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No. 12-23

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IN THE  
SUPREME COURT OF THE UNITED STATES

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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 RESPONDENT

## **QUESTIONS PRESENTED**

**I.** Whether as a matter of law a trial court may admit into evidence against a defendant in a criminal case the hearsay declaration of a murder victim under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), where there is no evidence that the defendant intended to procure the unavailability of the declarant, and the government relies on evidence that the defendant could reasonably have foreseen that his co-conspirator would murder the declarant in order to silence him.

**II.** Whether under Federal Rule of Evidence 501 an evidentiary privilege for information gathered in a journalistic investigation should be recognized, and if so, whether the privilege should be absolute or qualified.

**III.** Whether as a matter of law, under Federal Rule of Evidence 701 governing lay witness opinion testimony, a witness may testify to alleged code words and phrases in conversations, when the witness neither participated in nor observed the conversations, but merely read transcripts of them and reviewed the investigatory work of other law-enforcement personnel.

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## STATEMENT OF THE CASE

### Statement of Facts

William Barnes inherited Big Top Circus from his father in May 2000. (R.1). Big Top Circus was world renowned for its “one of a kind” elephant shows. (R.1). Barnes cofounded the charity “Boerum 4 Animals” with Alfred Anderson in 2008. (R.1). Anderson was convicted for fraud in connection with the charity for misappropriating funds. (R.1). Barnes was not charged in connection with Anderson’s fraud concerning “Boerum 4 Animals.” (R.1). Barnes operated Big Top for eleven years, however, in July of 2011 due to financial hardship the circus was on the verge of bankruptcy. (R.1). In order to avert inevitable bankruptcy, Big Top needed to raise \$500,000 by December 2011. (R.1).

Barnes invited Boerum City Circus and Flying Feats Circus to winter on his large elephant grazing grounds; the Asian elephants were to arrive on December 2, 2011. (R.1). Big Top, in conjunction with the visiting circuses, planned to create the “greatest elephant show on earth” and scheduled a month of holiday spectacular shows. (R.2).

On September 1, 2011, Barnes and Anderson planned a big game hunt. (R.7). Barnes directed Anderson to find a third hunter, and Anderson invited a close acquaintance, James Reardon, to join the hunt. (R.7). Reardon agreed to join the big game hunt. (R.7).

On August 30, 2011, Barnes contacted Kara Crawley, a journalist for the Boerum Times, to write an article for the upcoming elephant show. (R.2, R.9.) Barnes executed a standard release form at Crawley’s request granting her total control of her work product. (R.9). On September 15, 2011, Barnes toured the circus with Crawley and gave her unlimited access to the entire circus. (R.9). Crawley observed the animals train every day for about two weeks. (R.9).

During her time at the circus, Crawley met an employee who told her about uncorroborated information allegedly implicating Barnes in a conspiracy to kill his elephants and sell the ivory. (R.10). Based on this confidential source, Crawley wrote an article to expose Barnes alleged scheme. (R.10). The employee allowed Crawley to videotape their conversations for her own record. (R.10). The confidential informant demanded a pseudonym be used in the article and requested not to be identified as an employee at Big Top. (R.10). Crawley's exposé revealed the information she learned from the employee, and the article was published in the Boerum Times on December 1, 2011. (R.11).

On October 2, 2011, Barnes contacted Weapons Unlimited to purchase firearms for the hunt. (R.2). Jason Lamberti, an undercover agent from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, informed Barnes he could do the transaction off the books. (R.2). Lamberti agreed to provide Barnes with three fully automatic AK-47s for \$500 each with delivery on December 5, 2011. (R.2). Based on this information, the FBI obtained a warrant to intercept and record Barnes' telephone calls. (R.2). Barnes was under FBI surveillance from October 4, 2011 until December 1, 2011. (R.2) On October 6, 2011, Barnes contacted Alan Klestadt at Copters Corporation and arranged to rent a helicopter for December 15, 2011. (R.3).

FBI Agent Narvel Blackstock monitored about a dozen conversations between Barnes, Reardon, and Anderson from October 4, 2011 until December 1, 2011, when Barnes was arrested. (R. 12-13). Blackstock listened to the conversations contemporaneously and transcribed them afterwards. (R. 13). The government alleges that Barnes, Reardon, and Anderson used "code words" during these monitored conversations. (R. 13). Blackstock never deciphered or translated these alleged "code words" because he died from unrelated events on December 14, 2011. (R. 23). Agent Thomas Simandy replaced Blackstock in the government's

investigation on December 15, 2011. (R. 23). In his five years' experience with the FBI, Simandy has been assigned to about fifty drug related cases but has never investigated endangered species poaching or crimes against animal enterprises. (R.14).

Simandy's investigation consisted of reading the transcripts Blackstock had prepared, as well as interviewing Agent Lamberti and Alan Klestadt from Copters Corporation. (R. 13). However, Simandy never listened to, nor participated in the conversations, either contemporaneously or after the fact. (R. 13-14). Simandy made his conclusions about the alleged "code words" through the totality of his investigation and putting the words in context based on when the conversations took place in relation to supposed actions taken by Barnes, Anderson, and Reardon. (R. 13-14). Simandy concluded that mentions of "blood diamonds" referred to ivory elephant tusks, "Charlie tango" referred to the helicopter Barnes had arranged, and "black cat" referred to fully automatic AK-47s purchased from Agent Lamberti. (R. 13).

Unbeknownst to Barnes, Anderson became mentally ill and fabricated a story about hunting Barnes' elephants. (R.7). In November of 2011, Anderson explained his fabricated story about the alleged elephant hunt to James Reardon. (R.7). Due to his mental illness, Anderson became paranoid about Reardon's involvement in the hunt. (R.7). Phone calls between Barnes and Anderson reveal Anderson's paranoia with statements like: "I made a mistake with Reardon," "Let's get rid of him," "We need him out of the picture," and "I'm gonna take care of him." (R. 18-19). In response, Barnes explained he spoke to Reardon on the phone and "smoothed things over," Barnes warned Anderson not to do anything because he was "worried over nothing." (R. 18-19). Barnes made it clear he did not want anything to do with Anderson's plan to silence Reardon by saying "I don't want anything to do with this." (R.19).

