

No. 12 - 23

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

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES,

Respondent.

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

BRIEF FOR RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED

- I. Is *Pinkerton* conspiratorial liability inapplicable to the forfeiture by wrongdoing doctrine in Federal Rule of Evidence 804(b)(6) when there is no evidence that the defendant intended to procure the unavailability of the declarant, and the defendant could not have reasonably foreseen that his co-conspirator would murder the declarant in order to silence him?

- II. Is it proper to conclude that a journalist's privilege exists because of the need for a "robust" press and is an absolute privilege because holding otherwise would "eviscerate" the privilege?

- III. Is Agent Simandy's lay witness testimony inadmissible under Federal Rule of Evidence 701 when a he testified to alleged code words and phrases in conversations, when he neither participated in nor observed the conversations, but merely read transcripts and reviewed the investigatory work of other law-enforcement personnel?

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STATEMENT OF THE FACTS

William Barnes, the defendant, owned Big Top Circus and was co-owner of Boerum 4 Animals with Alfred Anderson. (R. at 1.) On July 10, 2011, Barnes was notified that Big Top had to raise \$500,000 by December 2011 or file for bankruptcy. (R. at 1.) A few days later, Barnes contacted two additional circuses inquiring into whether the circuses wanted to participate in the “greatest elephant show on earth.” (R. at 1-2.) These two circuses agreed to join Big Top for the show with the elephants arriving on December 2, 2011. (R. at 2.) On July 30, 2011, Barnes contacted Anderson and suggested that they hunt elephants on Barnes’s property and collect a profit from the ivory. (R. at 2.) Anderson agreed to this and proposed they find a third hunter. (R. at 2.) On September 1, 2011, Anderson told Barnes that his friend, James Reardon, was interested in being the third elephant hunter. (R. at 2.) Barnes accepted Reardon as the third hunter and by October 15, 2011, Barnes had made all the appropriate arrangements for weapons and supplies for the group. (R. at 2-3.)

On August 30, 2011 Kara Crawley, a reporter at the Boerum Times, was contacted by Barnes and informed her of the planned special performance holiday elephant show. (R. at 2.) Barnes offered Ms. Crawley unrestricted access to the circus in exchange for an article that would raise the profile of the event in an attempt to wring what profit he could from Big Top before the elephant “hunt.” (R. at 2.) Ms. Crawley accepted the offer, hoping to gain an inside look at the treatment of Big Top Circus’s animals. (R. at 22.) While the facilities normally require an extensive security clearance, Ms. Crawley was granted unlimited access from Barnes to the circus’s employees, facilities, and animals. (R. at 22.) In the course of her authorized, uninhibited visits to Big Top Circus, Ms. Crawley met an employee who wished to reveal information he or she had learned regarding Barnes’s plans for the elephants. (R. at 22.) As a condition subsequent to revealing any information, the employee required Ms. Crawley to use a

pseudonym and to not reveal his or her identity until after the employee no longer worked at the Circus. (R. at 22.) Ms. Crawley agreed to the employee's requirements and videotaped, without altering the employee's voice or appearance, the interview as a means solely for Ms. Crawley's note taking and not for to the public. (R. at 22.) On December 1, 2011, based on the employee's information, Ms. Crawley published an expose of Barnes's plan to kill the elephant. (R. at 3.) Barnes was taken into federal custody later that day. (R. at 3.)

From October 4, 2011 until December 1, 2011 Agent Blackstock intercepted numerous telephone conversations between Barnes and Alfred Anderson and James Reardon. (R. at 23.) Two of these conversations between Barnes and Anderson were about Reardon. (R. at 18-19.) In the first conversation about Reardon, Anderson tells Barnes that Reardon has been asking questions about the legality of the hunt, "about permits and stuff." (R. at 18.) Barnes dismisses Anderson's worries and tells him, "don't do anything. Not yet." (R. at 18.) In the second conversation between Barnes and Anderson which took place at 2:00 a.m. on November 29, 2011, Anderson was starting to panic about Reardon and said that, "[w]e need him out of the picture." (R. at 7, 19.) However, Barnes again said to "hold off" and that he didn't "want anything to do with this." (R. at 19.) On November 29, 2011 at approximately 7:30 p.m., Daniel Best watched Anderson run out of Reardon's apartment. (R. at 7.) When Best entered the apartment, he found Reardon dead on the floor. (R. at 7.) Anderson confession to killing Reardon later that evening after he was arrested. (R. at 7.)

As the original agent assigned to the investigation, Agent Blackstock listened to these conversations contemporaneously and transcribed them. (R. at 23.) Agent Blackstock died on December 14, 2011. (R. at 23.) One day later, Agent Thomas Simandy was assigned the case even though his usual caseload consisted of mostly drug-related cases. (R. at 14.) This was

Agent Simandy's first case dealing with crimes against animals and he had only been assigned 50 cases as an agent for the FBI. (R. at 14.) Agent Simandy merely reviewed the transcripts that were contemporaneously transcribed by Agent Blackstock and he interviewed other parties involved with the case. (R. at 23.) Agent Simandy interviewed ATF Agent Lamberti who told him about his October 2, 2011 conversation with Barnes. (R. at 23.) In addition, Agent Simandy interviewed a representative from Copters Corporation who told him that on October 6, 2011, Barnes contacted Copters Corporation and arranged a one-day rental of a helicopter for December 15, 2011. (R. at 23.)

