
No. 12-23

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2012

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

QUESTIONS PRESENTED

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

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

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

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STATEMENT OF THE CASE

Statement of Facts

William Barnes was the sole proprietor of Big Top Circus (“the Circus”) after inheriting the Circus from his father in 2000. (R. at 1.) The Circus is located in southern Boerum and spans across a hundred acres of land ideal for the Asian elephants that serve as the Circus’ main attraction. (R. at 1.) Unfortunately, in July 2011, the Circus’ accountant informed Mr. Barnes that the Circus needed to raise 500,000 dollars by December 2011 or be forced to file for bankruptcy. (R. at 1.) In an attempt to avoid bankruptcy, Mr. Barnes desperately reached out to other circuses to stage the “greatest elephant show on earth.” (R. at 2.) Boerum City’s Circus and Flying Feats Circus were to join Big Top Circus for one month. (R. at 2.) During this month, the elephants of all of the circuses would be housed on the Circus’ land free of charge. (R. at 2.) The arrangement saved the other circuses a significant expense that otherwise would have been spent to winter their elephants. (R. at 2.) Boerum City Circus and Flying Feats Circus each planned on bringing ten Asian elephants to perform. (R. at 2.) The elephants were to arrive on December 2, 2011. (R. at 2.)

On or about July 30, 2011, Mr. Barnes contacted Alfred Anderson and presented him with the opportunity to “hunt” elephants on the Circus’ property and share the ivory. (R. at 2.) Mr. Barnes intended to use the ivory profits to save his crumbling family circus. (R. at 2.) Mr. Barnes and Mr. Anderson agreed to find a third hunter to join them. (R. at 2.) On or about June 30, 2011, Mr. Barnes invited Kara Crawley, a reporter at the Boerum Times, to visit the Circus to write an article that would raise the profile of the elephant show. (R. at 2.) Ms. Crawley was given unrestricted access in exchange for the article. (R. at 2.)

On or about September 1, 2011, Mr. Anderson informed Mr. Barnes that James Reardon, an acquaintance, was interested in participating and the two men agreed to involve Mr. Reardon.

(R. at 2.) Further details were also discussed in September 2011, particularly the use of a helicopter and assault rifles. (R. at 2.) On or about October 2, 2011, Mr. Barnes contacted Weapons Unlimited, in the neighboring state of Texas, to inquire as to the price of three assault rifles. (R. at 2.) Unbeknownst to Mr. Barnes, the man he spoke with at Weapons Unlimited was an undercover Bureau of Alcohol, Tobacco, and Firearms (“ATF”) agent, Jason Lamberti. (R. at 2.) Agent Lamberti told Mr. Barnes that the rifles cost 1,000 dollars each, plus 300 dollars in fees, with a three month waiting period. (R. at 2.) However, Agent Lamberti offered an under-the-table deal providing Mr. Barnes with the rifles immediately for 500 dollars each. (R. at 2.) After Mr. Barnes paid with his credit card over the phone, Agent Lamberti agreed to deliver the rifles on December 5, 2011. (R. at 2.) The FBI obtained a warrant based on the telephone communications between Mr. Barnes and Agent Lamberti. (R. at 2.)

During October 2011, Mr. Barnes and Mr. Anderson agreed on the date of December 15, 2011 for the elephant hunt. (R. at 3.) Also, Mr. Barnes arranged the one-day rental of a helicopter from Copters Corporation scheduled for December 15, 2011. (R. at 3.) Mr. Anderson wired Mr. Barnes 1000 dollars to pay for his and Mr. Reardon’s rifles sometime in October 2011. (R. at 3.)

Mr. Anderson contacted Mr. Barnes regarding Mr. Reardon’s involvement on November 15, 2011. (R. at 7.) Mr. Anderson voiced concern that Mr. Reardon was having second thoughts about the hunt and Mr. Anderson suggested “getting rid” of Mr. Reardon. (R. at 7.) Mr. Barnes said he wanted nothing to do with it if Mr. Anderson decided to “shut him [Mr. Reardon] up for a while.” (R. at 7, 24.) Mr. Anderson called Mr. Barnes again regarding his mistrust of Mr. Reardon on November 29, 2011. (R. at 7.) Mr. Anderson maintained that Mr. Reardon needed to be “out of the picture.” (R. at 7.) Later in the day on November 29, 2011, Mr. Anderson was

seen running from Mr. Reardon's home and Mr. Reardon was found dead on the floor. (R. at 7.)
Mr. Anderson later confessed to killing Mr. Reardon. (R. at 7.)

Procedural History

Prosecution of the charges against Mr. Barnes began in the United States District Court for the Southern District of Boerum. (R. at 1.) The Grand Jury indicted Mr. Barnes with two counts of "Conspiracy to Deal Unlawfully in Firearms" pursuant to 18 U.S.C.A. §§ 371 and 922(a)(1)(a). (R. at 3.) The indictment specifically alleged that Mr. Barnes purchased two firearms for two individuals without a license. (R. at 3.) The third and fourth charges were for "Conspiracy to Commit a Crime of Violence Against an Animal Enterprise," under 18 U.S.C.A. §§ 43 and 371. (R. at 3.) Under these charges, the Grand Jury indictment alleged that Barnes unlawfully conspired to intentionally harm ten Asian elephants from the Boerum City Circus, as well as ten Asian elephants from the Flying Seats Circus. (R. at 3.) The fifth and final charge against Mr. Barnes was for "Conspiracy to commit unlawful takings under the Endangered Species Act," pursuant to 16 U.S.C.A. §§ 371 and 1538. (R. at 4.) The allegations under this charge state that Mr. Barnes conspired to unlawfully take forty Asian elephants protected under the endangered species act, and subsequently to kill the elephants together with co-conspirators, Alfred Anderson and James Reardon. (R. at 4.) The charge further alleges that firearms and a helicopter were procured to further this goal. (R. at 4.)