On November 28, 2011, Reardon called his friend, Daniel Best and allegedly exposed the conspiracy. (R. 8, 24). On November 29, 2011, due to his paranoia Anderson murdered Reardon. (R. 7). Best witnessed Anderson fleeing Reardon's apartment and he discovered Reardon's body. (R. 7). Later that night Anderson was apprehended by police and confessed to the murder because he feared Reardon would reveal the alleged elephant hunt. (R. 8). Barnes was not charged with a crime in connection to Reardon's murder.

### **Procedural History**

On December 4, 2011, a Grand Jury indicted Respondent William Barnes and charged him with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. §§ 922 (a)(1)(a), and 371. (R. 3). Barnes was charged with two counts of conspiracy to commit a crime of violence against an animal enterprise (Boreum City Circus and Flying Feats Circus) under 18 U.S.C. §§ 43 and 371 and one count of conspiracy to commit unlawful takings of (Asian elephants) under the Endangered Species Act, 16 U.S.C. § 1538. (R. 3, 4).

On May 1, 2012, the district court heard evidence and argument for three pre-trial motions. First, the District Court found James Reardon's hearsay statement inadmissible under the forfeiture-by-wrongdoing doctrine and Federal Rule 804 (b)(6). (R. 17). Second, the District Court granted Crawley's motion to quash the government's subpoena to compel the identity of her confidential source and recognized an absolute journalist's privilege. (R. 17). Third, the District Court precluded Agent Simandy's lay testimony Federal Rule of Evidence 701. (R. 17).

The government appealed the District Court's rulings on all three issues. An interlocutory appeal was granted pursuant to 18 U.S.C. § § 3731 and 3731-A. On July 12, 2012 the Court of Appeals for the Fourteenth Circuit affirmed the District Court's ruling on all three issues. (R.28-30). For the following the Fourteenth Circuit held: (1) James Reardon's hearsay statement is

inadmissible according to *Giles*, (2) Journalist Kara Crawley's claim of privilege is absolute; and (3) Agent Simandy's lay testimony is inadmissible pursuant to Federal Rule of Evidence 701. (R. 29-32).

The government subsequently petitioned for writ of certiorari by this Court and this Court granted the petition for writ of certiorari on October 1, 2012. (R. 36).

### **SUMMARY OF THE ARGUMENT**

For the reasons that follow, William Barnes, respondent in this case, respectfully requests this Court affirm the decision of the Court of Appeals for the Fourteenth Circuit. The lower courts properly excluded Reardon's hearsay statements, granted Crawley's motion to quash the government's subpoena, and excluded Agent Simandy's lay opinion testimony.

First, Reardon's unfronted hearsay statements are inadmissible. The District Court properly determined Barnes had not engaged in conduct designed to render Reardon unavailable. The ruling must be affirmed because Barnes did not forfeit his Sixth Amendment confrontation right or his right to assert a hearsay objection to Best's testimony at trial regarding Reardon's statements exposing Barnes' role in the alleged conspiracy.

A broad interpretation of *Pinkerton* conspiratorial liability is inconsistent with the forfeiture by wrongdoing doctrine and Fed. R. Evid 804(b)(6). The government's mere reasonable foreseeability argument based on *Pinkerton* fails because forfeiture by wrongdoing is a historic common law doctrine grounded in equity and public policy. The government concedes that Barnes had no role in the planning or of the murder. Application of the rule would offend notions of fair play and substantial justice to conclude otherwise would unfairly punish Barnes for the consequences for Reardon's murder. Barnes did not forfeit his confrontation and hearsay

objections because he did not intend or acquiesce in a wrongful act designed to procure Reardon's unavailability.

Second, Crawley's motion to quash the government's subpoena to compel her source was properly granted. However, the Fourteenth Circuit erred in granting an absolute privilege. In light of reason and experience this Court, under the authority of Fed. R. Evid. 501, must recognize a First Amendment based qualified journalist's privilege. Due to the majority of Federal Circuits' interpretation of *Branzburg* and the fact that 40 states have shield laws.

A qualified journalist's privilege can be overcome if the following three criteria are met: (1) the confidential information is relevant, (2) there is a compelling interest in justice to obtain the information, and (3) the information is not available through alternative means. Here, the government failed to satisfy the three pronged balancing test, and therefore cannot overcome Crawley's qualified journalist's privilege. The motion to quash the subpoena must be upheld, because the government failed to meet all three elements needed to overcome Crawley's qualified privilege. Testimonial privileges are narrowly construed, so therefore a qualified journalist's privilege is consistent with this requirement.

Third, Agent Simandy's lay opinion testimony regarding alleged code words was properly found inadmissible and excluded by the district court, and affirmed as inadmissible as a matter of law by the Fourteenth Circuit Court of Appeals. Agent Simandy's testimony fails to meet the criteria of Federal Rule of Evidence 701, which requires that the testimony is rationally based on the perception of the witness, is helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and the that testimony is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Additionally, a witness must lay a foundation that establishes his personal knowledge of the facts that form the basis of his opinion

or inference before he may testify to either opinion or inference, pursuant to Federal Rule of Evidence 602.

Agent Simandy's lay opinion testimony fails to meet any of the required criteria as set forth above because his conclusions concerning alleged code words came about only through his review of Agent Blackstock's transcripts, interviews, and his experience as an FBI agent. Agent Simandy did not listen to the alleged conversations or hear the alleged code words contemporaneously, or otherwise. Agent Simandy's knowledge was purely second hand.

Agent Simandy was brought in to investigate Barnes after the fact. In this regard, he never perceived any of the conversations for himself. Instead, Agent Simandy reviewed the work of Blackstock, in effect, reading the work of another, and doing follow-up work to contextualize alleged code words based on his prior experience and training. Agent Simandy's lay opinion testimony is not rationally based on his own perceptions. Instead, it relies on inferences and conclusions that should be left to the jury, and it is based on Agent Simandy's own specialized knowledge, training, and experience in violation of Fed. R. Evid 701.

