

No. 12-23

IN THE
Supreme Court of the United States
OCTOBER TERM 2011

UNITED STATES OF AMERICA,

PETITIONER,

v.

WILLIAM BARNES,

RESPONDENT.

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

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

- I. Can James Reardon's hearsay declaration be admitted into evidence under the "waiver-by-misconduct" doctrine, codified in Federal Rule of Evidence as 804(b)(6), when defendant William Barnes himself does not render the declarant unavailable?
- II. Can Federal Rule of Evidence 501 recognize the existence of a journalist's absolute or qualified privilege where the Supreme Court has rejected such privilege to exist and where acknowledgment of such privilege may endanger the integrity of the criminal justice system?
- III. Can FBI Agent Thomas Simandy, pursuant to Federal Rule of Evidence 701, testify to the meaning of vague and ambiguous code phrases based on his examination of transcripts containing these phrases and other investigatory findings?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....	2
STATEMENT OF THE CASE.....	2
I. <u>JAMES REARDON’S HEARSAY STATEMENTS TO DANIEL BEST</u>	2
II. <u>INFORMATION ACQUIRED BY JOURNALIST KARA CRAWLEY</u>	3
III. <u>FBI AGENT THOMAS SIMANDY’S INVESTIGATION</u>	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT.....	6
I. JAMES REARDON’S HEARSAY DECLARATION IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(6) WHERE THE APPLICATION OF PINKERTON LIABILITY FINDS DEFENDANT WILLIAM BARNES LIABLE FOR HIS CO-CONSPIRATOR’S MURDER OF REARDON SO AS TO PROCURE REARDON’S UNAVAILABILITY AS A WITNESS.....	6
A. <u>This Court Is Bound To An “Abuse Of Discretion” Review In Discerning Whether The Fourteenth Circuit Erred In Its Evidentiary Findings And To A “De Novo” Review To A Trial Court’s Legal Conclusions About The Federal Rules Of Evidence At The Confrontation Clause</u>	8
B. <u>The Fourteenth Circuit Mistakenly Precludes The Applicability of Pinkerton By Misinterpreting The Holding In Giles As Requiring The Applicability Of Rule 804(b)(6) Turn On Who Committed A Wrongdoing Rather Than On Why The Wrongdoing Had Occurred</u>	9
C. <u>The Language Of Rule 804(B)(6) Suggests That The Rule Is Consistent With Application Of Pinkerton Principles Of Conspiratorial Liability</u>	10

D.	<u>The Application of <i>Pinkerton</i> Principles Of Conspiratorial Liability Is Contingent Upon The Wrongdoing Being Done In Furtherance, Within The Scope, And As A Reasonably Foreseeable Consequence Of An Ongoing Conspiracy.</u>	11
	<i>i. Reardon’s murder was done in furtherance of and with the scope of the elephant poaching conspiracy.</i>	11
	<i>ii. Reardon’s murder was reasonably foreseeable.</i>	13
II.	BECAUSE NO JOURNALISTIC PRIVILEGE EXISTS UNDER RULE 501, BOERUM TIMES REPORTER KARA CRAWLEY CANNOT CLAIM SUCH PRIVILEGE AS PROTECTING THE IDENTITY OF THE SOURCE THAT HELPED EXPOSE DEFENDANT BARNES’ CRIMINAL CONSPIRACY	14
A.	<u>This Court Must Assess Whether A Journalistic Privilege Exists Under A <i>De Novo</i> Standard Of Review.</u>	15
B.	<u>In Applying The Three Considerations For Recognizing A Privilege Under Rule 501, The Fourteenth Circuit Cherry-picks Aspects Of The Field Of Journalism Rather Than Considering The Field In Its Entirety.</u>	15
C.	<u>Pursuant <i>Branzburg</i>, This Court Should Find The Government’s Interest In Investigating and Prosecuting Crime Outweighs The Benefits Of A Journalist’s Privilege.</u>	16
	<i>i. Disclosure of sources with knowledge of illegal activities does not affect reporters’ news-gathering ability</i>	18
	<i>ii. Exempting a journalist from testifying before a grand jury ignores the grand jury’s role in the maintenance of constitutional and criminal justice and may result in undesirable public policy implications.</i>	19
D.	<u>Even If This Court Finds A Journalist’s Evidentiary Privilege Under Rule 501, Such Privilege Should Be Qualified, Thereby Permitting The Waiver Of Such Privilege When Disclosure Of Information Is Highly Material And Not Attainable By Other Sources.</u>	20
III.	AGENT SIMANDY’S INTERPRETATION OF VAGUE AND AMBIGUOUS CODE WORDS BASED ON HIS INVOLVEMENT IN THE INVESTIGATION IS ADMISSIBLE LAY WITNESS TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 701.	21
A.	<u>This Court Must Reverse The Fourteenth Circuit’s Decision Where There Has Been An “Abuse Of Discretion.”</u>	22

B. <u>The Court Should Adopt The “Rationally Based On Witness Perception” Approach That Focuses On The Witness’ Perception Of Facts Acquired In The Underlying Investigation</u>	23
<i>i. A lay witness does not have to participate in or observe a conversation to testify about his perception and understanding of words spoken so long as his interpretation is grounded on his involvement in the investigation.</i>	24
<i>ii. A lay witness’ interpretation of coded words and phrases is “helpful” to the jury where the words are vague and ambiguous such that their meanings are unclear without the witness’ explanations.</i>	26
C. <u>Agent Simandy’s Interpretation Of Code Words Used By Barnes Based On His Review Of Intercepted Call Transcripts And Interviews With Agent Lamberti And Alan Klestadt Satisfies Rule 701’s “First-Hand Knowledge” And “Helpful” Requirements</u>	27
<i>i. Agent Simandy’s interpretation of the code words “black cat,” “Charlie tango,” and “blood diamonds” is informed by his first-hand perception of investigative records, rather than his specialized training or experience as a law enforcement officer.</i>	27
<i>ii. Agent Simandy’s interpretation of vague and ambiguous phrases satisfies Rule 701’s “helpful” prong, where absent his interpretation, a jury would not clearly understand the content of the communications relating to Defendant’s culpability.</i>	28
D. <u>The Injection Of A Personal Participation Or Direct Observation Of The Events Requirement Is Contrary To The Plain Meaning Of Rule 701 And Should Be Rejected</u>	29
<i>i. The federal circuits that have adopted a personal participation or observation requirement have based their decision on witness testimony that exceeded the scope of facts the witnesses actually perceived</i>	29
<i>ii. Agent Simandy’s testimony should be admitted even if this Court elects to adopt the Peoples’ understanding of rational perception where he is only interpreting code words he actually perceived rather than making blanket assertions of culpability</i>	31
CONCLUSION.....	32
APPENDIX.....	34

TABLE OF POINTS AND AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 1	2, 5, 15, 16, 17, 19, 35
U.S. Const. amend 6	2, 7, 35

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 501	2, 5, 14, 15, 32, 35
Fed. R. Evid. 602	2, 23, 34, 35
Fed. R. Evid. 701	<i>passim</i>
Fed. R. Evid. 702	2, 21, 30, 35
Fed. R. Evid. 804(b)(6)	<i>passim</i>

UNITED STATES SUPREME COURT CASES

<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	16, 17, 18, 19, 20
<i>Crawford v. Washington</i> , 541 U.S. 36, 68 (2004)	7
<i>General Electric Co. v. Joiner</i> , 522 U.S. 136 (1997)	22
<i>Giles v. California</i> , 554 U.S. 353 (2008)	7, 9, 10
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996)	14, 16
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997)	22
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946)	7, 8, 11
<i>Reynolds v. United States</i> , 98 U.S. 145, 158-59 (1878)	6
<i>United States v. Bryan</i> , 339 U.S. 323 (1950)	15

UNITED STATES COURTS OF APPEAL CASES

<i>Asplundh Mfg. Div. v. Benton Harbor Eng'g</i> , 57 F.3d 1190 (3d Cir. 1995)	21
<i>Gonzales v. National Broadcasting Co.</i> , 194 F.3d 29 (1998)	20