At the hearing on the government's motion in limine, Agent Simandy testified to his lay witness opinion concerning his five month, unfamiliar investigation on the alleged code words and phrases used during the intercepted telephone conversations between Barnes and Anderson and Reardon that were contemporaneously transcribed by Agent Blackstock before Agent Simandy took over. (R. at 23.) Agent Simandy testified about Barnes's repeated references to "blood diamonds," "Charlie tango," and "black cat." (R. at 23-24.) Agent Simandy suggested that these code words and phrases meant certain criminalizing evidence to Barnes. (R. at 23-24.) The government seeks to introduce Agent Simandy's lay witness opinion. (R. at 23.)

SUMMARY OF THE ARGUMENT

In the present case, the Circuit Court has ruled correctly that: (1) conspiratorial liability is not applicable to forfeiture by wrongdoing analysis; (2) 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 where, as here, the agent neither participated in the conversation nor observed it.

First, the Court of Appeals for the Fourteenth Circuit properly concluded that conspiratorial liability is inapplicable to the forfeiture by wrongdoing doctrine because actual

intent is required to forfeit confrontation rights. Under 804(b)(6), the forfeiture by wrongdoing doctrine does not apply to Reardon's hearsay statements because Barnes did not intend to prevent Reardon from testifying. By having no intent to render Reardon's unavailability, Barnes did not waive his confrontation rights. Additionally, conspiratorial liability is inapplicable to the forfeiture by wrongdoing doctrine because it is inconsistent with the proof required by *Giles* and *Grey* that the defendant intended to render the witness unavailable. Even if this Court recognized the application of conspiratorial liability to the forfeiture by wrongdoing doctrine, it does not apply in this case because Barnes did not participate directly in planning Reardon's unavailability nor was Reardon's unavailability in furtherance, within the scope, and reasonably foreseeable as a consequence of the ongoing conspiracy.

Second, the Court of Appeals for the Fourteenth Circuit properly concluded that the journalist's privilege exists because of the need for a "robust" press and is an absolute privilege because holding that the privilege is qualified would grant no privilege at all. A journalist's privilege exists because the public and private interests of a free and robust press that is trustworthy is not outweighed by the minuscule evidentiary benefit resulting from denial of the privilege. This is so because much of the proposed benefit will be thwarted by potential sources being afraid to disclose information and the common law supports a finding of such privilege. Furthermore, the journalist's privilege is absolute because the purpose of the privilege is to encourage people to speak to the press and to hold otherwise would "eviscerate" the privilege. Even if the Court decides to overturn the decision below and decide the privilege is qualified, the government fails to meet its burden of proof showing its need for the evidence.

Finally, the Court of Appeals for the Fourteenth Circuit properly concluded that Agent Simandy's testimony is inadmissible because he lacked first-hand knowledge of the

conversations. This was his only poaching case among the bulk of his drug-related cases. Additionally, he was not a participant in the conversations, and simply reviewed the transcripts as part of his investigation, which started five months prior to appearing in district court. Accordingly, this Court must affirm the ruling of the Circuit Court on all issues.

ARGUMENT

The Circuit Court’s decision must be affirmed because conspiratorial liability is not applicable to forfeiture by wrongdoing analysis; a journalist’s privilege exists and is absolute; and under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where, as here, the agent neither participated in the conversation nor observed it.

I. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT CONSPIRATORIAL LIABILITY IS INAPPLICABLE TO THE FORFEITURE BY WRONGDOING DOCTRINE BECAUSE ACTUAL INTENT IS REQUIRED TO FORFEIT CONFRONTATION RIGHTS.

Federal Rule of Evidence 804(b) provides hearsay exceptions if the declarant is unavailable as a witness under the criteria of Rule 804(a). FED. R. EVID. 804. Specifically, Rule 804(b)(6) states, “[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” is an exception to the rule against hearsay. FED. R. EVID. 804(b)(6). This Federal Rule of Evidence codified the common law doctrine of forfeiture by wrongdoing as applied by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878); *Giles v. California*, 554 U.S. 353, 387 (2008). Rule 804(b)(6) codified the forfeiture by wrongdoing doctrine in order to meet the need “for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’” FED. R. EVID. 804(b)(6) 1997 advisory committee’s note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)). The

goal is to prohibit a party from benefiting from his or her own wrongdoing by purposefully causing the unavailability of a witness. See *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005).

A. Under 804(b)(6), the forfeiture by wrongdoing doctrine does not apply to Reardon’s hearsay statements because Barnes did not intend to prevent Reardon from testifying and, by having no intent to render Reardon’s unavailability, Barnes did not waive his confrontation rights.

A defendant retains his Sixth Amendment right to confrontation when he does not intend to make the declarant unavailable as a witness and hearsay testimony is inadmissible in place of the witness’s testimony. The forfeiture by wrongdoing doctrine allows the introduction of hearsay statements of a witness who has been “detained” or “kept away” by the “means or procurement” of the defendant for the purpose of preventing the witness from testifying. *Giles*, 554 U.S. at 359. Even if the defendant caused a person’s absence, such as in a typical murder case, but did not do so with the intent to prevent that person from testifying, the testimony must be excluded unless the defendant had the opportunity to confront it. *Id.* at 361-62. In order to apply Rule 804(b)(6)’s forfeiture by wrongdoing doctrine, the court must find, by a preponderance of the evidence that, “(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.” *Gray*, 405 F.3d at 241 (citing *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000)).

In *Reynolds v. United States*, this Court first recognized the common law forfeiture by wrongdoing doctrine. *Reynolds*, 98 U.S. at 158. The United States Constitution gives the accused the right to confront witnesses testifying against the accused. *Id.* However, if the accused makes the witness absent by his own wrongdoing, he cannot complain if qualified evidence is admitted to substitute the testimony he kept away. *Id.* This Court stated, “[t]he

Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.” *Id.* The accused cannot insist on the privilege of confrontation when purposefully keeping the witness from testifying. *Id.* Therefore, this Court held if the accused purposefully keeps a witness from testifying, other lawful evidence may be supplemented for the missing testimony without violating the accused constitutional rights. *Id.* While continuing the development of the Confrontation Clause, this Court noted in *Crawford v. Washington* that there are certain exceptions, namely the rule of forfeiture by wrongdoing, that completely extinguish a party’s confrontation rights. 541 U.S. 36, 68 (2004).

