22R

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. Whether Federal Rule of Evidence 804(b)(6) makes admissible the hearsay declaration of an unavailable witness on the basis that the defendant's co-conspirator murdered the witness, where it was reasonably foreseeable that the co-conspirator would murder the witness in order to silence him, but there is no evidence that the defendant himself intended to prevent the witness from testifying.

II. Whether under Federal Rule of Evidence 501 there is an evidentiary privilege for information gathered during a journalistic investigation and if so whether this privilege is absolute.

III. Whether the requirements of Federal Rule of Evidence Rule 701, as a matter of law, exclude a witness who has neither participated in nor directly observed a conversation and has merely reviewed transcripts and conducted interviews from giving lay opinion as to the meaning of alleged code words in the conversation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. UNITED STATES SUPREME COURT CASES

II. UNITED STATES COURTS OF APPEALS CASES

III. UNITED STATES DISTRICT COURT CASES

IV. STATE COURT CASES

V. BRITISH CASE LAW

VI. FEDERAL RULES AND STATUTORY PROVISIONS

VII. SECONDARY SOURCES AND OTHER AUTHORITIES

STATEMENT OF THE CASE

William Barnes inherited Big Top Circus, a small business, from his father in 2000. (R. 1.) Located on over one hundred acres of grassland and deciduous forest in southern Boerum, the Big Top property provides excellent grazing grounds for Asian elephants, and the circus is known for its herd of twenty such animals. (R. 1.)

In July 2011, Barnes learned that Big Top required an additional $500,000 by the end of the year to avoid insolvency. (R. 1.) Barnes contacted two other Boerum circuses, Boerum City and Flying Feats, and proposed that the three circuses combine elephant herds "for a month of special holiday performances." (R. 2.) In exchange, Barnes offered to share Big Top's expansive acreage with Boerum City and Flying Feats' elephants for the winter. (R. 2.) Boerum City and Flying Feats agreed. (R. 2.) The circuses planned to bring ten elephants each to Big Top, arriving on December 2, 2011. (R. 2.)

Barnes then contacted Arthur Anderson, whom Barnes had met at a Boerum hunting convention three years previous. (R. 1.) Barnes invited Anderson to join him in a plan to hunt and harvest the ivory tusks of the approximately forty elephants that would be wintering at Big Top. (R. 2.) Anderson agreed and enlisted an acquaintance, James Reardon, to assist in the poaching scheme. (R. 2.)

On October 2, 2011, Barnes contacted Weapons Unlimited, a licensed and registered firearms supplier, to inquire into purchasing three assault rifles for the hunt. (R. 2.) Unbeknownst to Barnes, the Weapons Unlimited "employee" he spoke with was an undercover agent from the Bureau of Alcohol, Tobacco, and Firearms (ATF). (R. 2.) The agent informed Barnes that the assault rifles would cost $1000 per weapon, plus $300 in fees, and that Boerum law required a three month waiting period for licensing. (R. 2.) However, the agent also offered to sell Barnes

three unlicensed AK-47s immediately for $500 each, if Barnes were "willing to deal under the table." (R. 2.) Barnes accepted the latter offer and provided his credit card information to the agent, who agreed to deliver the weapons on December 5, 2011. (R. 2.)

Based on the ATF agent's transaction with Barnes, the government obtained a warrant to monitor and record Barnes' telephone communications. (R. 2.) The government proceeded to intercept Barnes' telephone communications from October 4, 2011 through Barnes' arrest on December 1, 2011. (R. 13.) Agent Narvel Blackstock was assigned to monitor and record Barnes' telephone conversations during this time. (R. 13.) Agent Blackstock listened to the conversations as they occurred and then transcribed them. (R. 13.)

Agent Blackstock died on December 14, 2011. (R. 12.) Agent Thomas Simandy was assigned to the case the following day. (R. 12.) Prior to his death, Agent Blackstock had transcribed "about a dozen" conversations between Barnes and his alleged co-conspirators, Anderson and Reardon. (R. 13.) Agent Simandy "thoroughly reviewed the transcripts." (R. 13.) In addition, Agent Simandy interviewed the ATF agent at Weapons Unlimited and an employee of Copters Corporation, who told Agent Simandy that Barnes had arranged for a one day helicopter rental for December 15, 2011. (R. 13.) Based on this investigation, Agent Simandy concluded that "certain code words and phrases were used" during the transcribed telephone conversations between Barnes, Anderson, and Reardon. (R. 13.) In Agent Simandy's opinion, "black cat" was used to refer to the assault rifles purchased from Weapons Unlimited; "Charlie tango" was used to refer to the helicopter rented from Copters Corporation; and "blood diamonds" was used to refer to elephant tusks. (R. 13.)

The telephone conversations intercepted by the government indicate that by mid-November, 2011, Reardon was having serious reservations about the planned hunt. (R. 7.)

Reardon conveyed these reservations to Anderson, who responded by telephoning Barnes on November 15 to say they should "get rid" of Reardon. (R. 18.) Barnes replied, "You're worried over nothing," and instructed Anderson not to do anything. (R. 18.) On November 29, Anderson again telephoned Barnes to express his concerns about Reardon, saying, "We need him out of the picture," and, "I'm gonna take care of him." (R. 19.) Barnes again instructed Anderson to "hold off" and told Anderson that, "I don't want anything to do with this." (R. 19.) At approximately 7:30 pm that same night, a friend of Reardon's, Daniel Best, observed Anderson running out of Reardon's apartment. (R. 7.) Best entered the apartment to find Reardon dead. (R. 7.) Anderson was arrested shortly thereafter and confessed to killing Reardon to prevent him from exposing the poaching scheme to the authorities. (R. 7.)

The day before, on November 28, Reardon had telephoned Best and disclosed to him the details of the scheme. (R. 8.) Reardon described speaking with both Barnes and Anderson about the planned hunt and said specifically that Barnes had explained to him "how they would kill the elephants and split the ivory." (R. 8.) The government did not monitor or record this call because it was not made from Barnes' telephone. (R. 8.)

Several months prior to Barnes' arrest on December 1, 2011, Barnes had contacted a staff writer for the Boerum Times, Kara Crawley, and invited her to write an article on Big Top to increase publicity for the upcoming holiday performances. (R. 9.) Crawley agreed and visited the circus for the first time on September 15, 2011, returning every day for the next two weeks. (R. 9–10.) During one of her visits, a Big Top employee approached Crawley because he or she knew that Crawley was writing an article about the circus. (R. 10.) The employee revealed overhearing "a certain conversation between . . . Barnes and another party concerning a plan to kill the elephants for their ivory." (R. 10.) The employee allowed Crawley to video record an

interview for Crawley's notes. (R. 10.) The employee's face was visible in the video recording. (R. 10.) However, Crawley understood the video to be "for [her] eyes only." (R. 10.) Furthermore, the employee requested that Crawley use a pseudonym in place of his or her real name and that he or she not be identified as a Big Top employee. (R. 10.) The employee expressed serious concern for his or her safety should his or her identity be revealed. (R. 10.) The Boerum Times published Crawley's article on December 1, 2011. (R. 10–11.) The article included the information about the planned hunt Crawley had learned from the employee but did not disclose the employee's identity. (R. 10.)