<i>McKevitt v. Pallasch</i> , 339 F.2d 530 (2003)	21
<i>Shoen v. Shoen</i> , 48 F.3d, 412 (9th Cir. 1995)	16
<i>United States v. Blackman</i> , 72 F.3d 1418 (9th Cir. 1995)	16
<i>United States v. Cano</i> , 289 F.3d 1354 (11th Cir. 2002)	24, 27
<i>United States v. Cherry</i> , 217 F.3d 811 (2000)	8, 10, 11, 12, 13
<i>United States v. Christian</i> , 673 F.3d 702 (7th Cir. 2012)	29
<i>United States v. El-Mezain</i> , 664 F.3d 467 (5th Cir. 2011)	25, 26
<i>United States v. Freeman</i> , 498 F.3d 893 (9th Cir. 2007)	26, 27, 28
<i>United States v. Garcia</i> , 413 F.3d 201 (2nd Cir. 2005)	30, 31, 32
<i>United States v. Gray</i> , 405 F.3d 227 (4th Cir. 2005)	7
<i>United States v. Jayyousi</i> , 657 F.3d. 1085 (11th Cir. 2011)	23, 24, 25, 26, 27, 28
<i>United States v. Johnson</i> , 617 F.3d 286 (4th Cir. 2010)	30, 31, 32
<i>United States v. Knox</i> , 124 F.3d 1360 (10th Cir.1997)	9
<i>United States v. Mastrangelo</i> , 693 F.2d 269 (2d Cir. 1982)	13, 14
<i>United States v. Miranda</i> , 248 F.3d 434 (5th Cir. 2001)	23, 24, 25
<i>United States v. Peoples</i> , 250 F.3d 630 (8th Cir. 2001)	26, 29, 30, 31, 32, 33
<i>United States v. Rivera</i> , 412 F.3d 562 (4th Cir. 2005)	13, 14
<i>United States v. Rollins</i> , 544 F.3d 820 (7th Cir. 2008)	26, 28
<i>United States v. Simas</i> , 937 F.3d 459 (9th Cir. 1991)	28
<i>United States v. Thompson</i> 286 F.3d 950 (7th Cir. 2002)	10
<i>United States v. Torrez-Ortega</i> , 184 F.3d 1128 (10th Cir.1999)	9
<i>United States v. Walker</i> , 796 F.2d 43 (4th Cir. 1986)	12
<i>United States v. White</i> , 116 F.3d 903 (D.C. Cir. 1997)	7,10

United States v. Zepeda-Lopez, 478 F.3d 1213, 1219 (2007)..... 8, 22, 23, 25, 29

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Brief For Respondent United States of America

OPINIONS BELOW

The United States District Court for the Southern District of Boerum ruled against the Government on three pre-trial motions. First, the Government's motion to admit hearsay under Federal Rule of Evidence 804(b)(6) was denied where the declarant was rendered unavailable by a defendant's co-conspirator. The court found Federal Rule of Evidence 804(b)(6) incompatible with principles of conspiratorial liability under the Supreme Court decision in *Giles v. California*. Second, journalist Crawley's motion to quash the Government's subpoena seeking her sources was granted. The court found a journalist's privilege to exist under Federal Rule of Evidence 501 and thus permit journalists to keep secret the identity of their sources. Finally, the Government's motion to admit Agent Simandy's laywitness opinion testimony as to the meaning of codewords was denied. The court found that the mere reviewing of transcripts did not satisfy the first-hand knowledge required by Federal Rule of Evidence 701 to testify about the material.

The Government appealed to the Fourteenth Circuit where the circuit judge affirmed the District Court's rulings, holding: (1) that conspiratorial liability is not applicable to Federal Rule of Evidence 804(b)(6)'s waiver-by-misconduct analysis; (2) that a journalist's privilege exists under Federal Rule of Evidence 501; and (3) that lay opinion testimony as to the meaning of codewords is inadmissible under Federal Rule of Evidence 701 where, as here, the agent neither participated in the conversation nor observed it.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fourteenth Circuit was filed on July 12, 2012. The petition for the writ of certiorari was filed in a timely manner. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following authorities are pertinent to this case and described in the appendix: U.S. Const. amend. I, cl. 2; U.S. Const. amend. VI; Fed. R. Evid. 501; Fed. R. Evid. 602; Fed. R. Evid. 701; Fed. R. Evid. 804(b)(6).

STATEMENT OF THE CASE

I. James Reardon's Hearsay Statements to Daniel Best

Before defendant William Barnes inherited and assumed control of Big Top Circus ("Big Top") in May 2000, the circus was highly profitable, renowned for its one-of-a-kind elephant show. (R. 21). However, by July 2011, Barnes had blown through Big Top funds, and the circus faced imminent bankruptcy. (R. 21). Rather than gracefully accept the end of the Big Top's legacy, Barnes devised a plan to squeeze the last bit of money out of the dying business. (R. 21). Under the pretenses of hosting "greatest elephant show on earth," Barnes coerced two neighboring circuses, each with ten Asian elephants to participate. (R. 2). Barnes additionally offered the neighboring circus' temperature-sensitive elephants the chance "winter" on his sizeable tropical grazing grounds, free of charge. (R. 7, 21). Both circuses accepted Barnes' offer, completely unaware of Barnes' intent to slaughter the elephants so as to harvest and sell their valuable ivory (R. 7, 21).

In late July 2011, Barnes solicited Alfred Anderson to join his scheme to kill the elephants. (R. 7, 21). Anderson in turn invited James Reardon to participate in a "domestic game hunt." (R. 21). Under the "domestic game hunt" guise, Reardon did not discover the true nature of the conspiracy until the end of November 2011. (R. 21). On November 15, 2011, Reardon called Anderson and expressed second thoughts about the "hunt" as well as concerns regarding the hunt's legality. (R. 24). Anderson then called Barnes and communicated that Reardon was a

security risk who should be put “out of the picture.” (R. 7, 18-19). Barnes subsequently reached out to Reardon in an attempt to smooth things over. (R. 9).

However, on November 28, 2011, Reardon contacted his friend Daniel Best and relayed to him the full nature of the elephant-hunt conspiracy, expressing concerns that his knowledge of the illegality of the hunt might lead Anderson to harm him. (R. 8, 24). Reardon informed Best that he intended to invite Anderson to his home to speak about the hunt the following day. (R. 24). On November 29, 2011, Best drove to Reardon’s home and observed Anderson running out the front door. (R. 24). He found Reardon dead on the floor of his apartment. (R. 7, 24). Anderson was apprehended by the police soon after and confessed to killing Reardon to prevent him from exposing the conspiracy. (R. 7, 24).

II. Information Acquired by Journalist Kara Crawley

On August 30, 2011, Barnes contacted *Boerum Times* reporter Kara Crawley. (R. 9). To garner publicity for “greatest elephant show on earth,” Barnes asked Crawley if she would be interested in writing a piece on Big Top, promising her unlimited access to the circus. (R. 9). Crawley agreed. (R. 9). While observing elephants in Big Top’s training ring, a Big Top employee approached Crawley, informing her that he or she had overheard Barnes conversing with another individual about a plan to kill the elephants for their ivory tusks. (R. 9, 10). The employee asked Crawley not to identify him or her by name, and not to reveal the tip while he or she was still employed by Big Top. (R. 10). The employee was aware that Crawley was writing an article on Big Top, and concerned for his or her personal safety, requested that a pseudonym be used. (R. 10). However, the employee allowed Crawley to videotape him or her without any facial obstruction. (R. 10).

On December 1, 2011, Crawley published an article in the *Boerum Times*, detailing what the employee had told her about Barnes' elephant-poaching scheme. (R. 11).

III. FBI Agent Thomas Simandy's Investigation

From October 4, 2011 through December 1, 2011, the government intercepted approximately one dozen telephone conversations between Barnes and his co-conspirators Anderson and Reardon. (R. 13, 23). Agent Narvel Blackstock contemporaneously listened to and transcribed these conversations. (R. 13, 23). Following Agent Blackstock's death on December 14, 2011, Agent Thomas Simandy was assigned to investigate this case. (R. 13, 23).

Agent Simandy reviewed the transcripts prepared by Agent Blackstock and conducted personal interviews with two individuals, Agent Jason Lamberti with the Bureau of Alcohol, Tobacco and Firearms ("ATF") and Copters Corporation's representative Alan Klestadt, about their respective communications with Barnes on October 2, 2011 and October 6, 2011. (R. 13, 23). Agent Lamberti told Agent Simandy that while working undercover at Weapons Unlimited, he arranged the sale of three AK-47s to Barnes to be delivered on December 5, 2011. (R. 2, 13, 23). Klestadt advised that he had arranged a one-day helicopter rental on Barnes' behalf for December 15, 2011. (R. 2, 13, 23).