Forfeiture by wrongdoing cannot be used to admit hearsay evidence and avoid the Confrontation Clause simply because the defendant committed some act of wrongdoing, which made the witness unavailable. In *Giles*, this Court stated that Rule 804(b)(6) requires the defendant’s intent to be specific to making the witness unavailable to testify. *Giles*, 554 U.S. at 367. If, however, the defendant had a prior opportunity to confront the witness, and that witness was now unavailable to testify, the prior statement is admissible regardless of whether or not the defendant was responsible for their unavailability. *Id.* at 373. But, if the defendant had no opportunity to confront the witness and did not cause the witness’s unavailability, the forfeiture by wrongdoing doctrine does not apply and the hearsay is inadmissible. *Id.* Additionally, in *Gray*, the court held that a defendant forfeits the right to exclude testimony as hearsay when the defendant wrongfully and intentionally makes the declarant unavailable as a witness in any proceeding. *Gray*, 405 F.3d at 242.

In *Gray*, the defendant killed her husband prior to his testimony in a separate court proceeding against her and her boyfriend. *Id.* at 231. At trial, Gray argued that Rule 804(b)(6) did not apply because she did not intend to make her husband unavailable as a witness at the

current trial. *Id.* at 241. The court held that Rule 804(b)(6) applies whenever the defendant's actions of wrongdoing were intended to and did keep the declarant from testifying against the defendant. *Id.*

Rule 804(b)(6) requires actual intent to keep the declarant from the witness stand, not just the witness's absence in a typical murder case. In this case, Barnes did not intend to kill Reardon and even told Anderson to hold off on taking any action against Reardon. (R. at 19.) The government's only evidence of Barnes's intent is the telephone calls that do not discuss the possibility of Reardon testifying against either Barnes or Anderson. Additionally, because Barnes had no prior opportunity to confront Reardon and did not cause nor intend Reardon's unavailability, Reardon's hearsay statements cannot be admitted against Barnes. Therefore, because Barnes did not intend to make Reardon unavailable to testify against him, Best's testimony is inadmissible against Barnes.

B. Conspiratorial liability is inapplicable to the forfeiture by wrongdoing doctrine because it is inconsistent with the proof required by *Giles* and *Grey* that the defendant intended to render the witness unavailable.

Traditional principles of conspiratorial liability are inapplicable to the forfeiture by wrongdoing doctrine because the defendant lacks the intent to render the witness unavailable. The doctrine of conspiratorial liability states that the overt act of one co-conspirator is attributable to all co-conspirators. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). However, the extent of this doctrine is limited. *United States v. Cherry*, 217 F.3d 811, 817 (2000). Each member of the conspiracy is legally responsible for the crimes committed by co-conspirators during the existence of a conspiracy. *Id.* (quoting *United States v. Russell*, 963 F.2d 1320, 1322 (10th Cir. 1992)). But conspirators are only responsible for those crimes that further the conspiracy, that are "within the scope of the unlawful project," and are "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Cherry*, 217 F.3d at 817

(quoting *Russell*, 963 F.2d at 1322). A conspirator's actions can only be attributed to co-conspirators for the purpose of waiving confrontation rights when it can be shown that the particular defendant participated in some way in the planning or execution of the murder committed by a co-conspirator. *United States v. White*, 838 F. Supp. 618, 623 (D.D.C. 1993).

For example, in *United States v. White*, five defendants were charged in a drug conspiracy and the government sought to admit statements of a murdered police informant against all defendants even though only two conspirators were involved in the murder. *Id.* at 622-24. The court rejected the argument that conspiratorial liability could be applied to all members of a conspiracy when the result would be a waiver of confrontation rights. *Id.* at 623. Failure to prevent the murder or mere participation in an alleged conspiracy is "insufficient to constitute a waiver of a defendant's constitutional confrontation rights." *Id.*

This case is similar to *White* because Barnes merely participated in a conspiracy with Anderson and, at best, failed to prevent Reardon's murder. Barnes and Anderson are charged as co-conspirators for the crime of violence against endangered animals similar to the drug conspiracy in *White*. (R. at 3-4.) Anderson took it upon himself to kill Reardon without the participation or knowledge of Barnes. Even though there was an existing conspiracy between Barnes and Anderson, murdering the third conspirator was never within the scope of the original conspiracy. Additionally, Barnes could not have reasonably foreseen Reardon's murder as a necessary consequence of this conspiracy especially since he needed Reardon's participation in the elephant hunt. Just as the court in *White* rejected waiving all co-conspirators confrontation rights, this court must also conclude that Barnes's confrontation rights cannot be stripped from him because of his co-conspirator's intent and actions outside of the conspiracy's scope.

Therefore, conspiratorial liability is inapplicable to the forfeiture by wrongdoing doctrine because Barnes had no intention of making Reardon unavailable to testify against him.

C. Even if this Court recognized the application of conspiratorial liability to the forfeiture by wrongdoing doctrine, it does not apply in this case because Barnes did not participate directly in planning Reardon's unavailability nor was Reardon's unavailability in furtherance, within the scope, and reasonably foreseeable as a consequence of the ongoing conspiracy.