On December 4, 2011, a grand jury indicted Barnes, charging him with conspiracy to deal unlawfully in firearms, conspiracy to commit a crime of violence against an animal enterprise, and conspiracy to commit unlawful takings under the Endangered Species Act. (R. 3–4.) Barnes was not charged with any crimes in connection with Reardon's murder. (R. 3–4.)

On May 1 and 2, 2012, the district court heard evidence and argument on three evidentiary motions: (1) the Government's motion to admit Best's testimony concerning his November 28, 2011 conversation with Reardon under Federal Rule of Evidence 804(b)(6), the forfeiture by wrongdoing exception to the hearsay rule; (2) a motion to quash the Government's subpoena seeking disclosure of Crawley's confidential source at Big Top; and (3) the Government's motion to admit Agent Simandy's lay witness opinion concerning the alleged code words and phrases used in the transcribed telephone conversations. (R. 25.) The district court ruled against the Government on all three motions. (R. 25.) The Government filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 20.)

The Fourteenth Circuit affirmed. (R. 20.) On the first issue, the court upheld the district court's conclusion that Rule 804(b)(6) requires proof that the defendant "intended to procure the

unavailability of the witness," and that this specific intent requirement cannot be satisfied by mere evidence that the defendant "could have reasonably foreseen that a co-conspirator would silence [the] witness." (R. 27.) On the second issue, the court recognized a journalist's privilege under Federal Rule of Evidence 501. (R. 29.) The Court further held that "the privilege is absolute and may not be overcome by a showing of need," and that, in the alternative, the court would be "inclined to sustain the privilege even under a balancing test." (R. 30.) On the third issue, the court held that a witness may only testify to alleged code words and phrases used in a conversation where the witness either participated in the conversation or contemporaneously observed it. (R. 30.) The Government filed a petition for writ of certiorari, which this Court granted on October 1, 2012. (R. 36.)

SUMMARY OF THE ARGUMENT

This Court should affirm the rulings of both the District Court and the Fourteenth Circuit that (1) the testimony of Best is inadmissible under Federal Rule of Evidence 804(b)(6); (2) Crawley's motion to quash the subpoena is granted because there is an absolute evidentiary journalist privilege under Federal Rule of Evidence 501; and (3) Agent Simandy's lay witness testimony was inadmissible under Federal Rule of Evidence 701.

The Fourteenth Circuit properly excluded Best's testimony because under this Court's holding in *Giles v. California*, Rule 804(b)(6) may only be applied where there is evidence that the defendant himself possessed the specific intent to prevent the witness from testifying. *Pinkerton* liability, which allows a defendant to be held criminally liable for substantive crimes committed by a co-conspirator, is inconsistent with this individualized specific intent requirement. Moreover, Rule 804(b)(6)'s fundamental policy rationales militate against allowing

courts to substitute *Pinkerton* liability for evidence that the defendant personally intended to prevent the witness from testifying.

The Fourteenth Circuit properly recognized an absolute journalist's privilege under Rule 501. Information gathered by a journalist is privileged because it meets the three factors for a federal common law privilege determined in *Jaffee v. Richmond*: (1) a journalist's privilege protects a private interest in reporting and the public interest in an informed citizenry; (2) this interest outweighs any burden on the collection of evidence because without the privilege the information is unlikely to exist; and (3) nearly all states have recognized some form of a journalist's privilege. A journalistic privilege is absolute because a qualified privilege would be so uncertain it would not serve the policy goals of the privilege. However, if a qualified privilege is recognized it applies to the present case.

The Fourteenth Circuit properly excluded the testimony of Agent Simandy because as a matter of law, he may not testify as a lay witness under Rule 701 as to the meaning of alleged code words in a conversation where he did not participate or directly observe the conversation. Agent Simandy's interviews and review of the transcripts do not meet the requirements of first-hand knowledge under Rule 701(a). In addition, his testimony does not meet the requirements of Rule 701(b) because it is not helpful to understanding the witness's testimony or determining a fact in issue and merely provides conclusory observations supporting the Government's position. Agent Simandy's testimony also does not meet the requirement of Rule 701(c) because it is based on his specialized expertise as an experienced FBI investigator. To allow Agent Simandy to testify in these circumstances would undermine the policy goals of the Rule 701 lay opinion exception. Accordingly, the Court should affirm the Fourteenth Circuit's holding on all three questions presented.

ARGUMENT

I. BEST'S TESTIMONY IS INADMISSIBLE BECAUSE UNDER *GILES V. CALIFORNIA*, FEDERAL RULE OF EVIDENCE 804(b)(6) REQUIRES A SHOWING THAT THE DEFENDANT PERSONALLY INTENDED TO PREVENT THE WITNESS FROM TESTIFYING, AND ALLOWING *PINKERTON* LIABILITY TO SUPPLANT THIS INDIVIDUALZIED SPECIFIC INTENT REQUIREMENT WOULD CONTRAVENE RULE 804(b)(6)'s FUNDAMENTAL POLICY RATIONALES.

The common law doctrine of forfeiture by wrongdoing excepts from hearsay and Confrontation Clause objections a hearsay declaration made by an unavailable witness where the defendant "engaged in conduct designed to prevent the witness from testifying." *Giles v. California*, 554 U.S. 353, 361 (2008). Since its inception, the doctrine has included a specific intent requirement. *See id*. In *Reynolds v. United States*, the earliest case in which this Court squarely addressed the exception, the Court emphasized that forfeiture by wrongdoing only applies where the defendant "voluntarily" prevents a witness's testimony. 98 U.S. 145, 158 (1878). More recently, in *Giles*, this Court reviewed forfeiture by wrongdoing jurisprudence from the founding era onwards and concluded that the doctrine may only be applied where the defendant acts with the specific intent to prevent a witness from testifying. *See* 554 U.S. at 361.

Rule 804(b)(6) codifies the common law exception. *Davis v. Washington*, 547 U.S. 813, 833 (2006). The Rule provides that a hearsay declaration "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 not excluded by the rule against hearsay. FED. R. EVID. 804(b)(6). Like the common law doctrine, Rule 804(b)(6) includes a specific intent requirement, which "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *Giles*, 554 U.S. at 367.

Under *Giles*, Rule 804(b)(6)'s specific intent requirement may only be satisfied by evidence that the defendant himself possessed the specific intention to prevent the witness from

testifying. *See id.* at 361. This individualized specific intent requirement cannot be satisfied by *Pinkerton* liability alone. *See United States v. Dinkins*, 691 F.3d 358, 385 (4th Cir. 2012). Moreover, Rule 804(b)(6)'s fundamental policy rationales militate against allowing *Pinkerton* liability to substitute for evidence that the defendant personally intended to prevent the witness from testifying. Accordingly, this Court should affirm the judgment of the Fourteenth Circuit.

A. Under *Giles v. California*, Federal Rule of Evidence 804(b)(6) Requires a Showing of Individualized Specific Intent that Cannot Be Satisfied by Mere *Pinkerton* Liability.

At the district court and court of appeals below, the Government relied on the theory, first espoused by *United States v. Cherry*, that Rule 804(b)(6) permits admission of hearsay testimony against a defendant who neither participated in nor had any intention of silencing a witness, so long as *Pinkerton* liability is proven by a preponderance of the evidence. *See* (R. at 8, 27.); 217 F.3d 811, 820 (10th Cir. 2000). However, *Giles* requires that hearsay testimony only be admitted under Rule 804(b)(6) upon a showing that the defendant personally intended to silence the witness. *See* 554 U.S. at 361. This individualized specific intent requirement is plainly inconsistent with the *Cherry* approach of admitting hearsay pursuant to *Pinkerton* liability alone.