The case proceeded to a hearing to decide the pre-trial motions before the Honorable Jennifer Wu, the Chief Judge of the United States District Court for the Southern District of Boerum. (R. at 5.) The first motion at issue was the government's motion in limine to introduce out of court statements as an exception to the hearsay rule under Rule 804(b)(6) of the Federal

Rules of Evidence. (R. at 6.) Specifically, these statements consisted of telephone calls made by the late Mr. Reardon to Daniel Best. (R. at 6.)

The second motion at issue was a motion to quash the subpoena for Ms. Crowley's testimony, brought by Ms. Crowley, citing journalist's privilege under Rule 501 of the Federal Rules of Evidence. (R. at 6.) The final motion was brought by the government seeking to introduce testimony of Agent Thomas Simandy as a lay witness under Rule 701 of the Federal Rules of Evidence. (R. at 6-7.) The defense contended that Agent Simandy's testimony did not meet the requirements of Rule 701. (R. at 7.)

First, the district court denied the government's motion seeking to introduce testimony under the 804(b)(6) exception to the hearsay rule. (R. at 16.) Second, the district court recognized a journalist's privilege under Rule 501, and thus quashed the subpoena to obtain Ms. Crowley's testimony. (R. at 17.) Finally, the district court denied the government's motion in limine to introduce Agent Simandy's testimony as a lay witness. (R. at 17.) The Court of Appeals for the Fourteenth Circuit affirmed the district court's decision as to all three motions. (R. at 20.)

SUMMARY OF THE ARGUMENT

The United States Supreme Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit's ("Fourteenth Circuit") decision denying the government's motion seeking to introduce testimony under Federal Rule of Evidence 804(b)(6) exception to the hearsay rule, recognizing the journalist's privilege under Federal Rule of Evidence 501, and denying the government's motion to introduce Agent Thomas Simandy's testimony as a lay witness.

First, the forfeiture-by-wrongdoing exception from Federal Rule of Evidence 804(b)(6) does not apply because William Barnes did not commit an act of wrongdoing to prevent James Reardon from testifying. Alfred Anderson killed Mr. Reardon because Mr. Anderson was afraid that Mr. Reardon was going to release information regarding the conspiracy to kill the elephants. Mr. Barnes was not involved, nor did he intend for Mr. Reardon to be killed. Additionally, the fact that Mr. Barnes and Mr. Anderson were co-conspirators to kill the elephants, does not permit the application of the forfeiture-by-wrongdoing exception. Unless the conspiracy is directly related to preventing a potential witness from testifying, involvement in a conspiracy for something unrelated is insufficient to apply the exception. Since the conspiracy Mr. Barnes was involved in had nothing to do with the murder of Mr. Reardon, the forfeiture-by-wrongdoing exception does not apply. Therefore, the Fourteenth Circuit properly excluded the hearsay statements of Mr. Reardon.

The Fourteenth Circuit correctly recognized a journalist's absolute claim of privilege by quashing the subpoena that compelled journalist Kara Crowley to testify. The courts have consistently utilized three fundamental principles to extend privilege to witness-spouse testimony, the relationship between a therapist and patient, and that between an attorney and his or her client. These three fundamental principles strongly support the need for a journalist's claim of privilege.

First, both public and private interests support a finding of a journalist's privilege. A journalist's integral role in society could not be fulfilled without a claim of privilege. Second, the evidentiary benefit from denying privilege would be slim. Affording protection to a journalist and his or her sources actually encourages discovery of information that would otherwise go undiscovered. Third, the majority of states have recognized a journalist's privilege,

supporting the theory that a cohesive body of policy decisions can form the common law.

Finally, a journalist's privilege is absolute. It would serve no purpose if a judge, based on the facts of a case, could rescind it.

The Fourteenth Circuit also properly determined that Agent Simandy's testimony did not meet the requirements for lay witness testimony under the Federal Rules of Evidence. A lay witness is meant to provide the reasonable perception that any untrained layman would possess as a party to the same event. Hence, first hand knowledge is a necessary to be a lay witness. This can be achieved by being a participant in a conversation or a live listener to the conversation about which one is testifying. Agent Simandy did not satisfy the requirement for personal knowledge. Agent Simandy's knowledge came exclusively from reviewing transcripts of conversations after they took place. Hence, the Fourteenth Circuit correctly determined that he did not qualify as a lay witness.

ARGUMENT

I. THE FORFEITURE- BY-WRONGDOING EXCEPTION DOES NOT APPLY TO MR. BARNES BECAUSE MR. BARNES DID NOT INTEND OR ACT TO RENDER THE DECLARANT UNAVAILABLE.

The forfeiture-by-wrongdoing exception does not apply to William Barnes because he was not involved in the murder of James Reardon. The exception only applies when a statement is offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result. Fed. R. Evid. 804(b)(6). In this case, the exception cannot apply because the Mr. Barnes was not involved in the murder of Mr. Reardon; one of his co-conspirators in the elephant scheme, Alfred Anderson, murdered Mr. Reardon. Further, the fact that Mr. Barnes was involved in a conspiracy with the man who killed Mr. Reardon does not mean that the forfeiture-by-wrongdoing exception can apply. Mr.