Agent Simandy reviewed transcripts containing references to "blood diamonds," "Charlie tango," and "black cat," alleged to have been spoken by Barnes to Anderson on several occasions. (R. 13, 23). Statements contained in the transcripts include "Charlie tango is ready" and "black cat was arranged." (R. 13). Based solely on his thorough review of the transcripts and his communications with Lamberti and Klestadt, Agent Simandy interpreted "blood diamonds" as a reference to elephant ivory tusks, "Charlie tango" as a reference to the rented helicopter, and "black cat" as a reference to the three AK-47s. (R. 13-14, 23-24).

Prior to this investigation, Agent Simandy had not been assigned to cases involving poaching or other crimes against animals, and was unfamiliar with common jargon, if any, used in these types of cases. (R. 14).

SUMMARY OF THE ARGUMENT

In the present case, the lower courts incorrectly ruled that: (1) James Reardon's hearsay declaration is inadmissible under Federal Rule of Evidence 804(b)(6) because conspiratorial liability does not apply to a "waiver-by-misconduct" analysis, (2) Federal Rule of Evidence 501 establishes an evidentiary privilege for journalists, exempting Kara Crawley from revealing the identity of her source; (3) Agent Simandy's lay opinion testimony as to the meaning of code words does meet the first-hand knowledge required by Federal Rule of Evidence 701.

First, James Reardon's hearsay declaration revealing the nature of the elephant poaching conspiracy should be admitted under the application of *Pinkerton* principles of conspiratorial liability to Federal Rule of Evidence 804(b)(6). The Rule's compatibility with *Pinkerton* is evidenced first by the lower court's misinterpretation of the *Giles v. California* holding to erroneously require a defendant alone engage in wrongdoing, and second by the "acquiesce" prong of the Rule suggesting the defendant himself need not commit the wrongdoing.

Next, the Court should compel Kara Crawley to comply with her subpoena and reveal the identity of the Big Top informant, where Federal Rule of Evidence 501 provides no evidentiary journalist's privilege and where Supreme Court precedent dictates that the First Amendment does not exempt Crawley from testifying before a grand jury about the identity of her source. Alternatively, if the Court finds a journalist's privilege to exist, the privilege should be *qualified* thereby allowing for the waiver of such privilege where, as here, a source's information is highly material to the case at bar and is not attainable from any other sources.

Finally, the Court should admit Agent Thomas Simandy's limited interpretation testimony under Federal Rule of Evidence 701 where he personally observed and reviewed the transcripts containing the code words and phrases used by Barnes in his conversations with Anderson and Reardon. Agent Simandy's perception of these ambiguous phrases, informed by his personal involvement in the investigation rather than his expertise or specialized knowledge, is all that is required to satisfy the "rationally based on the witness' perception prong for Rule 701. Further, his interpretations are helpful where they relay meanings of words that are not easily discernible by a jury. Accordingly, Agent Simandy's testimony satisfies Rule 701's requirements for lay witness testimony.

ARGUMENT

I. JAMES REARDON'S HEARSAY DECLARATION IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(6) WHERE THE APPLICATION OF *PINKERTON* LIABILITY FINDS DEFENDANT WILLIAM BARNES LIABLE FOR HIS CO-CONSPIRATOR'S MURDER OF REARDON SO AS TO PROCURE REARDON'S UNAVAILABILITY AS A WITNESS.

Federal Rule of Evidence 804(b)(6)¹ provides that a "statement offered against a party that has engaged in or acquiesced in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness" is not inadmissible hearsay. Fed. R. Evid. 804(b)(6). Housed among the numerous hearsay exceptions, Rule 804(b)(6) maintains an essential facet of judicial equilibrium: keeping constant the delicate balance between the rights afforded to the accused and those afforded the accuser. Disrupting this balance pollutes the integrity of the trial process as well as the spirit of justice itself.

To this point, this Court has long held that "a defendant's intentional misconduct can constitute a waiver of Confrontation Clause Rights." *See Reynolds v. United States*, 98 U.S. 145,

¹ All further references are to the Federal Rules of Evidence, unless otherwise noted.

158-59 (1878). The “waiver-by-misconduct” doctrine ensures the equity of rights between adverse parties, finding it common sense that “a defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him.” *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997). Thus, while the Confrontation Clause of the Sixth Amendment serves to protect the accused by providing him the right to confront his accusers at trial, *see Crawford v. Washington*, 541 U.S. 36, 68 (2004), this right is subject to principles of judicial fairness and as such is not absolute.

As such, the “waiver-by-misconduct” doctrine, codified in the Federal Rules of Evidence as Rule 804(b)(6), maintains that if a court find, by preponderance of the evidence, that a “(1) [defendant engaged or acquiesced in wrongdoing; (2) [the wrongdoing was] intended to render the declarant unavailable as a witness and (3) [the wrongdoing does] in fact, render the declarant unavailable as a witness,” otherwise inadmissible hearsay may be admitted and a defendant *waives his right* to confront his accuser. *United States v. Gray*, 405 F.3d 227, 235, 240 (4th Cir. 2005).

At issue in the present case is whether Rule 804(b)(6) may still waive defendant William Barnes’ rights under the Confrontation Clause when the wrongful procurement of adversarial witness, James Reardon, stems not from the Barnes’ direct engagement in the wrongdoing, but from Barnes’ involvement in a conspiracy wherein a his *co-conspirator*, Alfred Anderson murdered James Reardon’s to procure his unavailability as a witness. Finding *Giles v. California*, 554 U.S. 353 (2008) controlling, the lower court found Rule 804(b)(6) to require a defendant *himself* engage in the wrongful procurement of an adversarial witness, thus precluding the applicability of principles of conspiratorial liability defined in *Pinkerton v. United States*, 328 U.S. 640 (1946).

However the lower court misinterprets the holding in *Giles* as requiring liability for a wrongdoing turn on *who* committed a wrongdoing rather than on *why* the wrongdoing was committed. This misinterpretation is further evidenced by the language of Rule 804(b)(6) itself, which provides that a defendant may either “engage[] in *or acquiesce in* wrongdoing” in order for the applicability of the rule to be triggered. Fed. R. Evid. 804(b)(6)(emphasis added).

For the reasons herein set forth, this Court should hold that a correct reading of *Giles* finds the “acquiesce” language in Rule 804(b)(6), consistent with the Confrontation Clause, to be indicative of the applicability of Pinkerton principles of conspiratorial liability in discerning the wrongful procurement of an adversarial witness. This construction subsequently finds defendant Barnes is liable for the murder of James Reardon as a foreseeable result of his involvement in an elephant poaching conspiracy, thereby waiving Barnes’ Confrontation Clause rights as well as any objections to the admissibility of James Reardon’s hearsay declaration revealing the elephant-poaching conspiracy.

A. This Court Is Bound To An “Abuse Of Discretion” Review In Discerning Whether The Fourteenth Circuit Erred In Its Evidentiary Findings And To A “De Novo” Review Regarding A Trial Court’s Legal Conclusions About The Federal Rules Of Evidence At The Confrontation Clause.

In determining whether the lower court erred in its evidentiary findings, this Court is subject to an “abuse of discretion” standard of review. *United States v. Cherry*. 217 F.3d 811, 814. Thus, while the reviewing court will pay deference to the lower court’s evidentiary findings, it must reverse the lower court’s decision if made under a “mistaken view of the law (citation omitted).” *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1219 (2007). In the present case, the Fourteenth Circuit’s exclusion of James Reardon’s hearsay declaration constitutes an abuse of discretion because it was based on a mistaken view of the law—specifically, Rule 804(b)(6).

Accordingly, this Court must reverse the Fourteenth Circuit's evidentiary rulings as to James Reardon's hearsay testimony.

However, in addressing "legal conclusions about the Federal Rules of Evidence and the Confrontation Clause" this Court is subject to a *de novo* standard of review. *United States v. Torrez-Ortega*, 184 F.3d 1128, 1132 (10th Cir.1999) (citing *United States v. Knox*, 124 F.3d 1360, 1363 (10th Cir.1997)). Because this issue requires this Court to make a legal conclusion as to whether Rule 804(b)(6) still waives a defendant's Confrontation Clause rights when an adversarial witness is wrongfully procured by a defendant's *co-conspirator*, and not the defendant himself, this Court is subject to a *de novo* standard of review.