1. *Giles* Extends to Federal Rule of Evidence 804(b)(6).

The central holding of *Giles* – that the forfeiture by wrongdoing exception may only be applied where "the defendant intended to prevent a witness from testifying" – extends to Rule 804(b)(6). *See* 554 U.S. at 361.

In *Giles,* this Court considered whether the forfeiture by wrongdoing doctrine makes admissible the testimonial hearsay of a witness killed by the defendant, where there is no evidence that the defendant killed the witness for the purpose of preventing her testimony. *Id.* at 355. The defendant, Giles, and the victim, Avie, had recently ended a multi-year relationship when Giles shot and killed Avie. *Id.* at 356. At trial, the judge admitted hearsay testimony from a

police officer who had investigated Avie's report – made about three weeks prior to her death – that Giles had viciously attacked her and threatened to kill her with a knife. *Id.* at 357. The Court held that the forfeiture by wrongdoing exception may only be applied upon a showing that "the defendant engaged in conduct designed to prevent the witness from testifying." *Id.* at 361. Thus, the Court concluded that the trial judge had erred in admitting the police officer's hearsay testimony because although Giles was shown to have killed Avie, he "was not shown to have done so for the purpose of preventing testimony." *Id.* at 368.

While the circumstances underlying *Giles* involved testimonial hearsay and the violation of a defendant's right of Confrontation, the case's central holding extends to both the common law doctrine of forfeiture by wrongdoing and Rule 804(b)(6). This conclusion is supported by the reasoning of the *Giles* Court, which looked to Rule 804(b)(6) for guidance in its analysis of the common law doctrine. *See* 554 U.S. at 367–68. In doing so, the *Giles* Court evinced its expectation that Rule 804(b)(6) had been – and would continue to be – regarded as coextensive with the common law exception. *See id.* It would be incongruous with the reasoning in *Giles* to withhold from Rule 804(b)(6) the central holding of the case, when the *Giles* court relied on Rule 804(b)(6) in articulating that holding in the first place.

Furthermore, Rule 804(b)(6) is a codification of the common law forfeiture by wrongdoing doctrine, *Davis*, 547 U.S. at 833, and courts have repeatedly held that Rule 804(b)(6) and the common law doctrine are coextensive. *See, e.g., Giles,* 554 U.S. at 367–68; *United States v. Cherry*, 217 F.3d 811, 816 (10th Cir. 2000); *People v. Stechly*, 870 N.E.2d 333, 350 (Ill. 2007) (holding Rule 804(b)(6) and the common law doctrine "are coextensive, because the former is a legislative enactment of the latter"). Therefore, cases like *Giles* which delineate the scope of the common law doctrine simultaneously delineate the scope of Rule 804(b)(6).

2. *Giles* Requires Federal Rule of Evidence 804(b)(6) Only be Applied Upon a Showing That the Defendant Himself Possessed the Specific Intention to Prevent the Witness from Testifying.

Giles held that the common law forfeiture by wrongdoing doctrine and Rule 804(b)(6) may only be applied upon a showing that "the defendant intended to prevent a witness from testifying" *Id.* at 361. Thus, by the plain language of *Giles*, Rule 804(b)(6) requires a showing of individualized specific intent, i.e., evidence that the defendant himself possessed the intention to "prevent the witness from testifying." *Id.*

This proposition is bolstered by the fact that every case highlighted by the *Giles* Court as an exemplary exercise of the forfeiture by wrongdoing exception involved a defendant who had personally manifested an intention to prevent a witness from testifying. *See id.* at 359, 366, 369 (describing *Lord Morley's Case*, 6 How. St. Tr. 769, 770–71 (H.L. 1666); *Reynolds,* 98 U.S. at 148; and *Harrison's Case,* 12 How. St. Tr. 833, 851 (H.L. 1692)). Moreover, the *Giles* Court's ultimate conclusion based on its review of the case law was clear: "We are aware of no case in which the exception was invoked although *the defendant* had not engaged in conduct to prevent a witness from testifying." *Id.* at 361 (emphasis added).

Under both the plain language of *Giles* and the Court's review of existing case law, Rule 804(b)(6) may only be applied upon a showing that the defendant himself possessed the specific intention to prevent the witness from testifying. *Id.*

3. Federal Rule of Evidence 804(b)(6)'s Individualized Specific Intent Requirement Under *Giles* Cannot Be Satisfied by *Pinkerton* Liability Alone.

Pinkerton liability, which allows courts to impute criminal intent from one co-conspirator to another, is plainly inconsistent with Rule 804(b)(6)'s individualized specific intent requirement as articulated by *Giles*. *See Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946); *Giles*, 554 U.S. at 361.

Pinkerton held that a co-conspirator need not participate in the commission of a crime to be held criminally liable for it, so long as the crime is committed in furtherance of the conspiracy. *See* 328 U.S. at 646–47. The crimes at issue in *Pinkerton* were "contemplated precisely" by the conspiracy; it was "formed for the purpose" of committing them. *Id.* However, subsequent courts, relying on dicta from the opinion, have extended *Pinkerton* liability to crimes not "contemplated precisely" by the conspiracy, but merely "reasonably foreseen as a necessary or natural consequence" of the illegal enterprise. *Id.* at 648; *see, e.g., United States v. Mothersill*, 87 F.3d 1214 (11th Cir. 1996); *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

Pinkerton liability cannot satisfy Rule 804(b)(6)'s individualized specific intent requirement, in particular when limited only by reasonable foreseeability analysis. The doctrine allows defendants to be convicted for crimes in which they did not directly participate and of which they may have not even been aware – in other words, crimes that they had no individual intention to commit. *See, e.g., Mothersill*, 87 F.3d 1214. This approach stands in sharp contrast to the *Giles* Court's demand that Rule 804(b)(6) only apply upon a showing that the defendant himself "engaged in conduct designed to prevent the witness from testifying." 554 U.S. at 361. As the Fourteenth Circuit observed, "that a defendant could have reasonably foreseen that a co-conspirator would silence a witness does not mean that the defendant … designed that outcome." (R. 27.)

Allowing *Pinkerton* liability to impute specific intent in the Rule 804(b)(6) context would enable courts to substitute a legal fiction for what *Giles* in fact demands: evidence that the defendant personally intended to prevent the witness from testifying. *Id.* at 361. *Pinkerton* liability is thus inconsistent with Rule 804(b)(6)'s individualized specific intent requirement.

4. Because Federal Rule of Evidence 804(b)(6)'s Individualized Specific Intent Requirement as Articulated by *Giles* Is Inconsistent with *Pinkerton* Liability, *Giles* Effectively Overrules *United States v. Cherry*.

Because *Giles* held that Rule 804(b)(6) requires a showing of individualized specific intent – a requirement that may not be satisfied by mere *Pinkerton* liability – *Giles* in effect overrules *Cherry*. The Fourth Circuit recognized this overruling in *Dinkins*. *See* 691 F.3d at 385.