There are courts that found *Pinkerton's* conspiratorial liability to attach to the forfeiture by wrongdoing doctrine if certain circumstances are present. *See Cherry*, 217 F.3d at 820. Conspiratorial liability can be an appropriate tool for determining whether another's actions can be imputed to a defendant for purposes of assessing whether the defendant waived his confrontation rights. *Id.* at 818. The acquiescence portion of Rule 804(b)(6) is still consistent with the Confrontation Clause by allowing the consideration of *Pinkerton* conspiratorial liability in determining if the defendant wrongfully rendered the witness unavailable. *Id.* Specifically, a court may find that a defendant waived his or her confrontation rights if, by a preponderance of the evidence, (1) the defendant participated directly in planning or procuring the declarant'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. *Id.* at 820.

The court in *Cherry* noted that the facts in *Pinkerton* did not require the court to decide the extent to which co-conspirators would be liable for acts falling outside the scope of the conspiracy agreement. *Cherry*, 217 F.3d at 817 (quoting *Pinkerton*, 328 U.S. at 647-48). In *Pinkerton*, this Court stated that:

[a] different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan without could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

Pinkerton, 328 U.S. at 647-48. Given this language, the *Cherry* court looked at several previous opinions concerning *Pinkerton* conspiratorial liability and the forfeiture by wrongdoing doctrine to determine where the liability line should be drawn. *Cherry*, 217 F.3d at 817-18. Agreeing with this Court, *Cherry* held that conspirators are only responsible for crimes committed within the scope of the conspiracy, which are reasonably foreseen as a necessary or natural consequence of the conspiracy. *Id.* at 817 (quoting *Russell*, 963 F.2d at 1322). The court in *Cherry* continued, stating that it never extended liability to co-conspirators for first-degree murder that was not the original aim of the conspiracy because murder requires a specific intent that is a much more rigorous standard than reasonable foreseeability. *Cherry*, 217 F.3d at 818.

Cherry involved five defendants in a drug conspiracy with much of the evidence against them coming from one witness, Lurks. *Id.* at 813. Lurks was murdered prior to trial and the government moved to admit statements by Lurks under Rule 804(b)(6). *Id.* The circuit court held that the government failed to show by a preponderance of the evidence that any of the defendants directly participated in the murder of Lurks but remanded the case to apply the newly developed rule. *Id.* at 821.

Even if this court held that conspiratorial liability is applicable to the forfeiture by wrongdoing doctrine, the standard developed in *Cherry* is inapplicable to this case. This case is similar to *Cherry* in that the government has failed to show that Barnes directly participated in the planning or procurement of Reardon's unavailability nor was Reardon's murder within the scope or in furtherance of the conspiracy or a reasonably foreseeable consequence. Barnes, in fact, needed Reardon as a third gunman for the elephant hunt in order to make the profit he needed to avoid bankruptcy. Additionally, Barnes specifically told Anderson, his alleged co-conspirator, to not kill Reardon. (R. at 19.) After giving Anderson these instructions, Barnes

could not reasonably foresee that Anderson would then murder Reardon. It is clear from the facts that Barnes did not partake in planning or committing the murder. Furthermore, Reardon's murder was not within the scope of the conspiracy, the goal was to poach elephants in order to make a profit from the ivory. It was not reasonably foreseeable to Barnes that Anderson would get scared and kill Reardon. Barnes believed the plan was still in order until he was arrested two days after Reardon was killed. Therefore, this Court must find that even if conspiratorial liability can be applied to forfeiture by wrongdoing analysis, it is inapplicable in this case because Barnes was not involved in the planning or murder of Reardon nor was his murder reasonably foreseeable or within the scope of the conspiracy.

II. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT THE JOURNALIST'S PRIVILEGE EXISTS BECAUSE OF THE NEED FOR A "ROBUST" PRESS AND IS AN ABSOLUTE PRIVILEGE BECAUSE HOLDING THAT THE PRIVILEGE IS QUALIFIED WOULD GRANT NO PRIVILEGE AT ALL.

The Constitution states, "Congress shall make no law . . . *abridging* the freedom . . . of the press." U.S. CONST. amend. I (emphasis added). The Supreme Court of the United States ruled on *Brazenburg v. Hayes*, stating, "Congress has the freedom to determine whether a statutory [journalist's] privilege is necessary and desirable and to fashion standards and rules . . . as deemed necessary to deal with the evil discerned." *Brazenburg v Hayes*, 408 U.S. 655, 706 (1972). Three years later, Congress passed the Federal Rule of Evidence 501. FED. R. EVID. 501. It provides that "the privilege of a person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. Federal Rule of Evidence 501 authorizes federal courts to define new privileges and to define such privileges as qualified or absolute on a case-by-case basis. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

A. A journalist’s privilege exists because the public and private interests of a free and robust press that is trustworthy is not outweighed by the minuscule evidentiary benefit resulting from denial of the privilege because much of the proposed benefit will be thwarted by potential sources being afraid to disclose information and the common law supports a finding of such privilege.

A majority¹ of the United States Courts of Appeals recognize a journalist’s privilege.

Courts have taken this privilege so seriously because “the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). To determine whether a privilege should be recognized, courts consider the following: (1) the significant public and private interests that would be served by the privilege; (2) the relative weights of the interests to be served by the privilege and the likely evidentiary benefit that would result from the denial; and (3) “reason and experience” – that is, the extent to which the privilege is recognized by the states. *Jaffee*, 518 U.S. at 9-14.