## **ARGUMENT**

**I. THE DISTRICT COURT PROPERLY EXCLUDED UNCONFRONTED HEARSAY STATEMENTS PURSUANT TO FED. R. EVID. 804(B)(6) AND THE DOCTRINE OF FORFEITURE BY WRONGDOING; BECAUSE THE DEFENDANT DID NOT ENGAGE OR ACQUIESCE IN CONDUCT DESIGNED TO PROCURE THE WITNESS'S UNAVAILABILITY**

The Federal Rules of Evidence contain an exception to the hearsay rule when the declarant is unavailable by allowing a “Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability.” Fed. R. Evid. 804(b)(6). The text of the rule follows: “A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant’s unavailability as a witness, and did so intending that result.” Fed. R. Evid. 804(b)(6).

### **A. Standard of Review**

This Court reviews *de novo* whether an individual’s right to confrontation has been violated under the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36 (2004). This Court reviews the admissibility of hearsay statements under Fed. R. Evid. 804(b)(6) for an abuse of discretion at trial. *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001).

### **B. James Reardon’s Unconfronted Testimonial Hearsay Statements Were Properly Excluded.**

William Barnes did not forfeit his confrontation right or hearsay objection. The Confrontation Clause of the Sixth Amendment grants “the right ... to be confronted with the witnesses against him” at trial. U.S. Const. amend. VI. The Amendment anticipates that a witness who makes testimonial statements admitted against a defendant will customarily be available at trial for cross-examination; if the witness is unavailable, his prior testimony will be admissible only if the defendant had an earlier opportunity to cross-examine him. U.S. Const.

amend. VI; *Crawford* 541 U.S. at 68. The right to cross-examination is the quintessential common law privilege, it allows a criminal defendant to challenge adverse testimony and establish his or her innocence. *Id.*

The Confrontation Clause prohibits unfronted testimonial evidence. U.S. Const. amend. VI; *Crawford* 541 U.S. at 54. This Court explained in *Crawford*, testimonial evidence is defined to include at a minimum: “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 68. Testimonial evidence of a murder victim is often the most crucial and valuable piece of evidence to criminal prosecutions when there is scarce proof against the accused. *Davis v. Washington*, 547 U.S. 833 (2008).

James Reardon allegedly exposed the conspiracy to his friend Daniel Best. (R.2). Due to the testimonial nature of Reardon’s hearsay statements, the Confrontation Clause bars its admission without the opportunity to cross-examine the hearsay declarant. U.S. Const. amend. VI; 541 U.S. at 68. Here, the district court excluded Best’s testimony and the Circuit Court properly affirmed the exclusion of the inadmissible hearsay. (R.7, R.29).

The right to cross-examine an adverse witness is not absolute, “The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.... [I]f he voluntarily keeps the witnesses away, he cannot insist on his [confrontation] privilege.” U.S. Const. amend. VI; *Reynolds v. United States*, 98 U.S. 145, 158 (1878). The forfeiture by wrongdoing doctrine was first described in detail by this Court in *Reynolds*, a prosecution for bigamy. *Id.* Prior testimonial hearsay was admitted over the defendant’s objection at trial because he procured his second wife’s unavailability to prevent her from testifying against him. *Id.* at 154. The *Reynolds* Court found the defendant’s wrongful procurement of his second wife’s unavailability sufficient to forfeit his confrontation right and hearsay objection. *Id.* at 158.

The Court explained the law favors live testimony over hearsay and a defendant cannot take advantage of the law's preference and profit from it. *Id.* The *Reynolds* Court utilized the term procurement; which intimates the defendant must commit a wrongful act *vis-a-vis* a witness, neither general wrongful conduct nor reasonable foreseeability satisfies this requirement. *Reynolds*, 98 U.S. at 154; *Giles v. California*. 554 U.S. 353 (2008).

According to *Giles*, a defendant effectively forfeits his or her right to confront a hearsay declarant if he or she “designed conduct” intended to procure the declarant’s unavailability. *Giles*, 554 U.S. at 359. The “designed conduct” standard expressed in *Giles* does not encompass blanket *Pinkerton* conspiratorial liability. *Id.* This Court in *Crawford* and its progeny consistently approved the notion that a prophylactic rule like forfeiture by wrongdoing should only be applied in narrow circumstances. *See Crawford; Davis; Giles supra.*

The doctrine of forfeiture by wrongdoing is codified as an exception to the hearsay rule. *See Davis*, 547 U.S. at 836; Fed. R. Evid. 804(b)(6). The right to cross-examine is essential in the adversary system and increases “the ability of courts to protect the integrity of their proceedings.” 547 U.S. at 834. Reardon’s statements to Best allegedly exposing the conspiracy are testimonial in nature and are inadmissible hearsay under the Confrontation Clause. U.S. Const. amend. VI. William Barnes did not forfeit his confrontation rights therefore, the district Court properly excluded James Reardon’s testimonial hearsay statements. (R.16).

Clarifying the petitioner’s question on appeal, this Court must ask whether from the plain meaning of Fed. R. Evid. 804(b)(6) and confrontation jurisprudence is *Pinkerton* analysis applicable to the doctrine of forfeiture by wrongdoing?

**C. As a Matter of Law *Pinkerton* Conspiratorial Liability is Inapplicable to Forfeiture by Wrongdoing Analysis Codified by Fed. R. Evid. 804(b)(6).**

The district court employed the proper standard of proof (a preponderance of the evidence) and determined Barnes had not engaged in wrongdoing to procure Reardon's unavailability. (R.16.) Because Anderson confessed to murdering Reardon on his own the government could not sustain its burden to prove it was more likely than not Barnes procured Reardon's unavailability. *Id.* The district Court properly made a determination no wrongdoing occurred due to lack of evidence suggesting otherwise. (R.15,16).