Cherry was the first federal circuit level case to substitute *Pinkerton* liability for Rule 804(b)(6)'s specific intent requirement. *See Cherry*, 217 F.3d at 820. There, five defendants were charged in a drug conspiracy. *Id.* at 813. One of the five defendants murdered the government's key witness just prior to trial, and the government moved to admit the witness's hearsay declarations under Rule 804(b)(6). *Id.* The trial court admitted the declarations against the defendant murderer, but excluded them against the other four defendants. *Id.* at 814. The Tenth Circuit reversed, holding that neither a defendant's knowledge nor his participation are required under Rule 804(b)(6), so long as "the elements of *Pinkerton* – scope, furtherance, and reasonable foreseeability as a necessary or natural consequence – are satisfied." *Id.* at 821.

Giles effectively overrules *Cherry* because under *Giles*, Rule 804(b)(6) may only be applied upon a showing that the defendant himself possessed the specific intent to prevent the witness from testifying, and application of *Pinkerton* liability is inconsistent with this requirement. *See Giles*, 554 U.S. at 361. Decided nearly a decade before *Giles*,[1] discussion of Rule 804(b)(6)'s specific intent requirement is conspicuously absent from the *Cherry* opinion. The Tenth Circuit focused instead on the word "acquiesced" in Rule 804(b)(6)'s language, concluding that "the acquiescence prong of [the Rule] permits consideration of a *Pinkerton*

[1] Most, if not all, of *Cherry's* progeny were likewise decided prior to *Giles*. *See, e.g., United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002); *United States v. Rivera*, 412 F.3d 562 (4th Cir. 2005); *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006); *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007).

theory of conspiratorial responsibility in determining wrongful procurement of witness availability." 217 F.3d at 818. But under Rule 804(b)(6), a defendant must do more than merely acquiesce in "wrongfully causing . . . the declarant's unavailability as a witness;" a defendant must "[do] so intending that result." FED. R. EVID. 804(b)(6). The *Cherry* opinion offers scant analysis addressing how this specific intent requirement may be satisfied by *Pinkerton* liability alone.

The Fourth Circuit recognized *Cherry's* overruling in *Dinkins*, the only federal circuit level case since *Giles* to squarely address whether *Pinkerton* liability may supplant a showing of individualized specific intent in the Rule 804(b)(6) context. *See* 691 F.3d 358. There, the trial court admitted hearsay declarations made by a deceased witness, despite the fact that the defendant was incarcerated at the time of the witness's death, on the ground that the defendant's co-conspirators had murdered the witness. *Id.* at 383–384. Relying in large part on *Cherry*, the Fourth Circuit affirmed. *Id.* at 384–85.

However, the Fourth Circuit further held that under *Giles*, mere *Pinkerton* liability is not sufficient to satisfy Rule 804(b)(6)'s individualized specific intent requirement: "A court's decision . . . must be supported by evidence that the defendant 'engaged in conduct designed to prevent the witness from testifying.'" *Id.* at 385 (quoting *Giles*, 554 U.S. at 359). In other words, the *Dinkins* court recognized that, after *Giles*, the *Cherry* approach is not enough; Rule 804(b)(6) only permits admission of a hearsay declaration where there is also evidence of the defendant's own specific intention to prevent the witness from testifying. *See id.*

In sum, as the Fourteenth Circuit properly concluded, *Giles* effectively overrules *Cherry* because *Pinkerton* liability alone is not sufficient to satisfy Rule 804(b)(6)'s individualized specific intent requirement. (R. 27.) A court's decision to admit a hearsay declaration under the

Rule "must be supported by evidence that the defendant 'engaged in conduct designed to prevent the witness from testifying.'" *Dinkins,* 691 F.3d at 385 (quoting *Giles*, 554 U.S. at 359).

B. Allowing *Pinkerton* Liability to Supplant Rule 804(b)(6)'s Individualized Specific Intent Requirement Would Contravene the Rule's Fundamental Policy Rationales.

There are strong policy arguments against allowing courts to substitute *Pinkerton* liability for evidence that the defendant personally intended to prevent a witness from testifying.

First, Rule 804(b)(6)'s primary rationale is deterrence of deliberate witness tampering. *See United States v. Thompson,* 286 F.3d 950, 962 (7th Cir. 2002). It is aimed at preventing "abhorrent behavior which strikes at the heart of the system of justice itself." FED. R. EVID. 804(b)(6) advisory committee's notes (1997). Allowing *Pinkerton* liability to supplant Rule 804(b)(6)'s individualized specific intent requirement, however, would result in application of the Rule against defendants who neither participated in such "abhorrent behavior," nor had any intention for it to occur. Thus, the approach urged by the Government would not further Rule 804(b)(6)'s fundamental policy rationale of deterrence. "It is, after all, impossible to deter those who do not act intentionally." *Stechly*, 870 N.E.2d at 349.

Courts have also grounded Rule 804(b)(6) in "principles of equity," *Thompson*, 286 F.3d at 962, often citing to the *Reynolds* maxim that "no one shall be permitted to take advantage of his own wrong." 98 U.S. at 159. But the language of *Reynolds* does not support countenancing *Pinkerton* liability in the Rule 804(b)(6) context. The *Reynolds* Court wrote that a defendant forfeits his right of Confrontation "if a witness is absent by *his own* wrongful procurement;" that "the Constitution does not guarantee an accused person against the legitimate consequences of *his own* wrongful acts;" and, of course, that "no one shall be permitted to take advantage of *his own* wrong." The *Reynolds* Court's repetition of the phrase "his own" suggests that even when

the forfeiture by wrongdoing exception is grounded in "principles of equity," its application should be limited by notions of individual accountability.

Moreover, whether using *Pinkerton* liability to impute specific intent under Rule 804(b)(6) would be "equitable" is highly debatable. Numerous federal courts have pointed to due process concerns with *Pinkerton* liability. *See, e.g., Alvarez*, 755 F.2d at 850. Several state high courts have outright rejected the doctrine. *See, e.g., People v. McGee*, 399 N.E.2d, 1177, 1181–82 (N.Y. 1979). The Model Penal Code has done the same. *See* MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962). The controversial nature of *Pinkerton* liability suggests that its use in the Rule 804(b)(6) context is unlikely to further any interest in fairness.

Finally, the dissent at the Fourteenth Circuit argued that applying *Pinkerton* liability to Rule 804(b)(6) is fair because a defendant may be convicted of a substantive crime on the basis of *Pinkerton* liability; therefore, "it is at the very least incongruous that hearsay evidence may not be admitted against him on the same basis." (R. 33.) This argument is flawed. As discussed above, *Pinkerton* liability has not been universally embraced. Furthermore, while a conviction for a substantive crime on the basis of *Pinkerton* liability requires proof beyond a reasonable doubt, the standard for admission of hearsay testimony under Rule 804(b)(6) is a preponderance of the evidence. *See Dinkins*, 691 F.3d at 383. Thus, under the approach urged by the Government, otherwise inadmissible hearsay could be admitted against a defendant on the basis of an alleged conspiracy for which the defendant could not be convicted, and with which the defendant may not even be charged.

In conclusion, pursuant to both *Giles* and Rule 804(b)(6)'s fundamental policy rationales, Rule 804(b)(6) requires a showing of individualized specific intent that cannot be satisfied by *Pinkerton* liability alone. Because there is no evidence in the instant case that Barnes personally

intended to prevent Reardon from testifying, Best's testimony was properly excluded. Therefore, this Court should affirm the judgment of the Fourteenth Circuit.