B. The Fourteenth Circuit Mistakenly Precludes The Applicability of *Pinkerton* By Misinterpreting The Holding In *Giles* As Requiring The Applicability Of Rule 804(b)(6) Turn On *Who* Committed A Wrongdoing Rather Than On *Why* The Wrongdoing Had Occurred.

In *Giles v. California*, the Supreme Court held that Rule 804(b)(6) to require a "defendant intend to prevent a witness from testifying." 554 U.S. at 361. The Fourteenth Circuit understood this holding to constrain the applicability of Rule 804(b)(6) to a defendant, alone. However, this conclusion is not supported by the facts of the case.

In *Giles*, the defendant murdered his girlfriend in the midst of a domestic dispute. *Id.* at 353. At trial, the prosecution, under Rule 804(b)(6), attempted to introduce statements made by the defendant's girlfriend referencing the defendant's violent and abusive nature. *Id.* The defendant objected, arguing that he killed his girlfriend in fit of anger during an unexpected domestic dispute, and as such was never concerned his girlfriend would testify against him. *Id.* at 356. The Court agreed, and found girlfriend's hearsay declarations inadmissible under Rule 804(b)(6)'s "waiver-by-misconduct" analysis. *Id.*

Thus, though murder constitutes a wrongdoing, *see White*, 116 F.3d at 911, the facts in *Giles* demonstrate that the defendant's murdering of his girlfriend was not done with the intent to render her unavailable as a witness. As such, this Court must understand the holding in *Giles* as focusing on the "intent" language of Rule 804(b)(6). In doing so, this Court must hold that the Rule's applicability turns not on *who* committed the wrongdoing, but on *why* the wrongdoing occurred.

C. The Language Of Rule 804(b)(6) Suggests That The Rule Is Consistent With Application Of *Pinkerton* Principles Of Conspiratorial Liability.

Rule 804(b)(6)'s "acquiesce" provides that a defendant may "engaged in *or acquiesced in* wrongdoing," Fed. R. Evid. 804(b)(6)(emphasis added) thus supports the Rule's compatibility with *Pinkerton* principles of conspiratorial liability.

The definition of "acquiesce" within the scope of Rule 804(b)(6) is provided by the court in *United States v. Thompson* 286 F.3d 950, 964 (7th Cir. 2002). The court here held "acquiesce" to be the act of "accept[ing] tacitly or passively." *Id.* Conceptualizing a defendant's "acquiescence" to wrongful procurement of a witness to function as an intentional and voluntary act, the court found a defendant's "acquiescence" to be "no less valid as a means of waiver than the decision to more directly procure the unavailable of the witness." *Id.* As such, "a defendant who 'acquiesce[s]' in the wrongful procurement of a witness's unavailability but did not actually 'engage[]' in wrongdoing apart from the conspiracy itself" is be liable for the wrongdoing of his co-conspirator and this waives his Confrontation Clause rights. *Cherry*, 217 F.3d at 816.

Under this construction of Rule 804(b)(6), the involvement of a defendant in a conspiracy does not preclude the defendant from escaping liability simply because the defendant himself did not engage in the wrongdoing. Rather, by virtue of the defendant's role as a co-conspirator, the defendant "acquiesces" to acts done in furtherance of the conspiracy. As such, this Court holds

the construction of Rule 804(b)(6) to be consistent the application of *Pinkerton* principles of conspiratorial liability. In doing so, The Court will find defendant Barnes liable for co-conspirator Anderson's murder of Reardon. Though Barnes *himself* did not participate in the murder that rendered Reardon unavailable as a witness, his *acquiesced* to the murder by virtue of his role as co-conspirator.

D. The Application of *Pinkerton* Principles Of Conspiratorial Liability Is Contingent Upon The Wrongdoing Being Done In Furtherance, Within The Scope, And As A Reasonably Foreseeable Consequence Of An Ongoing Conspiracy.

Despite the applicability of *Pinkerton* principles of conspiratorial liability in the context of Rule 804(b)(6), evidence of the defendant's participation in a conspiracy alone is not demonstrative of the admissibility of testimonial statements. *See Cherry*, 217 F.3d at 820. In addition to a defendant's involvement in a conspiracy then, the wrongful procurement of an adversarial witness by a defendant's co-conspirator must have been done "in furtherance, within the scope of and [as] reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy." *Id.* These elements are satisfied in the present case.

i. Reardon's murder was done in furtherance of and within the scope of the elephant poaching conspiracy.

U.S. v. Pinkerton defines an act done "in furtherance" of a conspiracy as an act designed to achieve the common objective a conspiratorial scheme. 328 U.S. at 666. Such acts are defined by: (1) actual "acts and declarations" supporting the goals of the conspiracy and (2) a lack of affirmative withdrawal from the conspiracy. *Id.* In discerning whether an act is done in furtherance of a conspiracy, it is important to note that the scope of conspiracy extends beyond a conspiracy's primary goal to include a conspiracy's secondary goals, such as those "relevant to evasion of apprehension and prosecution for that [primary] goal" also fall within the scope of the conspiracy. *Cherry*, 217 F.3d at 820.

In the present case, both defendant Barnes and co-conspirator Anderson were active members of a conspiracy to hunt and kill endangered Asian elephants so as to harvest and sell the animals' ivory. Transcripts of Barnes' and Anderson's conversations in the days leading up to the big hunt are demonstrative of the threat Reardon posed to the success of the profitable scheme. On November 15, 2011, Reardon called Anderson with "second thoughts" about his involvement in the hunt. Reardon's insistence on determining the legality of the "domestic game hunt" Anderson invited him to participate in concerned both Anderson and Barnes. Presumably, to prevent Reardon from discussing his concerns with anyone, Barnes offered to talk Reardon himself and personally answer any questions Reardon had regarding the hunt. Despite this, Reardon again called Anderson voicing his concerns. Unwilling to risk the calling-off of the hunt, Anderson took matters into his own hands and murdered Reardon, assuring his silence and the viability of the scheme.

Thus, this Court should find that the evidence depicting Anderson and Barnes attempts to prevent Anderson from exposing the conspiracy coupled with a lack of evidence indicating either man's withdrawal from the conspiracy, *see United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986) (finding that the "defendant must show affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach his co-conspirators"), as indicative of Reardon's murder to be done in furtherance of the conspiracy. This Court should also find, pursuant to the notion of "secondary goals" in *Cherry*, that Reardon's murder achieved a secondary goal thus was done within the scope of the conspiracy. While Barnes' and Anderson's primary goal was to the killing of endangered elephants for their ivory, Reardon's insistence of proof of the schemes legality before he participate rendered Reardon a threat to the primary goal. As such, because his murder was intended to "eva[de]

apprehension and prosecution,” 217 F.3d at 820, his murder constituted a secondary goal under *Cherry*.

ii. Reardon’s murder was reasonably foreseeable.

Where a declarant is murdered by a defendant’s co-conspirator so as procure that declarant’s unavailability as a witness, the declarant’s death may be deemed reasonably foreseeable by a defendant should he have “bare knowledge of a plot to kill the victim and a fail[] to give warning to appropriate authorities. *United States v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005) (citing *United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982). Thus, a defendant’s lack of assertion against a planned murder constitutes the defendant’s “acquiescence in” or approval of a murder.

Transcripts documenting conversations between Anderson and Barnes on November 15, 2011 and November 29, 2011 demonstrate defendant Barnes’ bare knowledge of Anderson’s plan to murder Reardon. November 15, 2011 marked Anderson’s first recorded suggestion to kill Reardon. Despite a call from Barnes to Reardon attempted smooth things over, Reardon still had concerns regarding the hunt’s legality. Anderson’s suggested they, “get rid of him.” Two weeks later, on November 29th, Anderson again calls Barnes, but with heightened concern that Reardon might reveal the conspiracy. He emphatically tells Barnes, “[w]e’re out of time. We need him out of the picture.” Just after the phone call on the November 29, Anderson murdered Reardon.

