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No. 12-23

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

October Term 2012

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**UNITED STATES OF AMERICA,**

Petitioner,

-- against --

**WILLIAM BARNES,**

Respondent.

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

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**BRIEF FOR PETITIONER**

## QUESTIONS PRESENTED

- I. Does Federal Rule of Evidence 804(b)(6) permit admission of a murdered declarant's hearsay statements against a defendant when the defendant knew that his coconspirator would kill the declarant to silence him as a witness, and the defendant failed to take any measures to prevent the murder?
  
- II. Does Federal Rule of Evidence 501 permit a journalist to withhold highly probative evidence of criminal acts obtained during her journalistic investigation, and if so, can the Government nonetheless require the journalist to testify when it establishes a sufficient need for the evidence in the journalist's possession?
  
- III. Does Federal Rule of Evidence 701 permit a lay witness to testify to the meaning of code words and phrases in wiretapped conversations when the witness bases his opinion solely on his personal examination of certified transcripts of those conversations and interviews he conducts during the underlying case, and not on expertise gained in prior investigations?

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### **OPINIONS BELOW**

The opinion of the Fourteenth Circuit Court of Appeals is unreported but is reproduced on pages 20-35 of the Record. Similarly, the rulings of the United States District Court for the Southern District of Boerum are not published but can be found on pages 16-17 of the Record.

### **STATUTORY PROVISIONS**

The following statutory provisions are relevant to the determination of the present case:

Fed. R. Evid. 501  
Fed. R. Evid. 701  
Fed. R. Evid. 804(b)(6)

The full text of each provision appears in Appendix A.

### **STANDARD OF REVIEW**

This case presents three questions of law, which this Court must review de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

## STATEMENT OF THE CASE

### **Statement of Facts**

By July 2011, Respondent, William Barnes (“Defendant”), had mismanaged his once-successful company, Big Top Circus, to financial ruin. (R. 1.) In need of a way out, he devised an elaborate scheme to kill dozens of endangered Asian elephants for their priceless ivory. (R. 1.) A Grand Jury indicted the Defendant for his involvement in the scheme in December 2011. (R. 3.)

### ***The Elephant-Poaching Scheme***

The Defendant inherited Big Top from his father in 2000. (R. 1.) Big Top’s location made it an ideal habitat for Asian elephants, and the circus maintained a herd of twenty of the endangered animals. (R. 1.) The elephants garnered the circus national attention. (R. 1.)

However, in July 2011, after years of mismanagement by the Defendant, Big Top stood on the brink of bankruptcy. (R. 1.) Needing to quickly raise \$500,000, the Defendant hatched a scheme to salvage whatever profit he could from his near-bankrupt enterprise. (R. 1, 2.) First, he invited two circuses from northern Boerum to quarter their elephants on his land for the winter, ostensibly to perform a series of special holiday shows. (R. 1, 2.) Unbeknownst to the other circus owners, the Defendant was simultaneously plotting to kill their elephants, along with his own, for their extremely valuable ivory. (R. 2.)

Later that month, the Defendant enlisted Alfred Anderson, his longtime associate in a now-defunct fraudulent charity called “Boerum 4 Animals,” to join him on the hunt. (R. 2.) Anderson offered to find a third coconspirator, and eventually brought his acquaintance, James Reardon, into the scheme. (R. 2.)

Throughout September, the Defendant and Anderson finalized the details of the scheme,

and in early October, Anderson formally accepted the Defendant's offer on behalf of himself and Reardon. (R. 2.) The three men agreed that the Defendant would buy the weapons and rent a helicopter for use during the hunt. (R. 2.)

### ***The Weapons and Helicopter***

On October 2, 2011, the Defendant called Weapons Unlimited, a licensed gun dealer based in Texas, to purchase three assault rifles for the hunt. (R. 2.) The Defendant believed he was speaking with an actual gun salesman. (R. 2.) In reality, he was speaking with an undercover Bureau of Alcohol, Tobacco, and Firearms ("ATF") Agent, Jason Lamberti. (R. 2.) In response to the Defendant's request to buy unregistered, fully automatic rifles, Agent Lamberti offered to sell him three AK-47 assault rifles for \$500 apiece. (R. 2.) The Defendant accepted and paid in full with his credit card. (R. 2.) Four days later, the Defendant contacted Copters Corporation, another Texas-based company, to arrange for a one-day helicopter rental on December 15, 2011. (R. 3.)

Based on the information gained from the phone call with Agent Lamberti, the FBI obtained a warrant to tap the Defendant's phone. (R. 2.) The FBI executed the warrant on October 4 and monitored the Defendant's calls for the next two months. (R. 3, 23.)