II. UNDER FEDERAL RULE OF EVIDENCE 501 THERE IS AN ABSOLUTE EVIDENTIARY PRIVILEGE FOR INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION.

This Court should uphold the Fourteenth Circuit's ruling that under Federal Rule of Evidence 501 there is an absolute evidentiary privilege for information gathered in a journalistic investigation. The privilege includes the identity of the source, as well as other information collected during the investigation. A journalist's privilege meets the factors considered by this Court for deciding whether "in light of reason and experience" there exists a federal common law privilege under Rule 501. *See* FED. R. EVID. 501; *Jaffee v. Redmond*, 518 U.S. 1, 9–10 (1996). In order to achieve the public interests protected by a journalist's privilege, the privilege should be absolute. If the Court does decide to adopt a qualified privilege, however, the privilege applies to this case because the Government has not submitted sufficient evidence to show that information about the identity of Crawley's confidential source would outweigh the substantial costs of disclosure.

A. <u>A Journalist's Privilege Should Be Recognized Under Rule 501 Because It Would Serve Significant Private and Public Interests that Outweigh Any Burden on Truth Seeking and the Privilege Is Already Recognized by Nearly All States</u>.

In *United States v. Brazenburg*, the Supreme Court explicitly stated that although not constitutionally required under the First Amendment, a journalistic privilege may be recognized by federal or state action through the legislature or courts. 408 U.S. 665, 704 (1972). Immediately following *Brazenburg*, Congress amended Federal Rule of Evidence 501 governing evidentiary privileges to state in part: "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: (a) the United States Constitution; (b) a federal statute; or (c) rules prescribed by the Supreme Court." FED. R. EVID. 501. The amended Rule provides, "privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience." SEN. REP. NO. 93-1277 (1974). The structure of the Rule directs courts to "continue the evolutionary development of testimonial privileges." *Trammel v. United States*, 445 U.S. 40, 47 (1980).

While there is a general presumption of a duty to give testimony, exceptions to this principle are granted when an evidentiary privilege would "promot[e] sufficiently important interests to outweigh the need for probative evidence." *Jaffee,* 518 U.S. at 9. Courts have looked to three factors in recognizing evidentiary privileges under Rule 501: (1) whether significant public and private interests would be served by the purpose; (2) whether the interests served by the privilege outweigh the burdens on truth-seeking imposed by the privilege; (3) whether the privilege is widely recognized by states. *Id*. at 9–13.

A journalistic privilege meets all the factors espoused in *Jaffee* for recognizing a privilege under Rule 501 and should be recognized as part of the federal common law "in light of reason and experience." First, confidentiality of journalists' sources protects the private interest of journalists in publishing and the public interest in facilitating an informed citizenry through the free flow of information and investigatory reporting. Second, this interest substantially outweighs the truth seeking benefit of potential evidence because without the privilege the information is less likely to come into existence. Third, courts and state legislatures in nearly all fifty states have recognized some form of an evidentiary privilege for journalists.

1. A Journalistic Privilege Serves Significant Public and Private Interests Because It Is Rooted in the Need for a Relationship of Confidence and Trust and Facilitates the Free Flow of Information and Development of an Informed Citizenry.

This Court has recognized privileges that are rooted in the "imperative need for confidence and trust" and advance private and public interests. *Jaffee* 518 U.S. at 15; *see, e.g., Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege maintains adversarial justice system); *Trammel*, 445 U.S. at 51 (spousal privilege advances marital harmony); *see also Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (E.D. Cal. 1998) (mediation privilege reduces burdens on judicial system).

In *Jaffee*, this Court recognized an evidentiary privilege for communications between a psychotherapist and her patient. 518 U.S. at 15. There, a police officer shot a man and the trial court ordered the officer to turn over notes a social worker took during counseling sessions with the officer after the shooting. *Id*. at 5. The Court found the relationship between a patient and psychotherapist is rooted in the need for confidence and trust, and thus serves the private interest in effective treatment. *Id*. at 10–11. The Court held the privilege would serve the public interest by providing appropriate treatment for individuals with mental health issues, and generally improving the mental health of the citizenry. *Id.* at 11. The Court held these policy arguments supported expanding the application of the privilege to include social workers. *Id.* at 17.

As with other privileges recognized by this Court, the relationship between a source and a journalist is "rooted in the imperative need for confidence and trust." *See* 518 U.S. at 15. A journalist will not publish information from a source that is untrustworthy, and a source will not share information if the journalist is likely to disclose his or her identity. *See Brazenburg,* 408 U.S. at 728 (Stewart, J., dissenting); Karl H. Schmida, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39

Am. Crim. L. Rev. 1441, 1463–64 (2002). Furthermore, this relationship is key to serving the private interests of journalists in producing news. More importantly, the relationship promotes the public interest in maintaining the free flow of information. *See Brazenburg,* 408 U.S. at 743 (Stewart, J., dissenting); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). The Constitution recognizes that the press has a fundamental role in the discussion of public affairs. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Journalists function as independent government "watch-dogs," and their ability to perform this role is undermined when the government is able to subpoena journalists for information. *See Brazenburg,* 408 U.S. at 743 (Stewart, J., dissenting). As the facts in this case demonstrate, Crawley was approached by the employee because he or she was aware that she was writing about the circus and believed she would be able to utilize the employee's information without endangering the employee's anonymity. If Crawley were not entitled to a journalist's privilege, the employee might have chosen to stay silent rather than risk the potential repercussions of whistle blowing, thus depriving the public of valuable information about Barnes' elephant poaching scheme.

The Third Circuit identified the interests served by a journalist privilege when the court recognized an evidentiary privilege for journalists in criminal cases under Rule 501. *See Cuthbertson*, 630 F.2d at 147. Although decided before *Jaffee*, the court found there is "strong public policy supporting the unfettered communication to the public of information and opinion." *Id.* at 146. The court extended the journalist privilege to unpublished material in criminal cases, regardless of the confidentiality of the source, explaining that disclosure of such material is an intrusion on the newsgathering and editorial processes and may substantially undercut the free flow of information. *Id.* at 147.

2. Any Burden on Evidence Gathering by a Journalist's Privilege Is Outweighed by the Interests Advanced by a Journalist Privilege Because the Information Is Unlikely to Come into Being Without the Privilege.

This Court has recognized that the public interests advanced by a privilege will outweigh the burdens on truth seeking when the information would be unlikely to come into being without the privilege. 518 U.S. at 12. The Court has noted, "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests." *United States v. Nixon*, 418 U.S. 683, 705 (1974). Applying this concept in *Jaffee*, this Court found the evidentiary benefit from denial of the privilege for psychotherapists would be minimal, because "[w]ithout a privilege, much of the desirable evidence to which litigants such as petitioner seek access . . . is unlikely to come into being." 518 U.S. at 12. If the privilege did not exist, patients would be unlikely to seek therapy after events that were likely to result in litigation. *Id.*

This Court has declined to extend an evidentiary privilege when the truth seeking function of the evidence outweighs the interests served by the privilege. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 195 (1990). In *University of Pennsylvania*, the Court refused to recognize an evidentiary privilege for the academic peer review process. *Id*. The case arose in an employment lawsuit for alleged gender and racial discrimination in the University's tenure process. *Id.* at 185. Although the Court recognized the importance of confidentiality in the peer review process and the importance of colleges and universities in society, the Court found these interests did not outweigh the costs of nondisclosure. The Court did not recognize the privilege because it found addressing invidious discrimination was a great government interest and would be almost impossible without access to the peer review material. *Id*. at 194.