While Barnes’ contends and the Government concedes that Barnes never agreed to or suggested that Reardon be murdered. However, under *Rivera* and *Mastrangelo*, bare knowledge of a co-conspirator’s plot to kill along with the defendant’s failure to alert appropriate authorities to be representative of reasonable foreseeability. Here, co-conspirator Anderson made numerous requests to “get rid of” Reardon. Instead of attempting shuts down Anderson’s plans to kill

Reardon, Barnes' responses to Anderson's suggestions of murder—e.g. “Not yet,” “Hold off,” conversely suggest an openness to killing Reardon in the future. On the eve of Reardon's murder, Anderson fully commits to killing Reardon, explaining to Barnes that Reardon's knowledge of the hunt in addition to his incessant inquiries as to its legality rendered him too much of a liability. As such Barnes' possessed direct knowledge of Reardon's intent to kill Anderson, satisfying the “base knowledge” required under *Rivera* and *Malestrango*. This in conjunction with Barnes' failure to alert appropriate authorities about Reardon's potential murder satisfies *Pinkerton*'s reasonable foreseeability element.

Thus, pursuant to *Pinkerton* principles of conspiratorial liability and Rule 804(b)(6), this Court should find defendant Barnes liable for the murder of James Reardon as a in furtherance, within the scope and a foreseeable result of his involvement in an elephant poaching conspiracy thereby waiving Barnes' Confrontation Clause rights as well as any objections to the admissibility of James Reardon's hearsay declaration revealing the elephant-poaching conspiracy.

II. BECAUSE NO JOURNALISTIC PRIVILEGE EXISTS UNDER RULE 501, REPORTER KARA CRAWLEY CANNOT CLAIM SUCH PRIVILEGE AS PROTECTING THE IDENTITY OF THE SOURCE THAT HELPED EXPOSE DEFENDANT BARNES' CRIMINAL CONSPIRACY.

Federal Rule of Evidence 501 states that “[t]he common law, as interpreted by United States courts in the light of reason and experience, governs privilege, unless provided otherwise by the Constitution, a federal statute, or the Supreme Court of the United States. Fed. R. Evid. 501. At issue in the present case is whether a journalistic privilege exists under Rule 501.

The Fourteenth Circuit found it did, analyzing the recognition of a journalist's privilege by way of three considerations used in the recognition of a psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996). In doing this, however, the Fourteenth Circuit not only narrowly defines the purpose and scope of the field of journalism, but the court ignores the fact

that neither the Constitution, nor a federal statute, nor Supreme Court precedent find the existent of such privilege under Rule 501. Rather, the American judicial system seems content to adhere to the principle that the public “has a right to every man’s evidence.” *United States v. Bryan*, 339 U.S. 323, 331 (1950). With no compelling reason to stray from this principle, this Court should find no journalist’s privilege under Rule 501 and compel reporter Kara Crawley to comply with the Government subpoena and disclose the identity of her confidential source.

A. This Court Must Assess Whether A Journalistic Privilege Exists Under A “De Novo” Standard Of Review.

Because questions regarding: (1) whether a journalistic privilege exists under Rule 501, (2) what the scope of the potential privilege may be, and (3) whether the district court erred in its holding, are questions of both fact and law, *see United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995), this Court must exercise a *de novo* standard of review. *See Shoen v. Shoen*, 48 F.3d, 412, 414 (9th Cir. 1995).

B. In Applying The Three Considerations For Recognizing A Privilege Under Rule 501, The Fourteenth Circuit Cherrypicks Aspects Of The Field Of Journalism Rather Than Considering The Field In Its Entirety.

In *Jaffee v. Redmond*, the Court articulated three considerations governing the recognition of privilege under Rule 501: (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 burden on truth-seeking that might be imposed by it, and (3) “reason and experience” – that is, the extent to which the privilege is recognized by the states.” 518 U.S. at 9-14. In using this framework to consider a journalist’s privilege, the Fourteenth Circuit cherry-picked different facets of with respect to the practice of journalism instead of considering the field in its totality. Had the lower court engaged in the latter, it is unlikely an absolute journalist’s privilege would be found.

While the lower court is correct with respect to the first consideration that a journalist's privilege will serve the public good by allowing the press to report on corrupt government officials, the court implements far too narrow definition of the business of journalism. In doing so, the court disregards the growth of our present day media, discounting both the number of mediums news can be reported as well as in the number of those that identify themselves as journalists. Additionally, given this growth, exempting journalists from testifying before a grand jury does more harm than good. Allowing sources to go unidentified when they have highly relevant material to a given case, degrades the judicial process—keeping important facts from the jury, and derailing efficiency of the courts. *Branzburg*, 408 U.S. at 688.

Second, the court's finding that lack of privilege renders sources less forthcoming with information is unfounded and unsupported by conclusive evidence that demonstrate as such. *Id.* at 694. Privilege or not, this nation's citizens have never shied from the speaking with the media when faced with a gross injustice. *Id.* at 694-95.

Finally, that a "majority of states" have recognized a journalist's privilege is irrelevant in a federal jurisdiction, particularly where the federal jurisdiction finds no controlling authority—the Constitution, a federal statute, Supreme Court precedent—to recognize any such privilege. As such, neither should this Court.

C. Pursuant *Branzburg*, This Court Should Find The Government's Interest In Investigating and Prosecuting Crime Outweighs The Benefits Of A Journalist's Privilege.

In *Branzburg*, this Court contemplated the existence and applicability of a journalist's privilege where reporters subpoenaed to disclose the identity of confidential sources refused to do so, finding the First Amendment to shield them from compelled disclosure. *Id.* at 688. While the Court understood the First Amendment's role in protecting a free press, the *Branzburg* majority held the Government's interests in investigating and prosecuting crime to outweigh this

right. *Id.* The Court further contents that all citizens, including journalists, share a common duty reveal information about the illegal conduct of others to the Government. *Id.* at 697.

In response to this duty, reporters expressed concern that their inability to protect the identity of confidential sources would impede future sources from providing information, hurting the business of news reporting, including news of illegal conduct. *Id.* at 681-82. However, no empirical evidence supports the contention that disclosure of confidential sources will deter future sources from providing information. Additionally, the revelation of sources “involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.” *Id.* at 681. Further, the government does not “require the press to publish its sources of information or indiscriminately to disclose them on request.” *Id.* Therefore, members of the press may pursue confidential sources, and shield their identity from the *public*.

Because the facts in the present case are almost identical to those in *Branzburg*, this Court should find the *Branzburg* holding as controlling. Like the reporters in *Branzburg*, *Boerum Times* reporter, Kara Crawley was subpoenaed to reveal the identity of her source just after publishing an article disclosing illegal behavior. Crawley refused to reveal her source, arguing that compelled disclosure of this information violated her First Amendment rights. However, under *Branzburg*, because lack of a journalist’s privilege: (1) does not affect reporter’s ability to gather information from future sources, and (2) because exempting a journalist from testifying has undesirable public policy implications, this Court should compel reporter Crawley to complying with a subpoena demanding she identify her confidential source.

i. Disclosure of sources with knowledge of illegal activities does not affect reporters' news-gathering ability.

Branzburg held that compelling reporters to identify their confidential sources does not hamper newsgathering ability where available data does not conclusively prove that the flow of news to the public would be inhibited if reporters were required to testify. *Id.* at 693. Additionally, the Court found the nature of the journalist-informant relationship to be nuanced such that the existence of a privilege or lack thereof makes little difference. First, the Court held that “the relationship of many informants to the press is [] symbiotic . . . unlikely to be greatly inhibited by the threat of subpoena.” *Id.* at 694-695. Because confidential informants tend to provide information to reporters with the specific intent to alert the public to a cause or wrongdoing the informant finds personally significant, it is unlikely that disclosure of an informant’s identity will prevent future informants, equally eager to publicize their own causes, from reaching out to reporters.

Second, the Court found that even if an informant prefers anonymity, if he or she “is sincerely interested in furnishing evidence of the crime,” it is unlikely that the informant will find the disclosure of his or her identity to public authorities as violating a trust, particularly such authorities share the informant’s interest in justice and are additionally in charge of the informant’s safety and well-being. *Id.* at 695.

Here, the relationship between Crawley and her informant is demonstrative of *Branzburg*’s symbiotic relationship. First, the informant’s initiation of an interaction with Crawley and his or her voluntarily revelation of the elephant-poaching conspiracy at Big Top Circus, fully understanding Crawley’s position as a reporter, demonstrates the informant’s personal interest in alerting the public to a gross injustice. Additionally, the informant’s

willingness to appear on camera without concealing his or her face further suggest the informant is comfortable in aligning his or herself against the circus and animal cruelty.