Barnes did not intend for Mr. Reardon to be murdered and did not want any knowledge or involvement in his co-conspirator's plans to silence Mr. Reardon. Since Mr. Barnes did not intend for Mr. Reardon to be murdered and was not involved in the murder, the forfeiture-by-wrongdoing exception does not apply to the hearsay statements.

A. The Forfeiture-by-Wrongdoing Exception Does Not Apply Because Mr. Barnes Did Not Cause or Intend the Murder of Mr. Reardon That Rendered Him Unavailable as a Witness.

The forfeiture-by-wrongdoing exception does not apply because Mr. Barnes was not involved in the murder of Mr. Reardon. The rule applies only when the defendant's actions are designed to, and do render the declarant unavailable as a witness against the defendant. *Giles v. California*, 554 U.S. 353 (2008).

In order for the forfeiture-by-wrongdoing exception to apply, the defendant must have acted with the specific intent of preventing the witness from testifying. *Id.* In *Giles*, the defendant was convicted of murdering his girlfriend. *Id.* at 356. To contest the defendant's defense of self-defense, the prosecution sought to introduce statements the deceased had previously made regarding abuse she had suffered from the defendant. *Id.* The Court acknowledged that the exception could only apply if a defendant acts with intent to prevent the witness from testifying. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). If prior statements were admissible simply because the defendant committed homicide, "admissibility of the victim's statements to prove guilt would turn on finding the defendant guilty of the homicidal act; equity demands that more is supplied by showing intent to prevent the witness from testifying". *Id.* at 379 (Souter, J., concurring). The Court held that the defendant, although he intended to commit the criminal act, did not commit the crime with the intent of preventing the

declarant from testifying. *Id.* at 361. Therefore, without a finding of intent to prevent the declarant from testifying, the exception cannot be applied. *Id.*

In *United States v. Gray*, the defendant was convicted of mail fraud and wire fraud relating to her receipt of insurance proceeds following the deaths of her second husband and former boyfriend. 405 F.3d 227, 230 (4th Cir. 2005). During trial, evidence of out-of-court statements was admitted under the forfeiture-by-wrongdoing exception to prove that Gray murdered her former lovers to collect the insurance. *Id.* at 240. The statements were made by one of the men during the three months preceding his murder and proved that Gray had previously threatened his life. *Id.*

The forfeiture-by-wrongdoing exception applies where the defendant's own misconduct renders the declarant unavailable as a witness at trial, therefore "admitting evidence to supply the place of that which he has kept away." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145 (1878)). The defendant killed the declarant, thereby rendering him unable to testify. *Id.* The Court decided three factors are necessary in a forfeiture-by-wrongdoing analysis: (1) that the defendant engaged or acquiesced in wrongdoing; (2) that was intended to render the declarant unavailable as a witness; and (3) did render the declarant unavailable as a witness. *Id.* at 241. The evidence was admitted against the defendant because the defendant met all of the necessary factors given that, she herself murdered the defendant. *Id.* at 242. Since the defendant actively prevented the declarant from ever testifying, the evidence against her was admitted. *Id.*

In this case, Mr. Barnes was not involved in the murder of Mr. Reardon. Mr. Barnes was not the one concerned about the possibility of Mr. Reardon's second thoughts about the elephant scheme; it was Mr. Anderson who expressed his concern and desire to silence Mr. Reardon. (R. at 7.) Applying the reasoning from *Giles*, since Mr. Barnes did not act to silence Mr. Reardon,

nor did he intend to silence Mr. Reardon, the forfeiture-by-wrongdoing exception does not apply. Mr. Barnes did not kill Mr. Reardon and did not direct Mr. Anderson to kill Mr. Reardon; Mr. Anderson did it on his own and even confessed to the murder. (R. at 7.) In *Giles*, the respondent did commit the murder, but the Court held that intent to prevent the deceased from testifying was necessary to apply the forfeiture-by-wrongdoing exception. *Giles*, 554 U.S. at 361. Here, Mr. Barnes did not commit the murder, did not intend to commit the murder, and did not intend to prevent the witness from testifying. Mr. Reardon never even mentioned anything about possibly testifying. Therefore, the murder was entirely contrived by Mr. Anderson with no involvement of Mr. Barnes.

Additionally, when the *Gray* factors are applied to this case, it is clear that Mr. Barnes committed no wrongdoing, nor intended to commit wrongdoing, to prevent the deceased from testifying. The first factor requires that Mr. Barnes engaged or acquiesced in wrongdoing. It is clear from the Record that Mr. Barnes was not involved in the murder of Mr. Reardon. He was not seen fleeing from Mr. Reardon's home; Mr. Anderson was seen running from Mr. Reardon's home just moments before Mr. Reardon was found dead. (R. at 7.) Additionally, Mr. Anderson did not mention Mr. Barnes at all when he confessed to murdering Mr. Reardon. Therefore, Mr. Barnes did not engage in any wrongdoing related to the murder and thus, the first factor is not met.

The second factor from *Gray* is that Mr. Barnes must have intended to render Mr. Reardon unavailable as a witness. When Mr. Anderson discussed his concerns regarding Mr. Reardon with Mr. Barnes, Mr. Barnes took no interest. Additionally, the government concedes that, mere hours prior to Mr. Reardon's murder, Mr. Barnes told Mr. Anderson to hold off from whatever he was planning on doing to Mr. Reardon. (R. at 28.) Not only was Mr. Barnes not

actively involved in Mr. Reardon's murder, but he also had no implicit intent for the murder to occur. Therefore, Mr. Barnes did not intend to render Mr. Reardon unavailable as a witness.