The substantial private and public interests advanced by a journalist's privilege outweigh the truth seeking benefits of the evidence. As in *Jaffee*, where the Court was concerned that failure to recognize a psychotherapist-patient privilege would deter potential patients from seeking assistance, if a journalistic privilege is not recognized, potential informers are less likely to contact journalists or act as a source for a story. *See* 518 U.S. at 12. In this case, the employee was only willing to speak to Crawley on the condition that she not reveal his or her identity, use a pseudonym, and not identify him or her as an employee at Big Top. The employee was very concerned for his or her safety and probably would not have given Crawley the information otherwise. (R. 11.) If journalists could be required to reveal their sources, the source for information would disappear and journalists would have less ability to report. Ultimately, journalists would be less equipped to convey information, impairing the public's ability to evaluate the government and be informed on public affairs. *See Brazenburg,* 408 U.S. at 743 (Stewart, J., dissenting); *Cuthbertson*, 630 F.2d at 147.

3. A Journalistic Privilege Is Recognized by Nearly All States.

Courts have recognized evidentiary privileges under Rule 501 when the privilege was already widely recognized by states, either through legislative or court action. *See Jaffee,* 518 U.S. at 13; *see also Folb,* 16 F. Supp. 2d at 1176–78. In *Jaffee,* this Court highlighted that all fifty states had adopted some form of the psychotherapist privilege and that denying a federal privilege would "frustrate the purposes of state legislation enacted to foster these confidential communications." *Id*. at 13. The Court found the "existence of a consensus" among the states indicated that "reason and experience" support recognition of the privilege. *Id.* Furthermore, the Court noted that it was of "no consequence" that the recognition of the privilege was predominantly the result of legislative rather than judicial action. *Id.*

Courts have refused to sanction a privilege under Rule 501 where there is a lack of recognition among the states. *See University of Pennsylvania,* 493 U.S. at 194; *Trammel*, 445 U.S. at 48–49. In *University of Pennsylvania*, the Court noted that there was no constitutional, legislative, or common law precedent for a peer review material privilege. 493 U.S. at 194. Similarly, in *Trammel*, the Court noted the trend in state law supported its holding that spousal privilege does not extend so far as to allow an accused to exclude adverse testimony from a spouse who chooses to testify. 445 U.S. at 48–49.

As in *Jaffee*, the existence of a consensus among states that there should be some form of a journalist privilege supports the adoption of the journalist privilege under Rule 501. *See Jaffee*, 518 U.S. at 13. Nearly all states have recognized some form of a journalistic privilege, either through state shield laws or court decisions.[2] For example, the California Evidence Code provides that a reporter "shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured . . ." Cal. Evid. Code § 1070 (West 2012).

Adopting a journalist's privilege would support consistency between federal and state law. *See Jaffee,* 518 U.S. at 13. It is common for state and federal criminal charges to be brought in the same case, and if there is not a federal privilege, the state privilege is rendered moot. At the Fourteenth Circuit, the dissent argued judicial review would provide sufficient protection to journalists and their sources. (R. 33.) (citing *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003)). But the fact that almost all states have recognized a journalist's privilege in some form indicates a general consensus that the unpredictable protections afforded by judicial review of subpoenas do not sufficiently protect the journalist or the public interest. Because the journalist

[2] Anthony Fargo and Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 Wm. Mitchell L. Rev. 1347, 1356–1358 (2007). Thirty-one states and the District of Columbia have passed shield laws, eighteen states have recognized a journalist privilege through court decision, appellate courts in three states (Utah, Montana, and Wyoming) have not considered the issue, and Texas has rejected the privilege in criminal cases.

privilege meets the three *Jaffee* factors, "experience and reason" dictates the Court should recognize a journalist privilege under Rule 501.

B. The Journalist's Privilege Should Be Absolute Because a Qualified Privilege Will not Sufficiently Protect the Public Interests at Stake.

A journalistic privilege under Rule 501 should be recognized as an absolute privilege applying to all information gathered during a journalist's investigation, including sources as well as unpublished material. This Court has held that an absolute privilege, rather than a qualified privilege based on a balancing test, is necessary when a conditional privilege will "eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17. However, when recognizing an absolute privilege, the Court is not required to define the exact contours of the privilege, which should be determined on a "case-by-case basis." *See id.* at 18; *Upjohn*, 449 U.S. at 396. Here, the Court should recognize an absolute journalist's privilege, the contours of which will be decided subsequently on a case-by-case basis. As applied in this case, the journalist's privilege protects the identity of Crawley's confidential source.

In *Jaffee*, the Court held that a conditional psychotherapist privilege would "eviscerate the effectiveness of the privilege." 518 U.S. at 17. In order to effectuate the purpose of the privilege, affected parties must be able to predict whether their discussions will be protected. *Id*. at 18. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id*. The Court also noted that since it had not previously recognized the privilege, it was not "feasible to delineate its full contours in a way that would govern all conceivable future questions in this area." *Id.* at 18.

Here, as in *Jaffee*, a qualified privilege would "eviscerate the effectiveness" of the journalistic privilege. The privilege would be "uncertain" and vary widely in application, thus failing to address the underlying policy concerns. Sources would remain reluctant to come

forward and speak to journalists because they would be unsure whether the journalist's assurance of confidentiality would protect them. In order to ensure the important public interest in developing an informed citizenry, this Court should adopt an absolute journalist's privilege.

C. If the Court Does Recognize a Qualified Privilege the Identity of Crawley's Source Should Remain Confidential Because the Government Has not Made a Sufficient Showing the Evidence is Necessary.

In the alternative, the Court should adopt a qualified privilege for information gathered in a journalistic investigation. Under the qualified privilege test, the court would determine whether the interests furthered by disclosure outweigh the interests furthered by the privilege. (R. 11.) The Government must demonstrate the need for the evidence is greater than the general public interest in providing a free flow of information to the public and protecting the relationship of trust between a journalist and a source. Even under this test, the Government has not met its burden and, as the Fourteenth Circuit stated, "has not made a strong showing" for the disclosure of Crawley's confidential source. (R. 30.)

In conclusion, this Court should recognize an absolute evidentiary privilege under Rule 501 for information gathered during a journalistic investigation. The journalistic privilege meets the *Jaffee* factors for "reason and experience" as required by Rule 501 and is necessary to protect the public interest in a free flow of information and informed citizenry. An absolute privilege is necessary because a qualified privilege would be so uncertain it would "eviscerate" the effectiveness of the privilege. However, if the Court does adopt a qualified privilege, it applies here because the Government has not demonstrated a sufficient need for the evidence.

III. AS A MATTER OF LAW, UNDER FEDERAL RULE OF EVIDENCE 701 AGENT SIMANDY MAY NOT TESTIFY TO ALLEGED CODE WORDS AND PHRASES IN A CONVERSATION WHEN HE HAS NEITHER PARTICIPATED IN NOR OBSERVED THE CONVERSATION BECAUSE THIS TESTIMONY DOES NOT MEET RULE 701's REQUIREMENTS FOR FIRST-HAND KNOWLEDGE, HELPFULNESS TO THE JURY, AND NON-SPECIALIZED KNOWLEDGE.