However, even if the informant committed to anonymity, the informant's forthcoming nature with respect to information about the elephant poaching conspiracy suggests a "sincere interest" in exposing defendant Barnes' illegal activities. Additionally, Crawley's informant might appreciate revealing her identity to public authorities, given her expressed concerns regarding her employment, physical safety, and peace of mind. Thus, even if the informant would ideally remain anonymous, it is likely that the informant will mind disclosing his or her identity to public authorities because of a sincere interest in exposing the conspiracy.

Thus, Crawley's fear that disclosing her source at Big Top will scare future sources away is unfounded.

ii. Exempting a journalist from testifying before a grand jury ignores the grand jury's role in the maintenance of constitutional and criminal justice and may result in undesirable public policy implications.

The *Branzburg* court expressly acknowledges the grand jury's essential role in maintaining the integrity of the justice system by conducting the necessary inquiries to determine whether an accused is "properly subject" to the charges laid against him. *Id.* at 688. To do this fairly and effectively, the grand jury necessarily relies on the compliance of those summoned to testify before it. *Id.* As such, waiving compliance under a journalist's privilege prohibits the grand jury from doing the job it was designed to do. With respect to a journalist's privilege in particular, this Court stated in *Branzburg* that "[the Court] cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Id.* at 692. Thus, because the existence of a journalist's privilege permits

reporters to evade testifying before a grand jury, thereby allowing criminals such as defendant Barnes to act without consequence, this Court should not recognize a journalist's privilege.

D. Even If This Court Finds A Journalist's Evidentiary Privilege Under Rule 501, Such Privilege Should Be Qualified, Thereby Permitting The Waiver Of Such Privilege When Disclosure Of Information Is Highly Material And Not Attainable By Other Sources.

The notion of a "qualified journalist's privilege" as interpreted in Justice Powell's concurrence in *Branzburg* allows for journalists to keep sources confidential on a case-by-case basis. 408 U.S. at 665, 709. *See also, McKevitt v. Pallasch*, 339 F.2d 530, 531 (2003).

The Second Circuit determines on a case-by-case basis whether a qualified journalist's privilege exists through application of a three-prong test. *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 33 (1998). The test requires the party moving for disclosure to show that the information it seeks is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources. *Id.*

Here, the Government seeks to discover the identity of the Big Top employee who overheard a conversation between Barnes and another party discussing the elephant-poaching conspiracy. Because the conversation expressly addressed charges brought against defendant Barnes, identification of Crawley's source is highly material and necessary for the maintenance of a claim. Specifically, the conversation at issue forms the basis of the violence against animal charges against Barnes. Furthermore, because the conversation took place between Barnes and *another party*, the conversation also serves to maintain claims alleging Barnes' involvement in a conspiracy.

Additionally, Crawley's informant is the only witness that can provide "unimpeachably objective evidence" of the conspiracy charge. *Id.* at 36. The same information cannot be "reasonably obtained" from another source. Though the FBI had transcripts of conversations

between defendant Barnes and co-conspirator Anderson discussing details of the conspiracy, the date of executed warrant to tap Barnes' phone was October 4, 2011—long after Crawley met with her Big Top informant. Thus, the Government's interest in evidence material to present case outweighs a protection of an informant's identity under qualified privilege. Because of the highly material information overheard by Crawley's defendant, this Court must—either by finding no journalistic privilege to or by finding a qualified privilege waived by the Government's interest in investigating and prosecuting crime to exist—require Crawley to comply with her subpoena to appear before a grand jury and subsequently disclose the identity of her confidential source.

III. AGENT SIMANDY'S INTERPRETATION OF VAGUE AND AMBIGUOUS CODE WORDS BASED ON HIS INVOLVEMENT IN THE INVESTIGATION IS ADMISSIBLE LAY WITNESS TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 701.

Where a witness is not testifying as an expert under Rule 702, his opinion testimony must be limited to that (a) rationally based on his perception, (b) which is helpful to the jury's clear understanding of the witness' testimony or determining a fact at issue, and (c) which is not based on scientific, technical, or other specialized knowledge. Fed. R. Evid. 701. As a general rule, proper lay witness testimony relays “the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” Fed. R. Evid. 701, advisory committee's note (citing *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995)).

Agent Simandy's testimony satisfies Rule 701's “perception” requirement where he personally examined the transcripts containing the code words and interviewed witnesses who assisted Barnes with the alleged helicopter rental and weapons purchase. Additionally, his testimony regarding the vague and cryptic code words satisfies Rule 701's “helpful” prong

where it assists the jury in comprehending the content of the communications and determining Defendant's culpability. Finally, his testimony is not based on his expertise or "specialized knowledge" as a law enforcement officer where his interpretations arise entirely from his investigation of this case.

For the reasons set forth herein, this court should hold that a witness' helpful interpretations of code words informed by his first-hand review of transcripts coupled with information acquired through witness interviews satisfies Rule 701's "rationally based on the witness's perception" prong. Accordingly, the Court should admit Agent Simandy's limited testimony regarding the possible meaning of the code words under Rules 701 and 602.

At issue here is whether Agent Simandy's interpretation of coded words contained in transcripts of recorded conversations between Barnes and his co-conspirators satisfies Rule 701's "rationally based on perception" prong. Barnes contends that Agent Simandy's interpretations should not be admissible at trial where Agent Simandy did not participate in or directly observe the conversations. However, Rule 701 does not require that the witness personally participate in or directly observe the underlying events that are the subject of the records he has examined. Rather, the Rule merely requires the witness have "first-hand knowledge" regarding the materials to which he is testifying. Fed. R. Evid. 701, advisory committee's note.

A. This Court Must Reverse The Fourteenth Circuit's Decision Where There Has Been An "Abuse Of Discretion."

In determining whether the lower court erred in its evidentiary findings requiring reversal of such findings, this Court is bound to an "abuse of discretion" standard of review. *General Electric Co. v. Joiner*, 522 U.S. 136, 141-142 (1997) (citing *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997)). *See also Zepeda-Lopez*, 478 F.3d at 1219. While the reviewing court will

pay deference to the lower court's evidentiary findings, it must reverse if the lower court harbored a "mistaken view of the law (citation omitted)." *Id.*

The Court of Appeal's exclusion of Agent Simandy's testimony constitutes an abuse of discretion where it is based on a mistaken view of the law, specifically, an incorrect interpretation of Rule 701. Accordingly, this Court must reverse the Fourteenth District's evidentiary rulings as to Agent Simandy's proffered testimony.

B. The Court Should Adopt The "Rationally Based On Witness Perception" Approach That Focuses On The Witness' Perception Of Facts Acquired In The Investigation.

This case presents a split among the federal circuits concerning a witness' required level of involvement in the events forming the basis of his testimony to satisfy the "rationally based on perception" prong of Rule 701. To preserve the plain meaning of this rule, this Court should adhere to the approach that the "witness perception" prong is met when the testifying witness has personally examined the records to which he is testifying. *See, e.g., United States v. Jayyousi*, 657 F.3d 1085, 1102-1103 (11th Cir. 2011); *Zepeda-Lopez*, 478 F.3d at 1222; and *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001).

A witness need not be a participant in the underlying conversations or directly perceive them, but must have "first-hand knowledge" of the facts that form the basis of his opinion. *See* discussion *infra* Parts III.B.i. Here, the content of the call transcripts and witness statements constitute facts of which Agent Simandy possessed first-hand knowledge. These facts, in turn, form the basis of his interpretations of the three vague and ambiguous code phrases. Accordingly, where Agent Simandy is merely conveying his understanding of statements he personally observed and evaluated through his investigative efforts, his testimony is proper under Rule 701.