The final *Gray* factor is that Mr. Barnes rendered the witness unavailable. As the above analysis shows, Mr. Barnes was not involved in the murder of Mr. Reardon and did not render him unavailable as a witness. Therefore, the forfeiture-by-wrongdoing exception does not apply.

B. The Doctrine of Conspiratorial Liability Articulated in *Pinkerton* is Not Applicable to a Forfeiture-by-Wrongdoing Analysis Because Mere Participation in a Conspiracy Does Not Show Intent to Render the Witness Unavailable.

Hearsay statements cannot be admitted pursuant to a conspiracy theory of liability. *Pinkerton v. United States* holds that the overt act of one partner in crime is attributable to all; however, the overt act must be in furtherance of the conspired crime, not an entirely new crime. 328 U.S. 640, 647 (1946). However, for a conspiracy analysis to apply to the forfeiture-by-wrongdoing exception, the conspiracy must be to render the witness unavailable; it cannot be a conspiracy for a different crime. *Roberson v. United States*, 961 A.2d 1092, 1097 (D.C. Cir. 2008); *see also Gatlin v. United States*, 925 A.2d 594 (D.C. Cir. 2007) (holding that the forfeiture-by-wrongdoing exception applies to all conspirators if the conspiracy is to prevent a witness from testifying).

In *Pinkerton*, brothers were indicted for violations of the Internal Revenue Code; ten substantive counts and one conspiracy count. *Id.* at 641. Some of the overt acts charged in the conspiracy count were the same as those charged in the substantive counts, and each of the substantive offenses were committed pursuant to the conspiracy. *Id.* at 642. The defendants claimed that since all of the counts were essentially one in the same, their sentence should only be the maximum for a single conspiracy count. *Id.* The Court did not accept the rationale that

the substantive offenses were merged in the conspiracy because there are instances where the substantive charge and the conspiracy charge may not be merged. *Id.* at 643.

The Court defines conspiracy as when two or more come together to commit or cause to be committed a breach of the criminal laws involving deliberate plotting and secrecy. *Id.* at 644. The Court held that for one brother to not be held liable for certain offenses, there needed to be an affirmative act withdrawing himself from the situation. *Id.* at 646. Additionally, the Court reasoned that if actions of a co-conspirator were not reasonably foreseeable as necessary or natural consequences of the conspiracy as a whole, the offenses could be separated. *Id.* at 648. Since there was no evidence of any affirmative acts withdrawing from certain offenses, both brothers were held liable for all counts. *Id.*

The forfeiture-by-wrongdoing exception does not apply to a conspiracy analysis unless the conspiracy is committed to prevent the witness from testifying. *Roberson*, 961 A.2d at 1097. In *Roberson*, the defendant was found guilty of first-degree murder while armed, among other charges. *Id.* at 1093. On appeal, the defendant asserted that his rights were violated when testimonial hearsay statements from a witness, Anthony Lee, killed before trial were admitted. *Id.* Lee claimed to have seen an altercation between the man that the defendant murdered and a woman. *Id.* Lee was going to testify that he had seen the defendant hold a gun to the victim's head, heard a gun shot, and saw the victim laying on the ground. *Id.* Lee's testimony was admitted under the forfeiture-by-wrongdoing exception because he had been killed as a result of a conspiracy between the defendant and Suley Roberts. *Id.*

The District of Columbia Court of Appeals reasoned that the testimony was admissible through the forfeiture-by-wrongdoing exception because the conspiracy was directly related to preventing the witness from testifying. *Id.* at 1097. The defendant had been fearful of the

possibility of Lee “snitching,” and after Lee was killed the defendant said he was no longer worried because Roberts “had taken care of that for him.” *Id.* The court held that the defendant’s words could reasonably be construed as an admission that it was his friend Roberts who had killed Lee for the sole purpose of keeping Lee from testifying against the defendant. *Id.* The court established that there was no other reason for Lee to be murdered other than to prevent him from testifying. *Id.* Since the conspiracy was committed with the intent of eliminating Lee as a witness, the conspiracy analysis was sufficient to use the forfeiture-by-wrongdoing exception against the defendant. *Id.*

In this case, the conspiracy between Mr. Barnes, Mr. Anderson, and Mr. Reardon was to monetarily benefit from the elephant ivory. There was no conspiracy to eliminate Mr. Reardon as a witness. Using the Court’s definition of conspiracy from *Pinkerton*, Mr. Barnes and his co-conspirators did not come together to commit any wrongdoing to prevent anyone from testifying as a witness. Just because Mr. Barnes and Mr. Anderson were conspiring to commit a different crime, does not mean that the conspiracy can be used to hold Mr. Barnes liable for a crime he did not commit or intend to commit. As the Court held in *Pinkerton*, there are times when the substantive charge and the conspiracy charge are not connected and should not be merged; this is one of those times.