Federal Rule of Evidence 701 allows lay witnesses, in certain circumstances, to offer opinions based on their personal perceptions. Rule 701 states: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of 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.

The rationale behind this Rule is to "afford the trier of fact 'an accurate reproduction of the event' at issue." FED. R. EVID. 701 advisory committee's notes (1972). The Rule recognizes that "eyewitnesses sometimes find it difficult to describe the appearance or relationship of persons, the atmosphere of a place, or the value of an object by reference only to objective facts." *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. 2005). The Rule is intended to allow testimony relating to the appearance of persons or things, identity, and other "items that cannot be described factually in words apart from inferences." FED. R. EVID. 701 advisory committee's notes (2000). Examples of the types of evidence contemplated by Rule 701 include the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, and the value of one's property. *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1197–98 (3d Cir. 1995).

Under Rule 701, courts have not admitted lay opinion testimony as to the interpretation of alleged code words in a conversation when the witness did not directly participate or observe the conversation. *See United States v. Peoples,* 250 F.3d 630, 641 (8th Cir. 2001). This Court should affirm the Fourteenth Circuit's holding that an officer who has only reviewed transcripts of a conversation may not testify as a lay witness as to the meaning of words in the conversation because the officer's testimony does not, as a matter of law, meet the requirement of first-hand knowledge under Rule 701(a). *See* (R. 17, 32.) Although not necessary to reach the other requirements of the Rule, the testimony also does not meet Rule 701(b) and (c) because it is not helpful to the trier of fact and is based on specialized expertise. Admitting such testimony is incompatible with the legislative intent of Rule 701 because it would allow lay opinions to be admitted in a manner that evades the personal knowledge requirement and the safeguards governing expert testimony. *See Garcia*, 413 F.3d at 211; FED. R. EVID. 702; FED. R. CRIM. PROC. 16(a)(1)(E); *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993).

A. Agent Simandy's Interviews and Review of Transcripts of Intercepted Phone Calls Do Not Meet the Rule 701(a) Requirement of First-Hand Knowledge.

A person may not testify as a lay witness under Rule 701 unless the testimony is "rationally based on personal perception." FED. R. EVID. 701(a). This rule requires "first-hand knowledge." *See United States v. Marshall*, 173 F.3d. 1312, 1315 (11th Cir. 1999); FED. RULE EVID. 701 advisory committee's notes (1972). The requirement allows witnesses to provide the jury with "the unique insights of an eyewitnesses personal perceptions," but does not allow for pure opinion. *See Garcia*, 413 F.3d at 212. In the context of interpretation of alleged code words, testimony will meet the requirement of first-hand knowledge when the lay witness was "actually present and participating in the conversation and observing what was happening at the time." *Peoples*, 250 F.3d at 641; *see also United States v. Awan*, 966 F.2d 1415, 1430 (11th Cir. 1992).

To allow lay opinion testimony without first-hand knowledge would undermine the intention of the Rule to only allow limited lay opinion testimony when necessary for the fact-finder to understand a specific event because "items cannot be described factually in words apart from inferences." *See* FED. RULE EVID. 701 advisory committee's notes (2000).

Here, Agent Simandy's testimony is based solely on his investigation, which involved reviewing transcripts of conversations that were prepared by another officer, and interviewing two people. Because Agent Simandy did not personally participate in the conversation or directly observe the conversation he does not meet the first hand knowledge requirement of 701(a).

Courts have held that witnesses who were direct participants in conversations meet the first-hand knowledge requirement and may testify as lay witness as to the meaning of code words. *See, e.g., United States v. Parsee*, 178 F.3d 374, 379 (5th Cir. 1999). Courts have also held that witnesses who directly observed conversations as they took place were allowed to testify as lay witnesses in reference to the meaning of code words. *See, e.g., Awan*, 966 F.2d at 1430 (FBI agent "actually present and participating in the conversation and observing what was happening at the time").

Courts have found witnesses do not meet the first-hand knowledge requirement of 701(a) when the witness relies on information gathered during an investigation rather than personally perceived. *See Peoples*, 250 F.3d at 641; *Garcia*, 413 F.3d at 213; *but see United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). In *Peoples*, the Eighth Circuit found an FBI agent in charge of an investigation could not testify under Rule 701 regarding "the meaning of words or phrases used by the defendants" during recorded conversations because the agent lacked the requisite first-hand knowledge. 250 F.3d at 641–42. In a situation that closely mirrors the facts here, the agent 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 641. Although the agent asserted she had "uncovered hidden meanings for apparently neutral words," the court concluded she "lacked first-hand knowledge of the matters about which she testified. Her opinions were based on her investigation after the fact, not on her perception of the facts." *Id.* at 641–642.

In *Garcia*, the Second Circuit found it was an error for an agent to give a lay opinion as to the culpability of a defendant based on the "totality of the information gathered during the course of [his] investigation." 413 F.3d at 211. The court found that his opinion was "informed by all the evidence gleaned by various agents in the course of the investigation" and was not limited to his own personal perceptions, as required under Rule 701(a). *Id*. at 213.

The Eleventh Circuit's recent decision in *Jayyousi* stands as an exception to existing precedent. *See* 657 F.3d at 1123 (Barkett, J., dissenting). The court found that testimony of an FBI agent regarding the use of terrorist-related code words in the transcripts of telephone intercepts he reviewed was admissible under Rule 701. *Id*. at 1095 (Dubina, J., majority). The court held a lay witness could give opinion evidence based on "his examination of documents even when the witness was not involved in the activity about which he testified." *Id*. at 1102.

However, as Judge Barkett points out in her dissenting opinion, "there is simply no support for the majority's conclusion" that reading documents and conducting interviews satisfies the first-hand knowledge requirement. *Id.* at 1125 (Barkett, J., dissenting). The majority relies on several Eleventh Circuit cases that interpret Rule 701. *See id.* at 1102–1104 (Dubina, J., majority) (citing *United States v. Cano*, 289 F.3d 1354, 1360–64 (11th Cir. 2002); *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984); *United States v. Hamaker*, 455 F.3d 1316, 1331–32 (11th Cir. 2006)). These cases do not actually support the holding a lay witness may testify "based on examination of documents," even though the witness was not present for the

conversation. For example, the majority cites to *Gold*, where the court allowed the president of an eyewear company to testify about volume of eyewear at another company under long-standing practice that an officer of a business can testify about value or projected profits of the business. *See* 743 F.2d at 817. This decision does not directly support the holding that mere review of evidence is sufficient to meet the first-hand knowledge requirement. Overall, the majority neglected to accurately consider Eleventh Circuit precedent, which supports that a witness may not testify under Rule 701 as to the meaning of code words unless the witness actually participated or directly observed the conversation. *See* 657 F.3d at 1124–25 (Barkett, J., dissenting); *Awan*, 966 F.2d at 1430–31; *U.S. v. Novaton*, 271 F.3d 968, 1007 (11th Cir. 2001) (lay opinion on code words allowed because based on real-time surveillance).