### ***Agent Thomas Simandy's Testimony***

From October 4, 2011 until December 1, 2011, the FBI intercepted around a dozen calls between the Defendant, Anderson, and Reardon. (R. 23.) Agent Narvel Blackstock listened to the conversations contemporaneously and transcribed them. (R. 13, 23.) On December 14, Agent Blackstock died, and FBI Agent Thomas Simandy was assigned to the investigation the next day. (R. 23.) Upon taking the case, Agent Simandy thoroughly reviewed the certified transcripts of the conspirators' wiretapped conversations. (R. 23, 34.) He also interviewed ATF

Agent Lamberti and Alan Klestadt, the Copters Corporation employee with whom the Defendant had arranged the helicopter rental. (R. 23.) Both Lamberti and Klestadt relayed to Agent Simandy the contents of their conversations with the Defendant on October 2, 2011 and October 6, 2011, respectively. (R. 13, 23.)

Based on his growing familiarity with the case, Agent Simandy, who had never before worked on a case involving crimes against animals, was able to decipher the meaning of certain code words and phrases in the transcript. (R. 14.) For example, Agent Simandy believed that the conspirators were discussing ivory tusks when they repeatedly referred to “blood diamonds” during their conversations. (R. 13.) Further, on October 3, 2011, the Defendant stated on the wiretap that “black cat was arranged.” (R. 13.) Because that call came just a day after the Defendant had attempted to purchase three AK-47s from Agent Lamberti, Agent Simandy felt that “black cat” referred to those rifles. (R. 13.) Agent Simandy likewise deduced that the Defendant’s use of the phrase “Charlie tango is ready” in an October 8, 2011, conversation with Anderson referred to the helicopter the Defendant had rented just two days earlier. (R. 13.)

### ***James Reardon’s Murder***

In November 2011, Reardon began to express “second thoughts” to Anderson about going forward with the hunt. (R. 18.) This led Anderson to call the Defendant on November 15, 2011, to express his misgivings about Reardon’s continued involvement in their scheme. (R. 18.) Explaining that he had “a feeling” about Reardon, Anderson proposed to “get rid of him.” (R. 18.) In response, Barnes advised Anderson not to “do anything. Not yet.” (R. 18.)

Two weeks later, Anderson called the Defendant again and insisted that “[w]e need [Reardon] out of the picture.” (R. 19.) Anderson then stated, “I’m gonna take care of him . . . I’m doing it.” (R. 19.) At first, the Defendant replied, “hold off,” but he later demurred, stating,

“[j]ust shut [Reardon] up for a while.” (R. 19.) Although the Defendant ended the call by saying “I don’t want anything to do with this,” the Record does not indicate that he took any action to prevent Anderson from silencing their coconspirator. (R. 19.)

On November 28, 2011, Reardon called his friend, Daniel Best, and revealed the details of the Defendant’s elephant-poaching scheme. (R. 8.) However, because the call was not from the Defendant’s phone, it was not recorded by the wiretap. (R. 8.) The next day, at approximately 7:30 p.m., Best spotted Anderson running out of Reardon’s apartment. (R. 7.) Best continued into the apartment, only to find Reardon dead. (R. 7.) Later that night, the police arrested Anderson, who confessed to murdering Reardon to prevent him from divulging the Defendant’s scheme. (R. 7.)

### ***The Newspaper Article***

On December 1, 2011, Respondent Kara Crawley, a reporter for the *Boerum Times*, published an article exposing the Defendant’s scheme to the public. (R. 3, 11.) The article was based on Crawley’s weeks-long investigation into the Defendant’s circus. (R. 9, 11.) During that period, she was given “unlimited access” to Big Top’s facilities and employees, ostensibly to write a promotional story for the bogus holiday performances. (R. 9.)

While investigating the story, Crawley learned from a circus employee that he or she had overheard the Defendant plotting with an associate to kill the circus’s elephants for their ivory. (R. 10.) Although the employee wished to remain anonymous, the employee still allowed Crawley to videotape their interview without altering his or her face or voice. (R. 10.) Crawley’s exposé was largely based on information from the anonymous source. (R. 11.)

### **Procedural History**

The same day the *Boerum Times* article was published, the Defendant was taken into

federal custody. (R. 3.) On December 4, 2011, he was indicted on five counts: two counts of conspiracy to deal unlawfully in firearms, in violation of 18 U.S.C. §§ 371 and 922(a)(1)(a); two counts of conspiracy to commit a crime of violence against an animal enterprise, in violation of 18 U.S.C. §§ 43 and 371; and one count of conspiracy to commit unlawful takings under the Endangered Species Act, 16 U.S.C. §§ 371 and 1538. (R. 3, 4.)