Also in *Pinkerton*, the Court held that for a co-conspirator to not be held liable for certain offenses, he must affirmatively withdraw from the situation. 328 U.S. at 644. Here, Mr. Barnes specifically told Mr. Anderson that he “didn’t want anything to do with [it]” when Mr. Anderson suggested “silencing” Mr. Reardon. (R. at 24.) The idea to silence Mr. Reardon was solely the brainchild of Mr. Anderson and Mr. Barnes affirmatively withdrew himself from the situation with that statement. Additionally, it is not reasonable to conclude that Mr. Barnes could foresee

the murder of Mr. Reardon as a natural consequence of the conspiracy to kill the elephants. Murdering Mr. Reardon was never a part of the elephant conspiracy and would not be an automatic consequence; the three men were all in the elephant conspiracy together, at no point during the planning of that conspiracy was the murder of Mr. Reardon. The murder was a heinous act committed independently by Mr. Anderson, and therefore not foreseeable by Mr. Barnes.

The rule from *Roberson* should be applied because the holding specifically addresses the application of the forfeiture-by-wrongdoing exception to a conspiracy analysis. In this case, Mr. Barnes did not participate in a conspiracy to murder Mr. Reardon. Mr. Anderson killed Mr. Reardon on his own and even confessed to the murder. (R. at 24.) Mr. Barnes explicitly renounced any involvement in Mr. Anderson's efforts to silence Mr. Reardon. (R. at 24.) Further, Mr. Barnes never suggested killing Mr. Reardon; he did not support Mr. Anderson's idea of putting Mr. Reardon "out of the picture." (R. at 24.) The only conspiracy planned was the elephant conspiracy, not a conspiracy to kill Mr. Reardon. Therefore, since Mr. Barnes did not conspire with Mr. Anderson to kill Mr. Reardon, the forfeiture-by-wrongdoing exception should not apply.

II. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT JOURNALIST KARA CROWLEY'S WORK PRODUCT IS NOT SUBJECT TO SUBPOENA BECAUSE OF A JOURNALIST'S PRIVILEGE.

A journalist's privilege protects Kara Crowley from testifying in a court of law, as well as revealing her sources and work product. Rule 501 of the Federal Rules of Evidence allows for claims of privileges based on common law precedent. Fed. R. Evid. 501. The common law precedent has afforded privilege to the psychotherapist-patient relationship, attorney-client relationship, and witness spouse testimony. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). The same

principles that necessitate an application of privilege for these relationships also demonstrate the need for a journalist's claim of privilege. Hence, the Fourteenth Circuit correctly quashed Ms. Crowley's subpoena.

A. A Journalist's Privilege Exists and Should Be Applied to Protect Ms. Crowley's Sources and Work.

Under the Federal Rules of Evidence, a claim of privilege, which protects information from disclosure during the judicial process, is governed by the common law. Fed. R. Evid. 501. The Supreme Court in *Jaffee* extended a claim of privilege to the relationship between a psychotherapist and his or her patient. *Jaffee*, 518 U.S. at 17 (1996). Both the underlying rationale and three supporting principles behind this monumental decision demonstrate the need for a journalist's claim of privilege as well. *Id.* The underlying rationale behind the *Jaffee* holding was that claims of privilege are justified when the public good of the privilege transcends the necessity to ascertain the truth. *Id.* at 9. Just like the need for psychiatric rehabilitation transcends the necessity to ascertain the truth, a journalist's job to protect the public from injustice also outweighs this goal. The evidence that *Jaffee* put forth in support of this principle is expanded upon below.

1. Both public and private interests support a finding of a journalist's privilege.

Both public and private interest support a finding of journalist's privilege. The fundamental reason that the spousal privilege, attorney-client privilege, and psychotherapist-patient privilege exist is that those relationships could not function without a deep sense of confidence and trust. *Id.* at 10. Specifically, a therapist's relationship with their patient would not be productive if the patient did not feel they could be frank with his or her disclosures to the

doctor. *Id.* If information released to a patient's therapist were subject to exposure in the legal setting, not only would it threaten the nature of the doctor-patient relationship, it would threaten the ultimate success of a patient's treatment. *Id.*

This principle is deemed so sacred by the United States Court of Appeals that the Sixth Circuit upheld it even when the case at hand involved the threat of imminent death to a federal official. *United States v. Hayes*, 227 F.3d 578, 579 (6th Cir. 2000). In *Hayes*, the defendant was charged with threatening to kill his boss, a federal official. *Id.* His psychotherapist's medical records included detailed information about the defendant's threats. *Id.* The defendant moved to suppress his psychotherapist's medical records from the evidentiary record. *Id.* The United States Court of Appeals for the Sixth Circuit affirmed the decision granting the defendant's motion. *Id.* at 587. In doing so, the court stated that although a therapist's testimony in their patient's criminal trial would serve public ends, it was not one that would justify the means. *Id.* at 582. The violation of trust would detrimentally damage a patient's potential for successful medical treatment. *Id.* at 585.

The court further demonstrated their commitment to this privilege by completely rejecting the Tenth Circuit's "dangerous patient" exception to the doctor-patient privilege. *Id.* This exception provided that if a threat is serious *when* made, and disclosure of the threat is the only means of averting harm, then an exception to a psychotherapist's privilege exists so that their testimony will be admissible at trial. *Id.* at 582. The court cited the marginal connection between a psychotherapist's decision to notify a third party of a patient's threat to kill or injure with the refusal to permit a psychotherapist's testimony during later prosecution. *Id.* at 583-84. Given this limited connection, coupled with the fact that a psychotherapist's testimony would

diminish the likelihood of improving a patient's mental health, the Sixth Circuit upheld and strongly supported the privilege afforded to the psychotherapist-patient relationship. *Id.* at 585.