Here, in accordance with Rule 701, the District Court properly excluded the testimony of Agent Simandy's interpretation of alleged "code" words in the transcripts of conversations between Barnes, Anderson, and Reardon. (R. 17.) Although an experienced FBI agent, Agent Simandy has limited experience working on this case, only taking over after Agent Blackstock passed away. (R. 12.) His investigation consisted of reviewing the transcripts of intercepted phone conversations prepared by Agent Blackstock, and interviewing two people. (R. 13.)

As in *Peoples*, Agent Simandy did "not personally observe the events and activities discussed in the recordings, nor did [he] hear or observe the conversations as they occurred." *See* 250 F.3d at 641. Unlike Agent Blackstock, Agent Simandy did not contemporaneously listen to the phone conversations and cannot offer the fact-finder any insight about the phone conversations that they cannot gather from their own review of the transcripts and testimony from the other witnesses. *See* (R. 13.) Like *Garcia*, Agent Simandy's testimony is not based on any personal observations, but rather is based purely on review of "all the evidence gleaned by

various agents in the course of the investigation." *See* 413 F.3d at 213. Because Agent Simandy did not either participate in or directly observe the conversations, as a matter of law he does not meet the requirement for first hand knowledge under 701(a) and the lower courts were correct in excluding his testimony on the meaning of alleged code words.

B. Agent Simandy's Lay Opinions Do not Meet the Requirements of Rule 701(b) Because They Are not Helpful to a Clear Understanding of the Witness's Testimony or the Determination of a Fact in Issue and Are Merely Conclusory Observations.

Under Rule 701(b), lay testimony must be "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." FED. R. EVID. 701(b). Lay opinion testimony is only admissible to "help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Peoples*, 250 F.3d at 641. Rule 702(b) guarantees that a witness will not usurp the role of the jury by providing opinions "which merely tell the jury what result to reach." FED. R. EVID. 701 advisory committee's notes (1972); *see also United States v. Grinage*, 390 F.3d 746, 749 (2d Cir. 2004). A lay opinion will be excluded if it "amounts to no more than a conclusory observation." *United States v. Cortez*, 935 F.2d 135, 139 (8th Cir. 1991). Allowing conclusory observations would not serve the rationale of Rule 701 to allow testimony that is otherwise unavailable to the jury, but is difficult to describe using purely objective facts.

Courts do not allow lay opinion testimony under Rule 701(b) when the testimony threatens the independent evaluation of the evidence by the fact-finder. *See Grinage*, 390 F.3d at 751. In *Grinage*, the Second Circuit held that a DEA agent improperly testified under Rule 701(b) as to his interpretation of alleged code words in conversations that he had reviewed in the course of an investigation. 390 F.3d at 751. The court found that by offering an opinion based on

the review of the recorded telephone conversations, the agent's opinion testimony had "usurped the jury's function." *Id*. Furthermore, the court noted that since the agent was presented with an "aura of expertise and authority," there was a greater risk the jury would be "swayed" by the agent's testimony and would not independently evaluate the evidence. *Id*.

In contrast, in *Jayyousi* the Eleventh Circuit held that the agent's testimony would be helpful to the jury because he could "draw inferences about the meanings of code words that the jury could not have readily drawn." 657 F.3d at 1103. The testimony is helpful because they would otherwise "be unfamiliar with the complexities" of terrorist activities. *Id.* However, these points support labeling the agent as an expert, not allowing him to give a lay opinion. Furthermore, as Judge Barkett points out in her dissent, the testimony "does nothing more than give one side's understanding of the evidence." *Id.* at 1125 (Barkett, J., dissenting).

Here, as in *Grinage*, Agent Simandy has only reviewed the transcripts of recorded conversations as part of his investigation. *See* 390 F.3d at 751; (R. 13.) Based on this review of the evidence, as well as two interviews, Agent Simandy came to conclusions about the meaning of certain words in the conversations. (R. 13.) By offering an opinion based on simply reviewing the evidence, Agent Simandy would "usurp" the role of the trier of fact. *See Grinage,* 390 F.3d at 751. Agent Simandy's lay opinion will not provide the fact-finder with any information they cannot derive for themselves upon their own examination of the evidence. Furthermore, Agent Simandy is an authority figure, and it is likely that if his opinion were offered, the jury would be unduly swayed by his testimony. *See id*.

C. Agent Simandy's Lay Opinion Testimony Does Not Meet the Requirements of Rule 701(c) Because It Is Based on Specialized Expertise and Knowledge.

In 2000, the Committee added section (c) to Rule 701, which states lay opinion testimony may "not [be] based on scientific, technical, or other specialized knowledge within the scope of

Rule 702." FED. R. EVID. 701(c). This requirement was added because of concern that "the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." FED. R. EVID. 701 advisory committee notes (2000). The Committee distinguished lay and expert testimony, stating "lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" *Id.* To allow expert testimony under Rule 701 would undermine the structure of the Rules of Evidence because it would evade the safeguards in place to ensure the credibility of expert testimony.

Courts have generally admitted expert testimony regarding the meaning of alleged code words used by defendants. *See, e.g., United States v. Delpit*, 94 F.3d 1134 (8th Cir. 1996) (police sergeant expert testimony on slang/code words). Courts have not allowed law enforcement agents to give lay opinion as to the meaning of alleged code words under 701(c) when they have simply reviewed transcripts of the conversations or listened to recordings. *See Garcia*, 413 F.3d at 217; *Peoples*, 250 F.3d at 641; *United States v. Oriedo*, 498 F.3d 593, 604 (7th Cir. 2007).

In *Garcia*, the Second Circuit found that in addition to not meeting the first-hand knowledge requirement, the agent's testimony was based on "that of a law enforcement officer with considerable specialized training and experience in narcotics trafficking." 413 F.3d at 217. Because the agent's conclusions regarding various aspects of a conspiracy, including the use of code words, was not "that of an average person in everyday life" the court held it should have been offered as expert testimony. *Id*.

Here, Agent Simandy, has five years of experience working as an FBI agent. (R. 12.) During this time he has been assigned to approximately fifty cases. (R. 14.) Although he has never previously worked on crimes related to poaching or other crimes against animals, he has

experience with "all types of general crimes, mostly drug-related cases." (R. 14.) Given his background and lack of personal perception of the conversation, Agent Simandy's conclusions are based on his "considerable specialized training and experience" in criminal investigation. *See Garcia*, 413 F.3d at 217. To allow Agent Simandy to testify as a lay witness would subvert the explicit intention of Rule 701(c) to prevent expert testimony from being admitted under the "guise of lay opinion." *See Peoples*, 250 F.3d at 641.

Agent Simandy was properly excluded under Rule 701 because as a matter of law, in order for a witness to interpret alleged code words in a conversation, the witness must have either been a participant or personally observed the conversation. Since Agent Simandy only reviewed transcripts and conducted interviews, he did not have the requisite first-hand knowledge. The testimony also did not meet the requirements of 701(b), because by providing his lay opinion, Agent Simandy would usurp the role of the fact-finder rather than provide helpful information. Finally, Agent Simandy's testimony is based on specialized knowledge and is only properly admitted as expert testimony. To allow Agent Simandy to give lay opinion testimony would subvert the purpose of Rule 701 and undermine the reliability safeguards in the structure of the Federal Rules of Evidence.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals for the Fourteenth Circuit should be affirmed.

Respectfully Submitted,

_____

22R
Counsel for Respondent

Date: February 20, 2013.