A significant public and private interest may exist if it is protecting confidential communications. *Id.* at 11. For example, in *Jaffee v. Redmond*, the court held that a privilege exists between the confidential relationship of a psychotherapist and patient. *Id.* at 18. In that case, Jaffee, who was the administrator of the decedent’s estate, alleges that the decedent’s constitutional rights were violated when he was killed by Redmond, an on-duty police officer. *Id.* at 4. Jaffee demanded the notes from a confidential counseling session between a licensed clinical social worker and Redmond after the shooting. *Id.* at 5. The court determined that the notes between Redmond, the patient, and her therapist are privileged communications and protected from compelled disclosure. *Id.* at 18. It reasoned that the significant public interests

¹ For a discussion, see David J. Onorato, *A Press Privilege for the Worst of Times*, 75 Geo. L.J. 361, 361 (1986); *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).

that would be served by the privilege are to facilitate the provision of appropriate treatment for mental and emotional health, which is of “transcendent importance.” *Jaffee*, 518 U.S. at 11. In addition, the court reasoned that the significant private interests that would be served by the privilege is that effective psychotherapy for the patient “depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” *Id.* at 10. Disclosure of the confidential communications may cause embarrassment or disgrace and the “mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.*

Considering the significant public and private interests listed above, the court weighed it in view of the likely evidentiary benefit that would result from the disclosure. *Id.* at 11-12. It reasoned the evidentiary benefit would be “modest” and would chill confidential conversations between psychotherapists and their patients. *Id.* Moreover, without a privilege, much of the desirable evidence to which the petitioner seeks access to will unlikely ever come into being. *Id.* at 12. The court held, “this unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.” *Id.* Finally, it validated its holding stating that, in light of the Court’s “reason and experience,” all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. *Id.* at 12-13.

Conversely, the court in *McKevitt* held that a journalist’s privilege did not exist for a non-confidential person. *McKevitt*, 339 F.3d at 532-33. In that case, McKevitt asked the court for an order to produce tape recordings from a non-confidential interview with McKevitt’s key witness in a trial for a foreign country. *Id.* at 531. Pallasch, the journalist, declined to produce the tapes. *Id.* The court reasoned that the privilege should not extend to non-confidential communications between a journalist and his client because the public interest in cooperating in the criminal

proceedings of friendly foreign nations is more important than the harm caused by the journalist in that case. *Id.* at 532. The court further reasoned that there is no conceivable interest in confidentiality because the source is already known and there is no evidence to suggest the source thought the interview was to be confidential. *Id.* Moreover, there is no private interest in a journalist's privilege in that case because the witness actually wants the information to be disclosed for a biography that is to be written about him. *Id.* at 533. In fact, it is the journalist who did not want to disclose the information not because of possibly losing the trust from his source, but because he was afraid of lost profits due to the early release of the information that he was going to use for the biography. *Id.* at 533. While the court did recognize that some courts grant a common law journalist's privilege to non-confidential sources, it refused to do so here, in light of the little to no public or private interest and the likely evidentiary benefit that would result from the denial of the privilege. *Id.* at 532-33.

The journalist's privilege should be extended to a confidential source because trust and confidence is needed for a "robust press." Moreover, the likely evidentiary benefit will be "modest" because, without the privilege, potential sources will be reluctant to disclose sensitive information, thus, much of the evidence that parties desire would never come into existence. And, finally, through "reason and experience," there is a strong recognition in common law for the journalist's privilege to exist because a majority of the United States Courts of Appeals recognize the privilege, as does a majority of the states and the District of Columbia. Ms. Crawley's petition to the Court is similar to *Jaffee* because both cases involve confidential communications. In this case, Ms. Crawley, the journalist, met with an employee who wished to reveal information the employee had learned regarding the defendant's plan for the elephants. (R. at 22.) Before revealing any information, the employee asked Ms. Crawley to use a

pseudonym for his or her identity and to keep it secret until the employee left the circus. (R. at 22.) Subsequent to the employee's demands, Ms. Crawley agreed and interviewed the employee. (R. at 22.)

The facts of this case are similar to *Jaffee* where Redmond, in order to receive effective consultation, was ensured that her communication between the psychotherapist and her would be kept completely confidential. *Jaffee*, 518 U.S. at 10. Just as Redmond believed that her communications would be kept confidential between her and the psychotherapist because of the nature of the counseling session, the employee in Crawley's case thought his or her communication with Ms. Crawley would be kept confidential because the employee required that Ms. Crawley use a pseudonym and to not publish the employee's identity.

The Court in *Jaffee* held that a significant public interest existed because of the very important need for appropriate treatment of mental and emotional health and that a significant private interest existed because effective patient treatment depends upon an atmosphere of confidence and trust. *Jaffee*, 518 U.S. at 11. Moreover, it further reasoned that the likely evidentiary benefit that would result would be "modest" because, without the privilege, much of the evidence sought would never come into being. *Id.* at 11-12. Finally, the Court concluded that there is a strong recognition in common law for a psychotherapist-patient privilege to exist. *Id.* at 12-13.

Because the Court in *Jaffee* held that a significant public and private interest existed, and Crawley's case is similar to *Jaffee*, the Court here must conclude that a significant public and private interest existed because of the public interest of trust and confidence needed for a "robust press" that serves as a powerful antidote to any abuses of power, and because of the private interest in being protected from exposure will encourage disclosure of sensitive information to

the press. In addition, because the Court in *Jaffee* held that the likely evidentiary benefit resulting from the denial of the privilege is “modest”, and Crawley’s case is similar to *Jaffee*, the Court here must conclude that the likely evidentiary benefit will also be “modest,” because without the privilege, potential sources will be reluctant to disclose sensitive information, thus, much of the evidence that parties desire would never come into existence. Finally, because the Court in *Jaffee* held that there was a strong recognition in common law for the privilege to exist, and Crawley’s case is similar to *Jaffee*, the Court must also conclude that through “reason and experience” there is a strong recognition in common law for the journalist’s privilege to exist because a majority of the United States Courts of Appeals recognize the privilege, as does a majority of the states and the District of Columbia.² Therefore, since the Court in *Jaffee* held that a privilege existed between the confidential communications of a psychotherapist and his patient, and Crawley’s case is similar to *Jaffee*, the Court here must conclude that the confidential communication between a journalist and his client should also be privileged.