There is no requirement the hearsay sought to be admitted into evidence be reliable or credible. *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997) (no error in allowing trial judge's partial reliance otherwise inadmissible hearsay during a preliminary forfeiture determination); Fed R. Evid 104(a); *United States v. Gray*, 405 F.3d 227 (4th Cir.2005). Given the unreliable nature of hearsay Courts must be reluctant deprive a defendant the right to cross examination while admitting often damaging testimonial hearsay. *Id.*

Similarly proof of a conspiracy is accomplished by bootstrapping, as this Court in *Giles* noted; a "judge may determine the existence of a conspiracy in order to make incriminating statements of co-conspirators admissible against the defendant under Federal Rule of Evidence 801(d)(2) (E)." *Giles* 554 U.S. at 406 n. 6 (2008); *see Huddleston v. United States*, 485 U.S. 681, 687 n. 5 (1988) (a preliminary ruling on the ultimate issue is consistent with due process rights); *Bourjaily v. United States*, 483 U.S. 171, 177-79 (1987) (explaining a court must make a preliminary determination on the ultimate issue in a conspiracy case before admitting coconspirator statements into evidence); *see also* Fed. R. Evid. 801(d)(2).

During the course of a conspiracy all coconspirators can be held responsible for substantive crimes of coconspirators based on agency principles; only if the crimes were reasonably foreseeable to the accused and committed in furtherance of and within the scope of the conspiracy. *Pinkerton v. United States*, 363 U.S. 640 (1946) (held even though the defendant was incarcerated at the time the crime was committed he was still substantively liable for all of his coconspirator's crimes because they were reasonably foreseeable to the defendant and committed in furtherance of and within the scope of the conspiracy).

The government is urging a departure from the established doctrine of forfeiture by wrongdoing by asking this Court to apply Fed. R. Evid. 804 (b)(6) based solely on *Pinkerton* liability and nothing more. (R.8); *compare with Proffitt v. State*, 191 P.3d 963, 967 (Wyo. 2008).

The government proffers a broad rule that allows for the revocation of a defendant's fundamental trial right based solely on *Pinkerton* vicarious liability. The rule the government seeks to advance is inconsistent with Fed R. Evid 804(b)(6) and inapplicable to the facts of the case at bar. The government has failed to prove Barnes was involved in, or responsible for procuring Reardon's unavailability through knowledge, complicity, planning or in any other way, or that Barnes acted with the intent of procuring Reardon's unavailability as an actual or potential witness. (R.16-19). Petitioner asks this Court for a wholesale change to Fed R. Evid. 804(b)(6) and confrontation jurisprudence via *Pinkerton*. (R.8); 541 U.S. at 68; 554 U.S. at 359.

Furthermore because the standard of proof is so low, the risk of unfair trial based merely on *Pinkerton* is inconsistent with trial by jury. *Giles*, 554 U.S. at 359; *Huddleston*, 485 U.S. at 681. The government's proffered rule works to undermine the fact finding process by allowing unreliable hearsay statements to be used against a defendant solely on the basis that he could

have reasonably foreseen that his coconspirator would have engaged in conduct to render the witness unavailable. (R.8).

Reasonable foreseeability is a low threshold to meet and certainly not interchangeable with the ‘design conduct’ standard announced in *Giles*. 554 U.S. at 359. The government’s rule is too broad. Future defendants will have less power to prove their innocence in a conspiracy if one conspirator acting alone (like Anderson) engages in conduct designed to render the witness unavailable; even though the party who the statement is sought to be entered against did not engage in the conduct procuring the witness’s unavailability.

The government’s proffered rule is inconsistent with Fed. R. Evid. 804(b)(6) due to the overemphasis of *Pinkerton* conspiratorial liability with a corresponding underemphasis in policies, reasons and principles of the forfeiture by wrongdoing doctrine. Similarly in *Giles* this Court held California’s version of the rule was unconstitutional because it violated Giles’ Sixth Amendment right to confrontation and was inconsistent with the forfeiture by wrongdoing doctrine because of an absence of precedent following a variation of the established rule. *Giles*, 554 U.S. at 377.

The proffered rule is unworkable within the prophylactic framework of the forfeiture by wrongdoing doctrine. *Id.* Clearly, mere reasonable foreseeability is untenably inconsistent with an individual engaging or acquiescing in conduct designed to prevent the witness from testifying. The government’s position fails to consider the practical ramifications of the proffered change to a defendant’s right to confront a hearsay declarant based solely on the actions of a coconspirator. (R.27-28).

**i. There is no evidence to suggest Barnes engaged in conduct designed to procure Reardon's unavailability.**

The government alleges Reardon's murder was committed in furtherance of the conspiracy and reasonably foreseeable to Barnes. (R.8). However, the government contends the FBI recorded hours of conversations between the conspirators but has only sought to use two ambiguous conversations to prove reasonable foreseeability. (R.6, R.18, R.19). If the murder of James Reardon was something that was reasonably foreseeably to Barnes, the government should be able to produce more evidence than it did to prove it. (R.18, R.19). The record is barren of any evidence unequivocally linking Barnes to Reardon's murder because it was a distinct and separate crime. Furthermore Barnes was never substantively charged with Reardon's murder. (R.1). Barnes cannot be found liable for the murder of James Reardon due to Anderson's confession accepting full responsibility. (R.8). Anderson's was unable to perceive reality due to mental illness when he acted alone to procure Reardon's unavailability. (R.8).

The government has failed to meet its burden and looks to this Court to admit unreliable hearsay evidence based upon *Pinkerton* and precedents inconsistent with *Giles*. See *United States v. Cherry*, 217 F.3d 811, 815-21 (10th Cir. 2000) (held hearsay statements are admissible under *Pinkerton* liability only in certain cases due to the limits of Fed. R. Evid 804(b)(6) and the common law doctrine of forfeiture by wrongdoing). The government erroneously relies on *Cherry* (a pre *Crawford/Giles* case) as its leading authority of its *Pinkerton* argument; this Court should find their argument unpersuasive. (R.32). However, even in a light most favorable to the petitioner, application of the *Cherry* rule allowing *Pinkerton* coconspirator liability would still fail here. There is no evidence suggesting Reardon's murder was reasonably foreseeable Barnes or was committed in furtherance of the conspiracy. (R.27-28).

