hand knowledge in addition to participation suffices Rule 701(a)); *see also United States v. Awan*, 966 F.2d 1415, 1430 (11th Cir. 1992) (holding that the agent's testimony is admissible in part because of his participation in the conversation).

In this case, Agent Simandy's testimony easily falls within the scope of Rule 701(a). The statute's plain meaning compels such a finding. Here, Agent Simandy gave his opinion based on his perception of the conversations he had and the transcripts he read, nothing more. (R. 13-4). To add any additional burdens, such as actual participation in the conversation, would require a contrived stretching of the statutory language. Moreover, Agent Simandy's testimony does not rely solely on after-the-fact investigation. (R. 13). He personally interviewed Agent Lamberti and Alan Kledstadt regarding their conversations with the defendant and his co-conspirators. *Id.*

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<sup>4</sup> For the sake of simplicity, any time this brief mentions the requirement of "participation," under this point heading it shall be understood to include participation, observation, and personal knowledge as described in *Peoples*.

As the record states, it was the culmination of these conversations and the reading the transcripts which led him to his opinions regarding the code words. *Id.*

Moreover, a close examination of *Peoples*, the only case relied on by the lower court, reveals a fatal flaw in its assertion that actual participation is necessary in order to satisfy 701. In support of that assertion, the *Peoples* opinion cites three cases: *Parsee*, *Saulter*, and *Awan*. The major defect with the logic used in *Peoples* is its failure to distinguish a sufficient condition from a necessary one. Although those cases all find participation *sufficient* to satisfy 701, none of them state that participation is the *only* way to do so. The lower court's sole reliance on a case that greatly misjudged its cited precedent is a serious error that only this Court can remedy.

Even assuming *arguendo* that one could read a participation requirement into the statute, such interpretation produces bad policy. Imposing such participation would have dire consequences on law enforcement. First, transaction costs would increase because law enforcement would be discouraged from utilizing simple technology such as recording devices. Instead officers would be assigned to cases with the sole purpose of listening in on conversations that merely have potential of being used in court. More importantly, requiring participation would unjustly penalize law enforcement in situations where an agent who *had* participated in the conversation becomes unable to testify at trial. This case highlights the problem perfectly. Agent Blackstock's unrelated death left Agent Simandy, who was assigned to take over the case, no choice but to review the transcripts. (R. 12). The Fourteenth Circuit's interpretation punishes law enforcement by greatly hindering its ability to try a case as a result of an officer's unrelated death and should be heavily scrutinized. The myriad of policy concerns that arise with such a tenuous statutory interpretation further substantiate the need for this Court's reversal.

B. Agent Simandy's testimony is helpful in determining the real meaning of the code words used in the conversations between the defendant and his co-conspirators because, unlike the jury, he had sufficient time to review the transcripts and interviews of Agent Lamberti and Mr. Kledstadt.

In order for testimony to satisfy the second element of Rule 701, it must be helpful to the jury by providing an “understanding [of] the witness’s testimony or determining a fact in issue.” Fed. R. Evid. 701. The Rule’s main purpose is to avoid having a witness supplant the role of the jury. As indicated in the advisory notes, the threshold for this element is very low because of the opposition’s ability to cross-examine the witness. Fed. R. Evid. 701 advisory committee notes. Therefore, as long as the testimony provides more than “meaningless assertions which amount to more than choosing up sides,” it should be deemed helpful. *Id.*

Naturally, many courts have held that a witness’s translation of coded conversations for the jury is helpful under Rule 701. For example, in *United States v. Parsee*, the Fifth Circuit held that that the witness’s translation of the defendants’ use of the word “pants” to “drugs” was helpful for the jury under Rule 701. 178 F.3d 374, 380 (5th Cir. 1999); *see also United States v. Jayyousi*, 657 F.3d 1085, 1103 (11th Cir. 2011) (holding interpretations of code words with ambiguous meanings is admissible). Further, some courts have found an agent’s testimony helpful to the jury because, unlike the jury, he had the ability to review the materials many times. *See Zepeda-Lopez*, 467 F.3d at 1221. On the contrary, a mere recitation of the facts or a conclusory allegation of culpability will usually will not suffice. *United States v. Garcia*, 413 F.3d 201, 213-14 (5th Cir. 2005); *see also United States v. Dicker*, 853 F.2d 1103, 1109 (3d Cir. 1988) (“[T]he interpretation of clear conversations is not helpful to the jury...”).