This case is distinguishable from *McKevitt* because it involved non-confidential communication while Crawley’s case involves confidential communication. In Crawley’s case, as previously mentioned, the journalist met with an employee who wished to reveal information the employee had learned regarding the defendant’s plan for the elephants. (R. at 22.) Before the employee revealed any information, the employee asked Ms. Crawley to use a pseudonym for his or her identity and to keep it secret until the employee left the circus. (R. at 22.) Subsequent to the employee’s demands, Ms. Crawley agreed and interviewed the employee. (R. at 22.) These facts are distinguishable from *McKevitt* where the source is known and there is no

² See, e.g., *Connecticut State Bd. of Labor Relations v. Fagin*, 370 A.2d 1095, 1097 (Conn. Super. Ct. 1976); 735 ILL. COMP. STAT. 5/8-901 (1985); N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1990); D.C. CODE § 16-4701 (2004); N.J. STAT. ANN. § 2A:84-A-21 (West 2010).

evidence that suggests the source thought the interview was confidential. Moreover, the witness wanted the information disclosed so that a biography could be written on him, the only person who did not want to disclose the information was the journalist, for business reasons. *McKevitt*, 339 F.3d at 533.

Conversely, in this case where the employee asked to be kept anonymous by using a pseudonym and not revealing his or her identity, the witness in *McKevitt* was known and he had no desire to keep his information secret. The court in *McKevitt* held that a journalist's privilege for non-confidential sources should not exist because there is little to no public or private interest in granting a journalist's privilege to non-confident sources and there is a likely evidentiary benefit from denying the privilege. *Id.* at 532-33. Because the court in *McKevitt* held that there should not be a journalist's privilege for non-confidential sources, and this case is distinguishable in that there is a confidential source, this Court must conclude that a journalist's privilege exists because we are dealing with a confidential source.

Although less convincing, the government will argue that a journalist's privilege does not exist at all because the court in *Brazenburg* has already ruled on this issue³ and the Constitution does not grant a privilege. *Brazenburg*, 408 U.S. at 690-91. It will suggest, like Judge Zhu's dissent in *Crawley*'s case, that denying a privilege will have zero effect on informants who journalists suggest confidentiality to because from the beginning of our nation a vibrant, independent press has flourished without a privilege, and that *Brazenburg*, a Supreme Court case, has already decided that a journalist's privilege should not be extended. (R. at 33.); *Brazenburg*, 408 U.S. at 698-99. This argument, however, is without merit. Firstly, one is hard-pressed to argue that denying a privilege will have zero effect on informants considering that, in

³ The Court states in *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972), that it declined to “interpret[] the First Amendment to grant [journalist] a testimonial privilege.”

Crawley's case, the employee refused to provide any information to the journalist unless the journalist agreed to use a pseudonym and to keep his or her name secret. Thus, without the journalist's guarantee, the employee would not have provided any information. Secondly, while *Brazenburg* did refuse to grant a privilege in that case, it contemplated other measures, as noted before, to protect the confidentiality of journalists' sources. *Brazenburg*, 408 U.S. at 706. It stated, "Congress has the freedom to determine whether a statutory [journalist's] privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned." *Id.*; (R. at 28-29.) Thus, the correct interpretation of *Brazenburg* is if Congress so desires, it may grant a privilege. Congress desired to do so when it passed Federal Rule of Evidence 501.

The government may also argue that the interview was not confidential because the interview was videotaped without altering the employee's appearance or voice and that the journalist could reveal the employee's identity after the employee left the Circus. (R. at 22.) This argument is also not convincing because, as stated before, the employee only agreed to speak with the journalist after the journalist agreed to use a pseudonym and to keep the employee's identity anonymous. (R. at 22.) This clearly is not a situation where the employee disclosed information thinking that he or she's identity would be revealed as the source of the information.

Therefore, because common law supports finding a privilege and that the public and private interests of a free and robust press that is trustworthy is not outweighed by the minuscule evidentiary benefit resulting from the denial of the journalist's privilege, this Court must affirm the district court and circuit court's decision on recognizing a privilege.

B. The journalist’s privilege is absolute because the purpose of the privilege is to encourage people to speak to the press and to hold otherwise would “eviscerate” the privilege; moreover, even if the Court decides to overturn the decision below and decide the privilege is qualified, the government fails to meet its burden of proof showing its need for the evidence.

The overriding purpose of the journalist’s privilege is to encourage people to speak to the press. *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). Once the privilege is established, courts need to decide whether the original purpose for the privilege is better served by declaring the privilege as absolute or qualified. *McKevitt*, 339 F.3d at 531-33. If it is qualified, courts will generally apply a form of this test where the government must meet the burden of proof that: (1) the information is highly relevant; (2) necessary to the proper presentation of the case; and (3) unavailable from other sources. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979). If the courts find it necessary to declare the privilege absolute, no test is necessary and without some extreme circumstance, the journalist would never need to consider the potentiality of the court’s discretion in deciding whether this evidence is significant enough to permit forceful disclosure. *Jaffee*, 518 U.S. at 17.