**ii. Public Policy interests underlying the doctrine of forfeiture by wrongdoing are best served by narrowly construing the application of the rule.**

The essence of the forfeiture by wrongdoing doctrine is to prevent criminals to profit from their own misdeeds. The need for a prophylactic rule like Fed. R. Evid. 804(b)(6) is clear; its purpose is “to deal with abhorrent behavior . . . which strikes at the heart of the system of justice itself.” *United States v. Mastrangelo*, 693 F.2d 269, 272–273 (2nd Cir. 1982) (explaining public policy of the rule is aimed at preventing and deterring wrongful conduct designed at frustrating the judicial process.); *see also State v. Byrd*, 967 A.2d 285,295 (N.J. 2009); Fed. R. Evid. 804(b)(6) Advisory Committee’s Notes 1997. The forfeiture by wrongdoing doctrine is premised on strong public policy considerations, concurrently there are strong public policies in favor of the exclusion of unreliable hearsay. Best’s testimony would consist of otherwise inadmissible unreliable hearsay.

Forfeiture of the right to cross-examine is a logical result of the equitable principles that no person should benefit from his own wrongful acts. *Reynolds supra*. If there is no proof the defendant engaged in conduct designed to procure the witness’s unavailability the rule must not be applied. *Giles supra*; Fed. R. Evid. 804(b)(6). The government’s proffered rule does not sit well with the public policy and equitable principles underlying the doctrine and seeks to subvert the Confrontation Clause. U.S. Const. amend. VI; *Giles supra*; (R.8). Moreover, the government has not proffered evidence that Barnes was directly involved in or took any affirmative steps to procure Reardon’s silence; therefore the hearsay statements are inadmissible. (R.8).

**II. THE DISTRICT COURT PROPERLY GRANTED CRAWLEY’S MOTION TO QUASH THE SUBPOENA BECAUSE A QUALIFIED JOURNALIST’S PRIVILEGE PROTECTS HER FROM DIVULGING THE SOURCE OF HER CONFIDENTIAL INFORMATION, AND THE GOVERNMENT FAILED TO OVERCOME THE PRIVILEGE.**

Federal Rule of Evidence 501 explains the “common law - as interpreted by United States courts in the light of reason and experience - governs a claim of privilege.” Fed. R. Evid. 501. The journalist’s privilege is designed to protect the relationship between a journalist and their informants. Rule 501 is to be applied in “light of reason and experience,” and therefore provides courts with flexibility and application on a case-by-case basis. *Branzburg v. Hayes*, 408 U.S. 710 (Powell J., concurring). The rule also allows privileges to continue to be developed in the courts.

Freedom of the press is a long-standing principle in this country. The First Amendment states, “Congress shall make no law.... abridging the freedom of speech, or of the press” clearly protecting journalists. U.S. Const. amend. I. Tension arises when this newsgathering interest conflicts with the deep-rooted principle that “the public has a right to every man’s evidence, except for those persons protected by a constitutional, common-law, or statutory privilege.” *Branzburg* 408 U.S. at 688. Therefore, Rule 501 should be narrowly construed as a qualified journalist’s privilege. When deciding whether the privilege should be upheld, this Court should apply a balancing test and only when the movant seeking to overcome the privilege meets all three requirements should the privilege give way.

**A. Standard of Review.**

This Court reviews legal rulings of the trial court *de novo*, but will defer to an abuse of discretion standard when balancing the relevant factors. *Lee v. Dep’t of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005).

**B. Crawley Must Not be Compelled to Reveal Her Confidential Source Because She is Protected Under a Qualified Journalist's Privilege.**

This Court should recognize the journalist's privilege and uphold the motion to quash Crawley's subpoena. Because of the rise in the number of Circuits and State courts recognize a qualified journalist's privilege, this Court must recognize the importance of the journalist's privilege. This Court must balance the interests of having a free press and the obligation of all citizens required to give relevant testimony. *Branzburg*, 408 U.S. 665 at 710 (Justice Powell, concurring). A qualified privilege allows the flexibility for this balance.

This Court's decision in *Branzburg* showed an unclear answer as to whether a journalist's privilege exists and whether that privilege is absolute or qualified. 408 U.S. 665. The majority held that journalists do not have a right to refuse to testify, unless an investigation was issued in bad faith. *Id.* at 707. However, this Court recognized the danger that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Journalists only need to be concerned about grand jury subpoenas when they are "implicated in a crime or possess information relevant to the grand jury's task." *Id.* at 691. Although the majority held that there was no journalistic privilege, it is clear that they found limitations in that finding.

The *Jaffee* Court found it appropriate to recognize the psychotherapist privilege because all 50 states and the District of Columbia had enacted the privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996). When *Branzburg* was decided forty years ago, only 17 states had any type of shield law, and today 40 states have enacted shield laws to protect journalists. *See, e.g.*, N.J. Stat. Ann. § 2A:84A-21 (West); Cal. Evid. Code § 1070 (West). Today, most of the circuit and state courts have adopted a balancing test for a qualified journalist's privilege. Even in *Jaffee v. Redmond*, where this Court first recognized the existence of a privilege under Rule 501, it was determined that the psychotherapist-patient privilege is not an absolute privilege. 518 U.S. 1 (1996).

The *Jaffee* Court noted that there are limitations to the privilege, and application of the privilege should be applied on a case-by-case basis. *Id.* at 1927. Likewise, this Court should view a journalist's privilege as a qualified privilege with limitations similar to the reasoning in *Jaffee*. The majority of Circuits have already recognized a qualified privilege. *See, e.g., Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *In re Application to Quash Subpoena to Nat. Broad. Co., Inc.*, 79 F.3d 346 (2d Cir. 1996); *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). Post-*Branzburg* these Courts have recognized a qualified privilege under the First Amendment. Although *Branzburg* held there was no journalist's privilege, the facts of this case must be viewed independently. Therefore, this Court should affirm Crawley's motion to quash the subpoena, but find that the journalist's privilege is qualified *not absolute*. (emphasis added).