- i. A lay witness does not have to participate in or observe a conversation to testify about his perception and understanding of words spoken so long as his interpretation is grounded on his involvement in the investigation.***

Requiring that a witness' lay opinion testimony be based on his participation or direct observation of underlying events imposes an obligation absent from Rule 701. In declaring that it has "never held that a lay witness must be a participant or observer of a conversation" to testify as to "the meaning of coded language used in the conversation [,] the *Jayyousi* court indicated that lesser involvement may sufficiently satisfy the "rational based on witness perception" prong. 657 F.3d. at 1102. The defendants in *Jayyousi* challenged the testimony of an FBI agent who interpreted code words used by Islamist jihadists contained in intercepted call transcripts on the grounds that "he was not present during all of the intercepted calls [.]” *Id.* at 1101-102. The agent, “[b]ased on the present investigation and his participation in over 20 terrorist-related cases,” interpreted ambiguous code words including “football”, “soccer” and “tourism” for jihad, “tourist” for mujahideen, and “sneakers” for support.” *Id.* at 1095.

The court held that the agent's interpretation of these words grounded on "examination of voluminous documents" during his five-year investigation of the case constituted testimony "rationally based on [his] perception" of records in the government's possession. *Id.* at 1103. The agent had not "merely delivered a jury argument from the witness stand[.]" but had offered the jury testimony that would assist it in reaching its own decision regarding the Defendant's culpability.” *Id.* (citing *United States v. Cano*, 289 F.3d 1354, 1363 (11th Cir. 2002)).

Further, the testifying agent's expertise, if any, regarding coded-words used by terrorists, did not disqualify his testimony as that based on "scientific, technical or other specialized knowledge," where the agent's testimony was limited to information he learned "during this

particular investigation” and “interpreted code words based on their context.” *Jayyousi*, 657 F.3d at 1104.

In a case involving co-conspirators who provided financial aid to a terrorist organization, one FBI agent identified certain individuals as leaders of “zakat” communities, while another agent interpreted a phone call as referring to a Hamas leader. *United States v. El-Mezain*, 664 F.3d 467, 514 (5th Cir. 2011). Neither of the agents directly observed the underlying events or persons depicted in the videos or participated in the referenced phone conversations. *Id.* Rather their testimony was based on review of evidence secured in the case. *Id.* The Fifth Circuit held that the agents’ testimony was admissible under Rule 701 where their “opinions were limited to their perceptions from *their* personal investigation of this case.” *Id.* at 513 (emphasis added).

The court reached a similar conclusion in *Miranda*, where the defendants challenged an FBI special agent’s interpretation of code words used in recorded calls as inadmissible lay witness testimony. 248 F.3d at 438. The agent had translated intercepted telephone conversations that he did not listen to as they occurred. *Id.* at 441. Nevertheless, the agent’s opinions regarding the meaning of the words were based on his personal perception of information acquired via his “extensive participation in the investigation.” *Id.* Thus, he was properly testifying as a lay witness, rather than as an expert. *Id.*

Three other circuits have similarly tied Rule 701’s “perception” requirement to facts gathered in the investigation. In *Zepeda-Lopez*, the Tenth Circuit declared that the testifying agent’s identification of the defendant on a surveillance tape constituted proper lay opinion where the agent “had looked at the video ‘many times.’” 478 F.3d at 1222. Similar to the circumstances in *Miranda*, the Seventh Circuit held that Rule 701’s “perception” prong was satisfied even where the witness’ testimony was based on his interpretation of calls he had not

perceived contemporaneously. *United States v. Rollins*, 544 F.3d 820, 831-32 (7th Cir. 2008). The Ninth Circuit found no issue where the witness testifying to the meaning of “ambiguous statements” was not a participant to the conversations, and had only observed the speakers on some occasions. *United States v. Freeman*, 498 F.3d 893, 904-905 (9th Cir. 2007).

Notably, the *Freeman* court focused on the agent’s explanation for his interpretations, specifically that he deciphered the words based on the context of conversations between the co-conspirators. *Id.* at 900, 902. The agent had “first-hand knowledge” of the information to which he testified where his interpretations arose from his viewing “several hours of intercepted conversations,” some instances of direct observation, and other facts learned in the investigation.

ii. A lay witness’ interpretation of coded words and phrases is “helpful” to the jury where the words are vague and ambiguous such that their meanings are unclear without the witness’ explanations.

An agent’s lay testimony regarding the “meaning of terms” used in recorded conversations and documents, satisfies Rule 701’s “helpful” prong where it “provid[es] the jury with relevant factual information about the investigation.” *El-Mezain*, 664 F.3d at 513.

Accordingly, a witness’ interpretation of code words may be admissible where the potential meanings of the words are not perfectly clear without the witness’ explanations. *See, e.g., Jayyousi*, 657 F.3d at 1103 (agent’s testimony admissible under Rule 701 where it was based on his “examination of voluminous documents[,]” that enabled him interpret code words “that the jury could not have readily discerned.”).

In contrast, testimony that merely amounts to an argument or directly tells the jury what conclusion it should reach as to the defendant’s culpability is not “helpful” and will be held inadmissible. *See United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001) (FBI agent’s testimony regarding “plain English words and phrases” and assertions regarding the defendant’s

guilt constituted inadmissible lay witness testimony). *See also Jayyousi*, 657 F.3d at 1103, discussing *Cano*, 289 F.3d at 1364 (contrasting the testifying agent’s interpretation of vague code words with testimony offered by the agent in *Cano*, who deciphered “only a simple code” that “the jury could have deciphered easily”). The *Jayyousi* court admitted the agent’s interpretation of code words that enabled the jury to “understand better the defendants’ conversations that related to their support of international terrorism.” 657 F.3d at 1104.

C. Agent Simandy’s Interpretation Of Code Words Used By Barnes Based On His Review Of Intercepted Call Transcripts And Interviews With Agent Lamberti And Alan Klestadt Satisfies Rule 701’s “First-Hand Knowledge” And “Helpful” Requirements.

i. Agent Simandy’s interpretation of the “black cat,” “Charlie tango,” and “blood diamonds” is informed by his first-hand perception of investigative records, rather than his specialized training or experience as a law enforcement officer.

Agent Simandy’s limited interpretation testimony of three code phrases is based on his direct perception and understanding of those words based on the context in which they appear and information gleaned from his interviews with Agent Lamberti and Alan Klestadt. Accordingly, his first-hand interaction and comprehension of the phrases satisfies the first and third prongs of Rule 701. While Agent Simandy was not involved in the entire investigation of the case against Barnes, he fully reviewed transcripts documenting about a dozen conversations that took place over the course of a two-month period. Similar to the agents’ evaluations in *Jayyousi* and *Freeman*, Agent Simandy interpreted the code words “black cat,” “Charlie Tango” and “blood diamonds” by considering the content surround the phrases in the transcripts and information acquired in the investigation. *See Jayyousi*, 857 F.3d at 1095; and *Freeman*, 498 F.3d at 900.

Agent Simandy’s personal interviews with Agent Lamberti and Alan Klestadt concerning the subject matter of their communications with Barnes aided him in interpreting the code

phrases contained in the transcripts by clarifying Barnes' activities leading up to his arrest. The extent of Agent Simandy's personal investigation forms more than an adequate basis for his interpretations of the code words. *See Rollins*, 544 F.3d at 830-832 (agent's "impressions testimony" regarding the meaning of recorded conversations admissible where based on facts gathered in the investigation, including intercepted phone calls, witness interviews, admissions from members of the conspiracy, and surveillance).

Further, Agent Simandy did not possess specialized knowledge of "poaching" jargon from prior investigations that would inform his comprehension of the cryptic phrases. Since his interpretations are based entirely on his investigation of this specific case, his opinion regarding their meanings constitutes admissible lay witness testimony. *See, e.g., Freeman*, 498 F.3d at 900, 902 (agent's interpretation of ambiguous, statements consisting of "ordinary terms" admissible where "based on his general knowledge of the investigation.").

ii. Agent Simandy's interpretation of the vague and ambiguous phrases satisfies Rule 701's "helpful" prong, where absent his interpretation, a jury would not clearly understand the content of the communications relating to Defendant's culpability.

Agent Simandy's interpretations of the code words "black cat," "Charlie tango," and "blood diamonds" are helpful in consideration of the vague and ambiguous use of these words that renders their meanings not perfectly clear without his explanation. *See Jayyousi*, 657 F.3d at 1103; *Freeman*, 498 F.3d at 902. His interpretation aids the jury by enabling it to determine what Barnes may have "meant to convey." *Freeman*, 498 F.3d at 902 (citing *United States v. Simas*, 937 F.3d 459, 465 (9th Cir. 1991)). Knowledge of such information, allows the jury to better assess Barnes' culpability and the validity of his contention that Anderson was delusional in believing Barnes had conspired to kill his own elephants.