“Making the promise of confidentiality contingent upon a trial judge’s later evaluation” of the relative importance of the need for evidence and the need for confidentiality would “eviscerate” the privilege. *Id.* For example, the court in *Jaffee* held that the privilege should be absolute. *Id.* In that case, as previously mentioned, the court was deciding whether to allow disclosure of the confidential communications of a patient and her therapist. *Id.* at 5. The court held not only was there a psychotherapist-patient privilege but also if “the purpose of the privilege [to promote confidence and trust] is to be served, the participants in the confidential conversation” must be certain as to whether or not his or her communications may be disclosed in the future. *Id.* at 17-18. The court held that the privilege is absolute because holding

otherwise would result in “little better than no privilege at all” and it would not make for effective therapy with the patient. *Id.* at 10, 18.

This Court should agree with the District Court and the Court of Appeals and affirm the decision to make the privilege absolute because holding otherwise would cause discouragement to speak to the press, which is against the purpose of the privilege in the first place. Moreover, it would create uncertainty and have a “chilling effect” on communications between sources and the press.

Our case is similar to *Jaffee* because both cases require confidential interaction that promotes confidence and trust such that it warrants granting an absolute privilege. In this case, we are dealing with a journalist’s communications with an employee who refused to disclose any information unless the journalist could guarantee the employee’s anonymity. (R. at 22.) These facts are similar to *Jaffee* where in order to have successful therapy, Redmond, the patient, must know that in the future her communications will not be disclosed. *Jaffee*, 518 U.S. at 17-18. Just as Redmond must know that her communications in the future will be protected, the employee in our case also required that his or her communications remain anonymous.

The court in *Jaffee* refused to adopt a qualified privilege because it would “eviscerate” the privilege as if there was none at all and it would be counter-intuitive to the very purpose for adopting the privilege in the first place. *Jaffee*, 518 U.S. at 10; 17-18. Because the Court in *Jaffee* held that the privilege is absolute, and this case is similar to *Jaffee*, the Court here must also adopt an absolute journalist’s privilege. Holding otherwise would “eviscerate” the privilege as if there was none at all by creating a “chilling effect” on communications to the press and it would be counter-intuitive to the very purpose of the privilege: to encourage people to speak to the press. *Branzburg*, 408 U.S. at 715 (Douglas, J., dissenting).

Although less convincing, the government will attempt to argue that the journalist's privilege should be qualified. It will argue that the testimony relates to non-confidential information and therefore there is not a strong interest in protecting it. (R. at 11.) This argument, however, is lacking in substance. The government has not brought forth any evidence as to why the interests furthered by disclosure outweigh the interests furthered by the privilege by showing the court how it is (1) highly relevant, (2) necessary to the proper presentation of the case, and (3) unavailable from other sources. Since the government failed to put forth any evidence suggesting that interests would be furthered by disclosure, if this Court finds the privilege to be qualified, it must agree with the district court and circuit court below that the government has not met its burden to show that the evidence is required in this circumstance. More importantly, the Supreme Court of the United States stated in *Jaffee* that to grant a qualified privilege is to make "confidentiality contingent upon a trial judge's later evaluation of the relative importance" which would "eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17. Since the Supreme Court of the United States found it important enough to grant an absolute privilege in confidential communications, and this case is similar to *Jaffee*, the Court here must also feel compelled to agree with the district court and circuit court below and grant an absolute privilege because disclosing the employee's identity is "purely cumulative" and would add nothing more to the Government's case. (R. at 17.)

Consequently, since determining that the journalist's privilege is qualified would "eviscerate" the privilege and go against the purpose of the privilege to encourage people to speak to the press, the privilege must be determined to be absolute. Because the privilege is absolute and recognized, this Court must affirm the district court and circuit court's decision.

III. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT AGENT SIMANDY’S TESTIMONY IS INADMISSIBLE BECAUSE HE LACKED FIRST-HAND KNOWLEDGE OF THE CONVERSATIONS SINCE THIS WAS HIS ONLY POACHING CASE AMONG THE BULK OF HIS DRUG-RELATED CASES, WAS NOT A PARTICIPANT IN THE CONVERSATIONS, AND SIMPLY REVIEWED THE TRANSCRIPTS AS PART OF HIS INVESTIGATION, WHICH STARTED FIVE MONTHS PRIOR TO APPEARING IN DISTRICT COURT.

Federal Rule of Evidence 701 provides that opinion testimony from a non-expert layman witness is limited to testimony that is “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701. Subsection (a) is meant to limit this rule by requiring “first-hand knowledge or observation,” while subsection (b), limits testimony to only those topics that would be “helpful in resolving issues.” FED. R. EVID. 701 1972 advisory committee’s note. The purpose of Rule 701 is to remove the risk of an expert testifying “in lay witness clothing” while bypassing the reliability requirements set forth for experts in Federal Rule of Evidence 702. FED. R. EVID. 701 2000 advisory committee’s note. Lay opinion testimony that interprets facts already available to the jury and court is inadmissible because it “merely deliver[s] a jury argument from the witness stand.” *United States v. Jayyousi*, 657 F.3d 1085, 1103 (11th Cir. 2011) (quoting *United States v. Cano*, 289 F.3d 1354, 1363 (11th Cir. 2002)).