**C. The Government Failed to Meet its Burden Under the Balancing Test to Overcome Crawley's Qualified Privilege.**

There is a heavy burden placed on the government when First Amendment rights are compromised. *Branzburg*, 408 U.S. 665 at 739. When compelling a journalist to testify, the movant has the burden to prove that: (1) there is probable cause that the journalist has relevant information, (2) there is a compelling interest in obtaining the information, and (3) the information cannot be obtained by alternative means. *Id.* at 743 (Stewart J., dissenting); *see also Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).

In his concurrence, Justice Powell described the need for a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." *Id.* at 710. Confidential informants are essential for the newsgathering process. *Id.* at 729. In addition, confidentiality is often times a "prerequisite to a productive relationship." *Id.* When faced with a motion for a subpoena, the Court must balance the constitutional and societal interests on a case-by-case basis. *Id.* at 710.

First, the government did not show sufficient cause Crawley has relevant information. Journalists must not be compelled to disclose “information that is bearing only a remote and tenuous relationship to the subject of the investigation.” *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Crawley’s confidential source gave her information about a conversation he or she overheard. (R.10). Evidence is relevant, if the information has any tendency to make a fact more or less probable without the evidence. Fed. R. Evid. 401.

The district court properly concluded that Crawley’s confidential information would be “purely cumulative” and therefore inadmissible. (R.17). The government argues the information is not confidential because the informant was video recorded. (R.11). However, the government’s argument is flawed, because the employee appeared on camera for the sole purpose of Crawley’s notes. (R.10). The employee even asked Crawley to use a pseudonym to protect his or her identity and to keep their conversation in confidence. (R.12). Because the source requested confidentiality, the video is protected. *See Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976) (video tape and reporter notes disclosed because the sources did not request confidentiality).

Even if this Court views the videotape as a non-confidential work product, the privilege still applies because the government has not proved this information is necessary. *See In re Application to Quash Subpoena to Nat. Broad. Co., Inc.*, 79 F.3d 346 (2d Cir. 1996) (movant failed to establish that out-take videos were critical or necessary). It is essential for journalists to keep their confidential sources and information protected. Not protecting journalists and their informants would “substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege.” *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

Second, the government has not proven a compelling interest in obtaining the identity of the source of Crawley's information. There must be to be a clear and compelling interest that cannot be met through alternative means. *Caldwell v. United States*, 434 F.2d 1081, 1086 (9th Cir. 1970). In order to compel a journalist to disclose privileged information, the sought after information must go to the "heart of the matter" of the case. *United States v. Homer*, 545 F.2d 864, 981 (3d Cir. 1976). Here, Crawley's source is only a tangential piece of evidence, and the government has failed to show that this information will lead to a conviction. Knowing the source would only be cumulative evidence in this case, and the government has not proven otherwise.

Finally, the government has not attempted to obtain the information by alternative means. Even if the information sought is viewed as relevant and compelling, the movant must show that they have exhausted all other sources of obtaining the information. *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981). There is not a scintilla of evidence to show the government attempted to gain the information through alternative means. In *Zerilli*, the plaintiff's motion to compel a journalist to testify was denied because the plaintiff did not try to seek the information through the employees who likely spoke to the journalist. *Id.* Similarly, the government has not tried to gain the information from Big Top employees who likely spoke to Crawley. The court in *Zerilli* reasoned that a movant cannot overcome this third prong simply because alternative means would be "time-consuming, costly, and unproductive." *Id.* at 715. The government has not shown a modicum of effort to seek alternative access to the information other than subpoenaing Crawley, it could have interviewed Big Top employees. (R.10).

Crawley's exposé claimed her source was a former employee at Big Top, and the government has not made an effort to find the ex-employee because of the ease of seeking out a

journalist. See *Clyburn v. News World Communications, Inc.* 903 F.2d 29 (D.C. Cir. 1990) (plaintiff failed to follow leads in order to obtain the confidential information from alternative sources); (R.10). In *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), the Court found the alternative means requirement had been met because the plaintiff deposed two likely sources, but both sources had denied having given the journalist any information. In contrast, here the government did not attempt to depose any likely sources, and therefore Crawley should not be compelled to testify.

Here, the government failed to meet the three prongs of the balancing test and therefore, the court properly quashed the subpoena. The government did not make a reasonable effort to obtain the information from other sources, Crawley is not the only available source, and the confidential information is not essential to this case. Forcing a journalist to testify is viewed as “a last resort after pursuit of other opportunities has failed.” *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974). When balancing opposing interests, it must be assured that “the judgment does not constitute a forbidden intrusion on the field of free expression.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

There must be a balance between freedom of the press and the obligation of all citizens to provide relevant testimony. *Branzburg* at 710. Journalists must not be compelled to testify because it would harm their news-gathering abilities and future relationships with sources of newsworthy information. U.S. Const. amend. I. A journalist’s testimonial privilege must be qualified, because privileges are narrowly construed to protect the interests of justice. Crawley’s motion to quash the subpoena must be granted, however her testimonial privilege is qualified, rather than absolute as the lower courts’ erroneously held.

**III. THE DISTRICT COURT PROPERLY EXCLUDED AGENT SIMANDY’S LAY OPINION TESTIMONY REGARDING ALLEGED CODE WORDS BECAUSE SIMANDY LACKED FIRST-HAND KNOWLEDGE OF THE ALLEGED WORDS’ MEANING, FAILING TO MEET THE CRITERIA OF FEDERAL RULE OF EVIDENCE 701.**

A lay witness may present opinion testimony only if that testimony meets all three of the criteria provided under Federal Rule of Evidence 701: (a) the testimony is “rationally based on the perception of the witness,” (b) the testimony is “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue,” and (c) the testimony is “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. Pursuant to Federal Rule of Evidence 602, a witness must lay a foundation that establishes his personal knowledge of the facts that form the basis of his opinion or inference before he may testify to either opinion or inference. Fed. R. Evid. 602.

Agent Simandy’s lay opinion testimony fails to meet any of the required criteria as set forth above because his conclusions concerning alleged code words came about only through his review of Agent Blackstock’s transcripts, interviews, and his experience as an FBI agent. (R. 13-14). This Court must affirm the Fourteenth Circuit Court’s holding and exclude Agent Simandy’s lay opinion testimony because it is not rationally based on his own perceptions, it is relies on inferences and makes conclusions that should be left to the jury, and it is based on Agent Simandy’s own specialized knowledge, training, and experience, all in violation of Fed. R. Evid. 701.