Agent Simandy’s interpretations of these words is in stark contrast to the testimony offered by the FBI agent in *Peoples*, who interpreted “plain English words and phrases” that the jury could have readily deciphered. *See* 250 F.3d at 640. Further, the agent in *Peoples* presented her determinations as the government’s determinations, rather than merely her interpretation of statements uttered by the defendant, further defeating Rule 701’s “helpful” prong. *Id.* Her entire testimony, rather than assisting the jury in assessing the defendant’s culpability, invaded the jury’s province by telling it what conclusion it should reach. *Id.* at 640-642. In juxtaposition, Agent Simandy’s testimony aids the jury in understanding “coded, oblique” language. *Id.* at 640. Agent Simandy will merely provide a well-informed *interpretation* of the code words that the jury is free to accept or reject. *Zepeda-Lopez*, 478 F.3d at 1222-223; *United States v. Christian*, 673 F.3d 702, 714 (7th Cir. 2012).

Accordingly, his limited testimony meets all three of Rule 701’s prongs and should be presented to the jury at trial.

D. The Injection Of A Personal Participation Or Direct Observation Of The Events Requirement Is Contrary To The Plain Meaning Of Rule 701 And Should Be Rejected.

i. The federal circuits that have adopted a personal participation or observation requirement have based their decision on witness testimony that exceeded the scope of facts the witnesses actually perceived.

The requirement that lay opinion testimony be based on personal involvement or observation of the underlying events adopted by the Eighth, Fourth and Second Circuits improperly modifies the “witness perception” prong on the basis of overbroad, inappropriate testimony offered in cases decided by those circuits.

In *Peoples*, the testifying agent’s testimony amounted to any argument telling the jury what conclusion it should reach based “almost entirely of her personal opinions of what the conversations meant.” 250 F.3d at 640. Further, the agent decoded plain English words and

phrases that did not require deciphering, and thus, were not “helpful” to the jury. *Id.* at 640. The court suggested that if the agent’s testimony was limited to the “details of her investigation,” it may otherwise qualify as admissible lay witness testimony. *Id.* at 642. Instead, her testimony had gone far beyond to inadmissible personal assertions of the defendants’ culpability. *Id.*

Similarly, the agent’s testimony in *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010) is subject to criticism under either of the two approaches to the “witness perception” prong. The prosecution tried to admit the agent’s testimony that was not based on his personal perceptions of the case but rather his expertise without satisfying the requirements of Rule 702. *Id.* at 289-290, 292. By focusing on the agent’s “training and experience,” rather than his personal “observations from the surveillance employed,” the government treaded into Rule 702 territory and its strict requirements. *Id.* at 290, 293.

Further, the agent’s level of involvement and investigation did not adequately inform his testimony under Rule 701. The agent merely observed surveillance and did not even necessarily listen to all of the relevant calls. *Id.* at 293. Accordingly, his *broad* testimony regarding the nature and meaning of the various phone calls was not based on his first-hand knowledge of the facts, via direct observation or participation of underlying events, or through review of accumulated investigative records. Therefore, Johnson’s testimony that was not based on his involvement in the investigation invaded the jury’s province as the ultimate fact-finder. *Id.*

In *United States v. Garcia*, 413 F.3d 201, 210-213 (2nd Cir. 2005), the testifying agent offered his opinion as to the defendant’s culpability based on the totality of evidence gathered in the investigation, rather than limiting his testimony to his personal involvement and perceptions. The agent summarized evidence that had not yet been introduced into evidence, wrongfully implying to the jury, from the very outset, that the facts to which he testified could be assumed

true. *Id.* at 214. In turn, his “broadly based opinion testimony as to culpability” interfered with the jury’s ability to reach its own conclusion regarding the defendants’ culpability. *Id.*

ii. Agent Simandy’s testimony should admitted even if this Court elects to adopt the Peoples’ understanding of rational perception where he is only interpreting code words he actually perceived rather than making blanket assertions of culpability.

The agents’ overly broad “argument” testimony in *Peoples*, *Johnson*, and *Garcia* exceeded the scope of appropriate lay testimony based on the witnesses’ limited first-hand knowledge of the matters to which they testified. The breadth of the agents’ testimony and the level of investigation informing their opinions starkly contrast with Agent Simandy’s involvement in this case and the scope of his testimony. Here, Agent Simandy’s has “firsthand knowledge of the matters” for which his testimony has been sought, specifically, his observation and interpretation of language contained in the transcripts. *Cf. Johnson*, 617 F.3d at 293.

First, Agent Simandy extensively and thoroughly reviewed the transcripts of intercepted phone interviews, and spoke with two individuals whose communications with Barnes provide insight into the meaning of the coded language. Unlike the agents in *Johnson* and *Garcia*, Agent Simandy’s testimony is limited to reflect his actual involvement and perceptions. He has not presented the investigative efforts of other investigative agents as his own. *Cf. Garcia*, 413 F.3d at 212-213. Agent Simandy will merely convey to the jury that he has visually perceived certain words and phrases in a set of transcripts and interpreted them by considering the larger context of the transcripts he personally reviewed and information key actors conveyed to him.

Further, Agent Simandy’s limited testimony is introduced on the basis of his specific investigation of the case, rather than any specialized knowledge or expertise as a 5-year FBI agent. This is in contrast to the agent’s testimony in *Johnson*, which was presented on the basis of the his training and experience as a DEA agent. 617 F.3d at 289-290. Accordingly, his

interpretations are not ones “that an untrained layman could *not* make if perceiving the same acts or events.” *Peoples*, 250 F.3d at 641 (emphasis added).

The Government concedes that whether the specific code words and other transcribed statements were even spoken by Barnes is a separate matter that it bears the burden of proving. Agent Simandy is not asserting that Barnes actually spoke the subject words and phrases, nor is he summarizing the transcripts before they are introduced into evidence to sway the jury to presumptively accept his conclusions. *See Garcia*, 413 F.3d at 210 (discussing the limitations of lay witness testimony).

Given the limited scope of Agent Simandy’s helpful interpretation testimony, and the fact that his testimony rests upon his actual perception and evaluation of code words in the transcripts, his testimony satisfies the requirements of Rule 701 even under the *Peoples* approach.

CONCLUSION

With respect to the exclusion of James Reardon’s hearsay declaration revealing the nature of the elephant-hunt conspiracy, this Court should find that the proper reading of *Giles v. California* and of Rule 804(b)(6) find the rule compatible with the application *Pinkerton* liability. As such, though defendant Barnes’ co-conspirator, Anderson, murdered Reardon so as to render him unavailable as a witness, because the murder was done in furtherance, within the scope, and as a reasonably foreseeable consequence of the conspiracy, Reardon’s hearsay declaration is admissible under Rule 804(b)(6) and defendant Barnes waives his rights under the Confrontation Clause.

With respect to Kara Crawley’s refusal to name sources under a journalistic privilege, the Government contends that neither the language of nor the legislative history of Rule 501 shields her from revealing sources with knowledge of a crime. Rather, this Court has ruled expressly

against doing so in *Branzburg*. As such, this Court should adhere to the precedent it set out in *Branzburg* precedent and continue to hold that no journalist privilege exists. Alternatively, in finding privilege to exist, such privilege should be qualified, thereby able to be waived in the presence of strong Government interests.

With respect to Agent Simandy's limited testimony regarding his interpretation of code words and phrases contained in transcripts prepared by his predecessor, this Court should align with the *Jayyousi* approach in declaring that Rule 701's "rationally based on the witness' perception" requirement is met where the testifying witness personally examined the records to which he is testifying. Alternatively, Agent Simandy's testimony is admissible under the *People's* approach, which unnecessarily conflates a personal participation, observation or personal knowledge requirement, where his limited interpretation testimony relates to his direct observation of code words contained in the transcript.

APPENDIX

CONSTITUTION

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES

Privilege in General, Federal Rule of Evidence 501

The common law -- as interpreted by United States courts in the light of reason and experience -- governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

Need for Personal Knowledge, Federal Rule of Evidence 602

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal

knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Opinion Testimony by Lay Witnesses, Federal Rule of Evidence 701

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one 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.

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

2000 Amendments

The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or

things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

Hearsay Exceptions: Declarant Unavailable. Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability, Federal Rule of Evidence 804(b)(6)

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.