Additionally, the Court of Appeals for the Ninth Circuit further extended this claim of privilege to instances where the party was not even a licensed psychotherapist, and the privileged information is substantially likely to prove the relevant claim in a judicial proceeding. *Oleszko v. State Compensation Ins. Fund*, 243 F.3d 1154, 1159 (9th Cir. 2001). In *Oleszko*, the plaintiff an employee of the State Compensation Insurance Fund ("SCIF"), alleged sexual harassment, reverse race and national origin discrimination, and retaliation by her employer. *Id.* at 1155. She sought to have SCIF's Employee Assistance Program ("EAP") produce their records to show a pattern of sex and race discrimination by SCIF. *Id.* at 1155. The EAP was a work-based program designed to help employees with personal issues. *Id.* No one on the EAP was a licensed psychologist, psychiatrist or social worker. *Id.* at 1156. Furthermore, the EAP records likely contained valuable information regarding other employees' similar exposure to discrimination by SCIF. *Id.* at 1155. Despite, the benefit of this information, and the fact that the EAP professionals were not officially licensed psychotherapists, the court held that a claim of privilege protected the EAP's files. *Id.* at 1159. Specifically, the court stated the importance of the services provided by EAP and the enormous benefit that they provided as the type that necessitates a claim of privilege. *Id.* at 1158.

The very same principles apply to the relationship between a journalist and his or her sources. The productive and essential nature of this relationship necessitates the need for a claim of privilege in judicial proceedings. Just like the claim of privilege afforded to the psychotherapist-patient relationship is essential because of the confidence required to improve a patient's mental health, so is a journalist's claim of privilege. (R. at 29.)

A major function of journalism is to keep the public apprised of news in order to guard against abuses by the government. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). In *Mills v. Alabama*, the Supreme Court pointed out that the founding fathers specifically provided for freedom of the press in the First Amendment of the Constitution due to the integral role that journalism plays in American society. *Id.* Specifically, the Court stated, “the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.” *Id.* The Court went on to explain that restricting freedom of the press would silence the very agency that the Framers of the Constitution selected to keep American society free and informed. *Id.*

Ms. Crowley herself is a member of this very agency that the Framers found so vital to American life. The stated importance of Ms. Crowley’s work is, at minimum, of equivalent importance to the purpose behind a psychotherapist’s work. A psychotherapist’s job is to improve the mental health of their patient. In order to succeed at this task, the patient must feel trusting enough to disclose personal elements of their mental state with their psychotherapist, without fear of repercussion. The same concept applies to journalists. Their job is to expose information to the public to prevent abuses of power and other injustices. In order to do so, their sources must feel trusting enough to disclose private information. Hence, the claim of privilege, which applies to the psychotherapist-patient relationship, is also necessary to the journalist-source relationship for the same reason. Like a psychotherapist, a journalists’ purpose cannot be served without protection of the confidential relationship that enables them to do their jobs. Hence, the principles upon which *Jaffee* and *Hayes* were decided, apply to a journalist’s

necessary claim of privilege as well. The Fourteenth Circuit correctly utilized these principles to hold that a claim of privilege applies unequivocally to journalists. (R. at 30.)

2. There is a greater evidentiary benefit from granting a journalist's claim of privilege than denying it, because granting a journalist's claim allows evidence to come into existence.

The Fourteenth Circuit correctly held, under the second *Jaffee* prong, that the denial of a journalist's privilege would only result in a modest evidentiary benefit at best. (R. at 31.)

Without the existence of a journalist's privilege, evidence would not be discovered at all. (R. at 30.) Sources would not feel the trust necessary to disclose information to journalists in the first place, and thus the information that constitutes evidence in itself would not be discovered or reported. (R. at 30.) The *Jaffee* Court mirrored this principle, stating that without privilege for psychotherapists, ". . . much of the evidence to which litigants such as petitioner seek access- for example, admissions against interest by a party- is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." 518 U.S. at 12.

3. The majority of states have recognized a journalist's privilege, creating a consistent body of law to serve as precedent for protecting the journalist-source relationship.

The third point put forth by *Jaffee*, which also supports the necessity for a journalist's privilege, is that all states have enacted legislation that provides for a claim of privilege. *Id.* at 13. The Federal Rules of Evidence specifically state that in civil cases, "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. In response to this provision of the rule, states rapidly developed laws recognizing various claims of privilege, including that which protects psychotherapists and their patients.

Jaffee, 518 U.S. at 14. The response from the states is what *Jaffee* refers to as a “consistent body of policy determination by state legislatures.” *Id.* at 13. Specifically the *Jaffee* Court stated that this cohesive response from the states has the equivalent power of the common law and has become the primary source of development in the field of evidentiary privilege. *Id.*

The Supreme Court espoused the same tenant in *Funk v. United States*, when it based its decision on whether a witness could be considered competent in criminal trials by the trend in state legislation. 290 U.S. 371, 374 (1933). The Court in *Funk* cited Section 34 of the Judiciary Act of 1789, which states that the laws of the several states, except when the Constitution provides otherwise, will be regarded as rules of decisions at common law in the Courts of the United States. *Id.* (citing 28 U.S.C.A. §1652 (1948)).

The *Funk* decision shows the strength of the third point in *Jaffee*. Collectively, similar legislation enacted by several states at once, influences matters in the U.S. Courts just as the common law would. Given the states’ commitment to claims of privilege, the Court of Appeals for the Fourteenth Circuit correctly extended privilege to Ms. Crowley’s work product.