**A. Standard of Review.**

A district court's decision to admit or exclude lay opinion testimony is reviewed for abuse of discretion. *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001). Reviewing courts give deference to the district court’s decision concerning the prejudicial effect and the probative value

of evidence. *United States v. Davis*, 154 F.3d 772 (8th Cir. 1998). Questions of the reliability and consistency of witness testimony are within the province of the jury. *United States v. Aguayo Delgado*, 220 F.3d 926 (8th Cir. 2000).

**B. Agent Simandy Cannot Testify to Alleged Code Words Because Lay Witness Testimony Must Be Rationally Based on the Witness's Perceptions Rather Than Conclusions Drawn From The Totality of His Investigation.**

Rule 701 provides lay opinion must be rationally based upon the perception of the witness. Fed. R. Evid. 701. A lay witness “may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” *Peoples*, 250 F.3d at 641. Testimony of witnesses is admissible if predicated on concrete facts within their own observation and recollection and perceived from their own senses. *Randolph v. Collectramatic, Inc.*, 590 F.2d 844 (10th Cir. 1979). Rule 701 does not prohibit all inference drawing by witnesses, but the inferences drawn must be connected to perception, based on what the witness saw or heard. *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000).

Courts have held that testimony based on the observations and investigations of others does not allow for conclusions rationally based on the witness's own perception of events. *See, e.g., United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008) (clear abuse of discretion by admitting an agent's testimony, which amounted to reading in portions of another agent's report); *DIJO, Inc. v. Hilton Hotels Corp.*, 351 F.3d 679 (5th Cir. 2003) (abuse of discretion in permitting a financial consultant to testify as a lay witness when his opinion was not based upon his own independent knowledge or observations).

In *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005), the Court explained a law enforcement agent may testify to his opinions concerning his personal perception of subjective factors concerning transactions that he participated in. *Id.* at 211. The *Garcia* Court explained: “[b]y allowing the agent to state his opinion as to a person’s role in such circumstances, Rule 701 affords the jury an insight into an event that was uniquely available to an eyewitness.” *Id.* at 211-12. However, the Court held when an agent relies on the entirety or totality of information gathered in an investigation to offer a lay opinion, he is not presenting the jury with the unique insights of an eyewitness’s personal perceptions. *Id.* To present such investigatory results reviewed by the agent would replace the function of the jury to reach its own conclusions. *Id.*

The Court in *Garcia* found the agent’s opinion based on the totality of information gathered by various persons in the course of an investigation was not admissible before a jury. *Id.* This Court should also reject Agent Simandy’s opinion testimony. Agent Simandy was not a participant in the conversations concerning alleged code words, nor did he listen to the audio recordings. (R. 14). Agent Simandy instead based his interpretations of the conversations on reviewing pre-collected and transcribed information and conducting after-the-fact interviews with some of the participants of those conversations. (R. 14). Agent Simandy’s opinion, like the agent in *Garcia*, “was not limited to his personal perceptions but drew on the total[ity of] information developed by all the officials who participated in the investigation,” and making his conclusions by “placing the quoted language in context.” *Garcia*, 413 F.3d at 212. These conclusions are not rationally based on Agent Simandy’s perception of events, as required by Rule 701(a), and should therefore be excluded.

Agent Simandy’s opinion testimony is distinguishable from similar cases concerning alleged code words in which opinion testimony has been allowed. *See, e.g., United States v. Parsee*, 178

F.3d 374, 379 (5th Cir.1999) (witness was a participant in the conversation); *United States v. Saulter*, 60 F.3d 270, 276 (7th Cir.1995) (witness had first-hand knowledge of the facts being related); *United States v. Awan*, 966 F.2d 1415 (11th Cir. 1992) (abuse of discretion in admitting lay opinion testimony from undercover agent as to his perception of the meaning of comments contained in tape recorded conversations in which he participated). Each of these cases involved witnesses who were participants in the conversations to which they gave subsequently opinion testimony. Agent Simandy, however, was never present in the conversations to which he would testify, nor did he listen to the wiretap audio contemporaneously or at all. (R. 14).

Additionally, Agent Simandy's investigation is distinguishable from the facts of *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011), upon which the government relied on in pretrial motions. (R. 15). In *Jayyousi*, the agent providing opinion testimony based his interpretations of the intercepted code words on an investigation that spanned over five years. *Id.* at 1104. This agent read thousands of wiretap summaries, hundreds of verbatim transcripts, faxes, publications, speeches, and he listened to the intercepted calls in English and Arabic. *Id.* at 1103.

Agent Simandy, however, conducted a much shorter investigation which included reviewing only about a dozen conversations and interviewing two participants to the conversations. (R. 13). Agent Simandy and the agent in *Jayyousi* are only similar in that neither agent was a participant in the conversations to which they wish to give opinion testimony. Neither agent had personal knowledge about the underlying facts to which they would testify.

The Eleventh Circuit abused its discretion to admit the agent's testimony concerning alleged code words in *Jayyousi* because the agent involved never perceived the events as they transpired.

*Jayyousi*, 657 F.3d at 1103. This Court should reject the Eleventh Circuit’s conclusions and exclude Agent Simandy’s conclusions as not rationally based on his own perceptions, in violation of Rule 701, affirming the decision of the Fourteenth Circuit.

**C. Agent Simandy’s Lay Opinion Testimony Cannot Be a Substitute For the Jury’s Role as the Trier of Fact in Considering What Inferences to Draw From the Evidence Presented.**

Rule 701(b) requires lay opinion testimony to be helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue. Fed. R. Evid. 701. Lay opinion testimony will fail this requirement “when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion.” *Lynch v. City of Boston*, 180 F.3d 1, 17 (1st Cir. 1999). The purpose of the helpfulness requirement is to exclude testimony where the witness is “no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions which would merely tell the jury what result to reach.” *United States v. Meises*, 645 F.3d 5, 16 (1st Cir. 2011). Rule 701 calls for exclusion for lack of helpfulness where “attempts are made to introduce assertions which amount to little more than choosing up sides.” Fed. R. Evid. 701 advisory committee’s note (1972).