A witness is merely delivering a jury argument from the witness stand when the witness testifies to alleged code words and phrases, that the witness neither participated in, nor observed the conversations, but merely read transcripts and reviewed the investigatory work of other law-enforcement personnel. *Jayyousi*, 657 F.3d at 1103 (quoting *Cano*, 289 F.3d at 1363); (R. at 37.) Lay witnesses may testify only to assist the jury or court in understanding the facts that the witness is testifying to. *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). The lay

opinion testimony cannot provide specialized explanations or interpretations that an average person could not make in the same situation. *Id.* Specifically, non-expert law enforcement officers may testify to their lay opinion only when: (1) the officer is a participant in the conversation, (2) has personal knowledge of the facts in the conversation, or (3) observed the actual conversations. *Id.*

For example, the court in *Peoples* held that the law enforcement officer may not testify to alleged code words and phrases. *Peoples*, 250 F.3d at 640. In that case, the defendants were charged with killing a government witness in connection with the witness's disclosure of information material to another charge of the defendant's. *Id.* at 634-35. The evidence brought by the government was in the form of witness testimony from Agent Neal who had listened to recorded telephone and visitation conversations between the defendants. *Id.* at 639-40. Agent Neal "did not personally observe the events and activities discussed in the recordings, nor did she hear or observe the conversations as they occurred." *Id.* at 640. In that testimony, Agent Neal explained how the murder occurred by giving her opinion regarding the meaning of code words and phrases used by the defendants during the conversations. *Id.* The court held that because the testimony was not based on her perception of the facts, but based on her investigation after the fact, Agent Neal lacked first-hand knowledge of the matters about which she testified. *Id.* at 641. Since Agent Neal lacked first-hand knowledge of the matters about which she testified, she was not a participant in the conversations, nor did she observe the actual conversations, her testimony was inadmissible under Rule 702. *Id.*

Conversely, in *Jayyousi*, the court held that a law enforcement officer may testify to alleged code words and phrases when the officer's knowledge rises to a personal level based on five years of investigation, thousands of wiretap summaries, plus hundreds of verbatim

transcripts, even though he never was directly a part of the conversation. *Jayyousi*, 657 F.3d at 1102. In that case, defendants were charged with conspiring to support terrorist activities, among other charges, which lead to an FBI agent's testimony regarding code words and phrases used in the conversations about terrorist acts. *Id.* at 1091, 1102. The court allowed the agent's testimony even though it was his lay opinion because of the complexities and average person's unfamiliarity with international terrorist activities. *Id.* at 1102-03. The agent linked his testimony to specific calls, wire transfers, and other discrete acts that gave material support to his interpretations and put the code words and phrases into context. *Id.* at 1103.

A law enforcement officer as a lay witness cannot explain code words and phrases under Federal Rule of Evidence 701 when he was not a party of the conversation and his knowledge does not rise to a personal level. Barnes's case is similar to *Peoples* and distinguishable from *Jayyousi* because Agent Simandy lacked first-hand personal knowledge on the subject matter to which he testified and the complexity of his testimony did not rise to a level that warrants specialized interpretation for the jury and court. In this case, defendants were being charged with conspiracy to commit a crime of violence against an endangered animal. (R. at 3-4.) The government wishes to have Agent Simandy testify to his interpretation of the conversation between the defendants. Agent Simandy was assigned to this case only five months prior to appearing in the District Court. (R. at 13.) Moreover, his investigation into the defendants consisted of reviewing transcripts of conversations between defendants that were compiled contemporaneously by Agent Blackstock, the previous agent on this case. (R. at 13.) Agent Simandy was never a participant in any conversations between defendants, nor was did he observe the conversations. Additionally, he had no personal knowledge of the facts within these

conversations; Agent Simandy's only knowledge is of the transcripts put together by a different agent. Also, this is Agent Simandy's only case out of fifty that is not drug-related. (R. at 14.)

These facts are similar to *Peoples* where Agent Neal, the law enforcement officer, had only listened to recorded telephone and visitation conversations between the defendants. *Peoples*, 250 F.3d at 640. Agent Neal did not personally observe the events and activities discussed in the recordings, nor did she hear or observe the conversations as they occurred. *Id.* The facts of this case are distinguishable from *Jayyousi* because the officer's knowledge was based on a five year long investigation, thousands of wiretap summaries, and hundreds of verbatim transcripts. *Jayyousi*, 657 F.3d at 1102. The agent was necessary to explain to the court and jury the complexities and unfamiliarities with international terrorist activities by linking specific instances of phone conversations, wire transfers, and other discrete acts to put the code words and phrases into context. *Id.* at 1103.

Just as Agent Neal in *Peoples* lacked any personal knowledge of the conversations and based her opinions on her investigation after the fact, Agent Simandy only reviewed transcripts produced by the previous agent and that is the extent of his knowledge. Conversely to the agent in *Jayyousi*, who based his testimony upon a five year long investigation using countless resources and hours, Agent Simandy based his knowledge on five months of transcript reviewal. Additionally, unlike the agent in *Jayyousi* who spent the majority of his career investigating terrorism cases, Agent Simandy's usual cases involve drug-related offenses and this is his first poaching case. (R. at 14.)

The court in *Peoples* held that the law enforcement officer's opinion was based on her investigation after the fact, not on her personal knowledge and perception of the facts because the agent's knowledge did not rise to a personal level. *Peoples*, 250 F.3d at 641. Because the

court in *Peoples* held that the testimony was inadmissible and Agent Simandy's testimony is similar to those facts, the Court here must conclude that Agent Simandy's testimony is also inadmissible. Agent Simandy lacked any personal knowledge of the facts within the conversation as well as not being a party to those conversations. The court in *Jayyousi* held that the FBI agent's testimony rose to a level of personal knowledge and was necessary to understand the evidence because of his familiarity with that particular case and complexities of terrorism activities. *Jayyousi*, 657 F.3d at 1102-03. Because the *Jayyousi* court held that the agent's testimony was admissible, and these facts are distinguishable from this case, this Court must find that Agent Simandy's testimony does not rise to a level that warrants admissibility.

Therefore, because Agent Simandy lacked first-hand knowledge of the conversations, was not a participant in the conversations, and simply reviewed the transcripts as part of his investigation, this Court must uphold the District Court and Court of Appeals ruling that his testimony is inadmissible under Rule 701.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,
Counsel for Respondent, 23