In this case, Agent Simandy’s interpretation of coded language is the exact type of testimony that courts have held to be helpful under Rule 701(b). First, like the agent *Zepeda-Lopez*, Agent Simandy had a lot of time to become familiar with the relationship between the

conversations and their context. Unfortunately, the jury does not enjoy this same privilege. Therefore, Agent Simandy's layperson testimony is helpful for the jury to understand the true meanings of the conversations between the defendants. Moreover, as the advisory committee notes point out, respondent has ample opportunity to cross-examine Agent Simandy in an effort to undermine his credibility. Finally, Agent Simandy's testimony would not preclude the jury from doing its job. Unlike *Garcia*, Agent Simandy is not making any conclusory statements about culpability or even identification. Unlike *Dicker*, Agent Simandy is not testifying about a clear conversation. Rather, the testimony at issue is simply about translating coded language. (R. 13). Accordingly, Agent Simandy's testimony satisfies the helpfulness requirement under Rule 701(b) because it provides the jury with a useful translation of coded language without compromising the jury's role as the fact finder.

C. Agent Simandy's testimony satisfies Federal Rule of Evidence 701(c) because all of his conclusions are based on knowledge obtained solely in this investigation.

For testimony to be admissible under Rule 701, it cannot be based on specialized knowledge possessed by an expert in the field. Rather, testimony is admitted under Rule 701 when the witness obtained a "particularized knowledge" of the matter. *See* Fed. R. Evid. 701 advisory committee's note to 2000 amendments. In other words, lay opinion results from a process of reasoning familiar in everyday life as opposed to a process of reasoning which can only be mastered by specialists. *See Jayyousi*, 657 F.3d at 1104; *see also El-Mezain*, 664 F.3d at 514.

If an officer's testimony is based on knowledge gained from the involvement in the particular investigation as opposed to specialized training or experience, it passes Rule 701(c). In *El-Mezain*, the Fifth Circuit explained that the officers' testimony was acceptable under Rule 701 because the opinions were based on information obtained during the agents' extensive

investigation in the case. 664 F.3d at 514. In reaching this conclusion, the Fifth Circuit further added that the agents' testimony did not rely on training and experience as members of law enforcement generally. *Id.* The Eleventh, Ninth, and Seventh Circuits are in accord with this Rule. *Jayyousi*, 657 F.3d 1085 at 1104 (finding the agent's testimony regarding coded language admissible under 701(c) because it was based on his experience from that particular investigation); *see also United States v. Freeman*, 498 F.3d 893, 902 (9th Cir. 2007) (finding the agent's testimony admissible under 701(c) because he was not using specialized knowledge of drug jargon but general knowledge from that investigation); *United States v. Rollins*, 544 F.3d 820, 832-33 (7th Cir. 2008) (admitting the agent's testimony under 701(c) despite having years of experience because his conclusions came solely from that particular case).

On the contrary, courts will deny admissibility of an agent's testimony if the agent uses his specialized background and experience to devise his conclusions. *Garcia*, 413 F.3d 201, 216-17 (2d Cir. 2005) (finding agent's testimony regarding the conspirators' roles inadmissible under 701(c) because it was based on his expertise in narcotics trafficking); *see also United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006) (holding agents' answers to hypothetical questions requiring prior experience in law enforcement inadmissible under Rule 701); *see also Peoples*, 250 F.3d at 641 (holding that agent's testimony regarding coded language, plain language, and opinions on defendants thoughts was inadmissible under Rule 701). These circuits illustrate a reluctance to allow agents to give opinions founded in expertise and experience.

Agent Simandy's lack of experience with this type of case, in addition to the limited scope of his conclusions, ensure that his testimony is not based on the specialized knowledge proscribed by Rule 701. Before this case, Agent Simandy had never been assigned to crimes against animals. (R at 14). Therefore, the likelihood of Agent Simandy being able to draw on

prior experience is greatly diminished. Like the conclusions of the agents in *Jayyousi*, *Freeman*, and *Rollins*, Agent Simandy's conclusions were derived by knowledge obtained during the investigation of this case. (R.14). To arrive at his conclusions, Agent Simandy simply matched the conversations with their relative contexts. *Id.* This is drastically different from the agent in *Garcia* who used his expertise in narcotics to form his opinions. Further, unlike the agents in *Perkins* and *Peoples* who opined on a myriad of topics, Agent Simandy's testimony is narrowly tailored to only decoding the conversations. Thus, the limited scope of Agent Simandy's testimony coupled with his lack of familiarity with animal cruelty cases strongly support a finding of admissibility under Rule 701(c).

### **CONCLUSION**

For the foregoing reasons, Respondent respectfully requests this Honorable Court **REVERSE** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) the conversations between Daniel Best and James Reardon should be admitted under FRE 804(b)(6), the forfeiture-by-wrongdoing hearsay exception; (2) there is no journalist privilege under Rule 501, and if there is, it is a qualified privilege not triggered by the facts of this case; (3) Agent Simandy's testimony regarding the translation of coded language is admissible under Rule 701.

Respectfully Submitted,

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Counsel for Respondent

Date: February 20, 2012.