Opinion testimony is not properly received merely to tell the jury what result to reach, or usurp the fact-finding function of the jury. *Garcia*, 413 F.3d at 210-11. Jurors are not helped within the meaning of Rule 701 by opinion testimony that, in addition to telling them “what was in the evidence,” also told them “what inferences to draw from it.” *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004). There would be no need for the jury to review personally any evidence at all if such broad based opinion testimony were admissible under Rule 701. *Id.* Instead, the opinion witness could merely tell the jury what result to reach. *Garcia*, 413 F.3d at 214.

In *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011), the court held that a law enforcement agent's testimony was wrongly admitted because his testimony had no insight to offer jurors based on his personal knowledge. *Id.* at 16. The court also found that the testimony amounted to "argumentative interpretation" or "dressing up argument as evidence." *Id.* at 16-17. The court found that the agent's testimony could only have "replaced, rather than aided, the jury's assessment of the evidence" and was thus not admissible lay evidence. *Id.* at 17.

Agent Simandy's testimony regarding alleged code words would serve a similar function as the testimony that was held inadmissible by the *Meises* court. Agent Simandy's conclusions could be arrived at by the jury through the examination of the wiretaps that Agent Simandy read, and through the testimony of Agent Lamberti and Alan Klestadt on direct and cross-examination. This Court should reject Agent Simandy's opinion testimony because it would not be helpful to a clear understanding of the determination of a fact in issue, but rather would allow for the government to put on argument dressed up as evidence. Agent Simandy should not be permitted to tell the jury what inferences to draw from the evidence before it, or to accept his conclusions as true. To do so would be to usurp the jury's role as fact-finder. This Court should find the testimony inadmissible under Rule 701(b) and affirm the rulings of the courts below.

**D. Agent Simandy's Lay Opinion Testimony Cannot Be Based on Conclusions Drawn From His Own Specialized Knowledge and Experience, Which Would Fall Under the Scope of Federal Rule of Evidence 702.**

Agent Simandy's conclusions of the meanings of alleged code words are drawn from his specialized knowledge and investigatory experience gained as an agent with the FBI for the past five years and work on approximately 50 cases. Agent Simandy did not translate the alleged code words based on his perceptions of the conversations as they transpired, which violates Fed. R. Evid. 701(c) that requires such opinions *not* be drawn from "scientific, technical, or other

specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701; (emphasis added).

Here, the lower courts correctly excluded Agent Simandy’s testimony as lay opinion rather than allowing the government to execute what the Circuit Court of Appeals referred to as an “end run around the more exacting requirements for expert testimony.” (R. 31).

Under Rule 701, “[w]hat is essentially expert testimony ... may not be admitted under the guise of lay opinions. Such a substitution subverts the disclosure and discovery requirements of Federal Rules of Criminal Procedure 26 and 16 and the reliability requirements for expert testimony.” *Peoples*, 250 F.3d at 641; *see also* Fed. R. Evid. 701 advisory committee’s note to 2000 amendments. Lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning, which can be mastered only by specialists in the field. Fed. R. Evid. 701 advisory committee’s note to 2000 amendments.

In *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011), the Court found when an individual is testifying about the operations of a drug conspiracy because of knowledge of that drug conspiracy, that witness should be admitted as a lay witness. However, an individual testifying about the operations of a drug conspiracy based on previous experiences with other drug conspiracies should be admitted as an expert. *Id.* at 365. The court explained that “[w]e have drawn that line because knowledge derived from previous professional experience falls squarely ‘within the scope of Rule 702’ and thus by definition outside of Rule 701.” *Id.*

Law enforcement officers are often qualified as experts to interpret intercepted conversations using slang, street language, and the jargon of the illegal drug trade when Rule 701(c) would otherwise prohibit such opinion testimony. *See, e.g., United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (police officer gave expert testimony based on his specialized knowledge of narcotics code terminology); *United States v. Delpit*, 94 F.3d 1134, 1144 (8th Cir. 1996) (police

officer gave expert testimony interpreting slang and drug codes in connection with recorded telephone calls); *United States v. Earls*, 42 F.3d 1321, 1324–25 (10th Cir. 1994) (expert testimony was proper to show that defendants were speaking in code).

Agent Simandy’s specialized experience and training as an FBI agent is beyond that of any layman. This special training and expertise helps formulate Agent Simandy’s testimony, which would fall into the realm of expert testimony because it would involve “specialized explanation or interpretation that an untrained layman could not make if [investigating] the same acts or events.” *Peoples*, 250 F.3d at 639.

An untrained layman would not have the expertise to identify “Charlie Tango” as a helicopter, “blood diamonds” as elephant ivory tusks, or “black cat” as AK-47s through reviewing conversations intercepted by wiretaps. These conclusions required Agent Simandy’s expertise in FBI investigations, which Fed. R. Evid. 701(c) clearly prohibits. Without his considerable specialized training and experience in narcotics trafficking Agent Simandy would not have been able to decipher the alleged code words.

In a light most favorable to the government even if Agent Simandy could testify to the meaning of the alleged code words the government has usurped the role and function of the jury as the finder of fact. This too would be in violation of Rule 701(b) and should be prohibited. This Court should affirm the lower courts’ rulings and exclude Agent Simandy’s lay opinion testimony concerning alleged code words.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court AFFIRM the decision of United States Court of Appeals for the Fourteenth Circuit and hold: (1) James Reardon's unfronted hearsay statements are inadmissible because *Pinkerton* conspiratorial liability is inconsistent with the forfeiture by wrongdoing doctrine and Fed. R. Evid. 804(b)(6), (2), Kara Crawley does not have to divulge the identity of her confidential source because she is protected under a narrowly construed qualified journalist's privilege, and (3) Agent Simandy's lay opinion testimony inadmissible because it does not meet the requirements of Fed. R. Evid 701.