The Supreme Court showed further support for this principle in *Trammel v. United States*, in evaluating the privilege of refusal to testify against one’s spouse. 445 U.S. 40, 40 (1980). The Court relied heavily on the rationale utilized in *Hawkins v. United States*, the precedent as to witness-spouse privilege at the time. 358 U.S. 74, 79 (1958). *Hawkins* chose to abandon the common law principle of admitting a witness-spouse testimony, in favor of the states’ legislative trend prohibiting it. *Id.* at 79. The Court thus viewed state legislation regarding privilege as more authoritative on the necessity for privilege than the common law itself. *Trammel*, 445 U.S. at 40. This principle applies to a journalist’s privilege as well. The fact that all fifty (50) states and the District of Columbia rapidly enacted privilege laws to protect

the psychotherapist-patient relationship for the exact same reasons that journalists need the protection of privilege, supports the Fourteenth Circuit's decision. Therefore, this Court should uphold the journalist's claim of privilege, and affirm the Court of Appeals for the Fourteenth Circuit's holding.

B. A Journalist's Privilege Is Absolute.

The Fourteenth Circuit correctly concluded that a journalist's privilege would be futile if it were not absolute. (R. at 32.) Specifically, the Court in *Jaffee* rejected the government's proposition that a balancing component be utilized in making a determination of privilege. 518 U.S. at 17. The Court stated that, "making the promise of confidentiality contingent on a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* This ultimately proves the Supreme Court's belief that without the absoluteness of privilege, a claim of privilege serves no purpose. Hence, the Supreme Court should affirm the Fourteenth Circuit's decision in accordance with their belief that privilege is ineffective without absolute protection.

Prior to *Jaffee*, the Court in *Upjohn Co. v. United States* emphasized the importance of this same idea. 449 U.S. 383, 393 (1981). The privilege at issue in *Upjohn* was between an attorney and a client. *Id.* at 679-80. An IRS investigation was instigated based on information obtained from a questionnaire that Upjohn Company's General Counsel sent to the company's foreign managers in preparation of litigation. *Id.* at 383. In holding that the responses to the questionnaires and related work product were covered by attorney client privilege, the Court stated the following with respect to evidentiary privileges:

But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether the particular discussions will be protected. 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.* at 393.

Thus, *Jaffee* solidified the principle first iterated in *Upjohn*, that a claim of privilege is absolute. Privilege would serve no purpose if it were uncertain. Exactly on point with the *Upjohn* analysis, the Fourteenth Circuit stated that if a source is uncertain as to whether a journalist's promise would be honored, they will be reluctant to speak. (R. at 30.) Hence, an uncertain privilege provides no greater benefit than no claim of privilege. (R. at 30.) Hence, the Fourteenth Circuit correctly concluded that Ms. Crowley's privilege is absolute. (R. at 30.)

C. The *Branzburg* Opinion Does Not Negate a Journalist's Privilege; It Set the Precedent for the Creation of Concrete Claims of Privilege.

In 1972, the Supreme Court held that the First Amendment itself does not provide for a journalist's privilege. *Branzburg v. Hayes*, 408 U.S. 665, 665 (1972). The Court made clear, however, that this holding was not necessarily meant to restrict the extension of privilege in the future. *Id.* at 706. The *Branzburg* Court stated that Congress is free to determine whether a journalist's privilege is necessary, and if they deem it as such, they may enact legislation protecting that claim of privilege. *Id.* The Court specifically indicated, that their decision might not be permanent precedent, depending on Congress's action. *Id.* Three years later, in response to this decision, Congress passed Rule 501 of the Federal Rules of Evidence, which outlined specific privileges at issue in this case. (R. at 28.) Hence, the *Branzburg* Court set the precedent for the creation of privilege in 1975, as opposed to restricting privilege.

III. AGENT SIMANDY'S TESTIMONY IS NOT PERMISSIBLE UNDER THE FEDERAL RULES OF EVIDENCE, AS CORRECTLY DETERMINED BY THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT.

The Federal Rules of Civil Procedure strictly regulate who may testify as a witness in federal judicial matters. The threshold is set by Rule 602 of the Federal Rules of Evidence which

mandates that a witness have personal knowledge of a matter in order to testify. Fed. R. Evid. 602. Rule 701 of the Federal Rules of Evidence places an additional caveat to a witness's testimony. Fed. R. Evid. 701. This rule states that when a witness is not testifying as an expert, their testimony is limited to that which is rationally based on the witness's perception. Fed. R. Evid. 701(a). Witness, in the context of Rule 701, has come to mean someone who has first-hand knowledge or experience by way of being a participant in the conversation or a live listener to a conversation. *United States v. Peoples*, 250 F.3d 630, 639 (8th Cir. 2001).

Agent Simandy's knowledge in this case does not fit the requirements described above. (R. at 14.) The extent of Agent Simandy's knowledge came from his review of transcripts and recordings. (R. at 14.). He reviewed all of this information after the conversations took place. *Id.* Hence, Agent Simandy's testimony must be excluded based on Rule 701. He was neither a participant nor a live listener to the conversations about which he was called on to testify.

A. Under Rule 701, a Lay Witness Opinion Is Only Permissible When It Is Rationally Based on Personal Observations and First Hand Knowledge of Information.

The purpose of a lay witness's testimony is to help the jury understand the facts and circumstances surrounding the event or conversation to which the witness is testifying. *Peoples*, 250 F.3d at 641. A lay witness, unlike an expert witness, is not meant to provide a specialized explanation. (*Id.*) The information to be provided by a lay witness is the reasonable perception that any untrained layman would possess after perceiving the same events. *Id.*

Hence, the Court of Appeals for the Eighth Circuit emphasized in *Peoples* the need for first hand knowledge in order to serve the purpose intended for lay witnesses. *Id.* Agent Simandy did not have first hand knowledge of the conversations to be discussed in his testimony, under the definition of first hand knowledge interpreted by *Peoples*. *Id.* Agent Simandy's

knowledge came exclusively from transcripts of conversations after they took place. (R. at 32.) His perception was not the result of participation in a conversation that would give him adequate perception of the events unfolding before him. (R. at 32.) Therefore, as the Fourteenth Circuit correctly decided, Agent Simandy's opinion was not formed in the requisite manner for it to count as lay witness testimony. (R. at 32.)

The Court of Appeals for the Eighth Circuit has held that first hand knowledge is only satisfied, "when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *Peoples*, 250 F.3d at 641. In *Peoples*, the court determined that a law enforcement agent lacked first-hand knowledge of the matter about which she testified because her opinions were solely based on her investigation after the conversations took place. *Peoples*, 250 F.3d at 641. The agent, Agent Neal, gave her testimony after reviewing recorded conversations. *Id.* The court ruled that this did not count as first hand knowledge under Rule 701 of the Federal Rules of Evidence, and it undermined the purpose of lay witness testimony serving to provide a layman's perception of the events before them. *Id.* at 642.

In this case, Agent Simandy came to his conclusions about code words used between Mr. Barnes and others by reviewing transcripts after the conversations took place. (R. at 13.) Not only was Agent Simandy not a party or direct witness to the conversations, he was not even the original agent assigned to the case. (R. at 13.) Thus, part of Agent Simandy's conclusions, which he wished to provide as testimony, came from information that he received from the original agents on the case. *Id.* Under the analysis put forth in *Peoples*, this would not come close to meeting the requirement for lay witness testimony. This case largely mirrors the case in *Peoples*, where Agent Neal familiarized herself with records of events after they took place.

Peoples, 250 F.3d at 641-42. Just as Agent Neal’s testimony did not qualify as that of a lay witness, Agent Simandy’s should not either. In fact, Agent Simandy’s testimony is even farther attenuated given that he was not familiar with Mr. Barnes case from the outset of the investigation. (R. at 13.)

B. There Is a Strict Distinction Between an Expert Witness and a Lay Witness so That Even a Qualified Expert Like Agent Simandy Cannot Qualify as a Lay Witness Without First-Hand Knowledge of the Events About Which They Are Testifying.

While Agent Simandy might have had significant law enforcement experience interpreting transcripts and conversations that would qualify him as an expert, he still does not meet the requirement in Rule 701. Here, Agent Simandy’s testimony was put forth as lay witness testimony under Rule 701, rather than expert testimony. (R. at 6.) Although he testified as to his extensive experience with FBI investigations, the government did not introduce his testimony as expert testimony under Rule 702. (R. at 6.) Under the Federal Rules of Evidence, an expert may testify when it “permits the trier of fact to understand the evidence or determine the fact at issue.” Fed. R. Evid. 702. A lay witness, under Rule 701, however, is meant to provide distinctly different information. As stated above, a lay witness is meant to provide the perspective of any layman witnessing the same events or conversations. *Peoples*, 250 F.3d at 641. This distinct difference between Rule 701 and Rule 702 demonstrates the need for first hand knowledge as a lay witness under Rule 701. While a person might have significant experience in a particular field so as to qualify as an expert under Rule 702, they cannot circumvent the requirement of first hand knowledge for their testimony to be admissible under Rule 701. *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010).

A strikingly similar scenario to this case occurred in *Johnson*, where a law enforcement agent was called to testify under Rule 701, as to his interpretation of wiretapped phone calls.

Johnson, 617 F.3d at 293. His testimony largely focused on his training and credentials that qualified him to interpret the conversations. *Id.* He was not, however, a party to the conversation, nor was he a witness to it. *Johnson*, 617 F.3d at 293. The *Johnson* court ruled that since he did not directly observe the surveillance or even listen to all of the calls, he could not be considered a lay witness. *Id.*

Here, the pretense under which Agent Simandy testified was the same as the agent in *Johnson*. Agent Simandy's testimony was brought under Rule 701, presumably for him to testify as to his perception of the conversation between the defendants and others. (R. at 13.) Instead of recounting his perception of the conversation, he attempted to give his expert opinion based on analysis of transcripts of conversations after they occurred. (R. at 13.) Not only did Agent Simandy's testimony fail to meet the requirement of Rule 701, but his testimony was more appropriate for expert testimony rather than lay witness testimony.

The United States Court of Appeals for the Fourth Circuit cautioned against such action in their holding in *United States v. Perkins*, reasoning, “. . . at the bottom, Rule 701 forbids the admission of expert testimony dressed in lay witness clothing.” 470 F.3d 150, 156 (4th Cir. 2006). The court elaborated, stating that when testimony focuses on the standard of an “objectively reasonable officer” as opposed to common knowledge, the line between Rule 701 and Rule 702 has been crossed. *Id.* Thus, the Fourteenth Circuit correctly concluded that Agent Simandy's testimony did not meet the requirements of Rule 701 and was not appropriate for the purposes of Rule 701.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this honorable court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold:

(1) the testimony of Mr. Reardon inadmissible under Federal Rule of Evidence 804(b)(6); (2) a journalist's privilege exists under Federal Rule of Evidence 501; and (3) Agent Simandy's testimony does not constitute lay witness testimony under Federal Rule of Evidence 701.

Respectfully Submitted,

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Counsel for Respondent

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