Before trial, the Government moved *in limine* to introduce the hearsay statements made by Reardon to Best prior to his murder under Federal Rule of Evidence 804(b)(6). (R. 6.) The Government also moved to admit the opinions of Agent Simandy as to the meaning of the coded language in certified wiretap transcripts as lay opinion testimony under Rule 701. (R. 6.) In addition, Crawley moved to quash the subpoena, claiming that the information about the Defendant's scheme she obtained during her journalistic investigation was privileged under Rule 501. (R. 6.) The United States District Court for the Southern District of Boerum heard oral argument on the motions on May 1 and 2, 2012. (R. 5.) On May 2, the district court held against the United States on both of its motions and quashed Crawley's subpoena. (R. 16, 17.)

The Government then filed an interlocutory appeal pursuant to 18 U.S.C. §§ 3731 and 3731-A to the Court of Appeals for the Fourteenth Circuit. (R. 20.) On July 12, 2012, the court of appeals upheld the district court's three rulings, concluding that: (1) conspiratorial liability is not applicable to the forfeiture-by-wrongdoing analysis under Rule 804(b)(6); (2) an absolute journalist privilege exists under Rule 501; and (3) lay opinion testimony about the meaning of code words and phrases is not admissible under Rule 701 unless the witness observes or participates in the conversation about which he testifies. (R. 20.) On October 1, 2012, this Court granted the Government's Petition for Writ of Certiorari to address those three issues. (R. 36.)

## SUMMARY OF THE ARGUMENT

This case is about a desperate businessman’s last-ditch effort to save his failing company. To that end, the Defendant plotted to poach 40 endangered Asian elephants for their ivory, illegally purchased fully automatic assault rifles for the hunt, and stood idly by as his coconspirator murdered a potential witness to keep his scheme from being exposed. Now he attempts to avoid conviction by asking this Court to adopt an unreasonably narrow interpretation of the Federal Rules of Evidence to exclude highly probative evidence of his criminal acts. This Court should not condone that effort and should instead reverse the decision below because: (1) Reardon’s hearsay statements are admissible under Rule 804(b)(6); (2) Rule 501 does not allow Crawley to withhold relevant evidence of the Defendant’s criminal acts; and (3) Agent Simandy’s opinion testimony meets the standard for lay opinion testimony under Rule 701.

First, the plain language of Rule 804(b)(6) expressly provides that a defendant’s acquiescence will trigger the hearsay exception of forfeiture-by-wrongdoing. The “reasonably foreseeable” standard of *Pinkerton* coconspirator liability is consistent with the Rule’s use of the term “acquiesced.” In this case, Reardon’s murder was reasonably foreseeable to the Defendant because Anderson specifically told the Defendant that he was going to silence Reardon to prevent him from exposing their conspiracy. As a result, the Defendant forfeited his hearsay objection to the admission of Reardon’s highly probative statements to Best regarding the details of the Defendant’s elephant-poaching scheme.

Second, this Court has already held that neither the Constitution nor the common law recognizes a journalist privilege, and nothing in Rule 501 permitted the court below to veer from that precedent. Further, assuming Crawley could substantiate her dire predictions about the effect of not affording her protection – she cannot – the Government’s interest in prosecuting

crimes reported to the media by confidential sources outweighs any speculative burden on newsgathering that might result without a privilege. In any event, balancing the competing interests at stake here is particularly a legislative function, so creation of a journalist privilege should be left to Congress. Alternatively, if this Court recognizes a journalist privilege, it should follow the overwhelming majority of circuit courts and hold that the privilege is qualified. In this case, the Government's need for Crawley's testimony about what she learned during her "unlimited access" to Big Top far outweighs her interest in maintaining confidentiality with her source.

Lastly, Agent Simandy's testimony satisfies the liberal three-part test for admitting lay opinion testimony under Rule 701. First, Agent Simandy based his conclusions about the meaning of the conspirators' coded language on contextual clues from his thorough review of certified transcripts of the Defendant's wiretapped conversations and first-hand interviews with others involved in this case. His opinions, therefore, are rationally based on his personal knowledge of the transcripts he examined. Second, Agent Simandy's testimony is helpful to the jury because his extensive investigatory work on this case allows him to better perceive contextual clues and infer the meaning of the conspirators' coded language. Third, Agent Simandy's conclusions about the meaning of the conspirators' coded words and phrases is based solely on the first-hand knowledge he gained while investigating the Defendant's scheme, and not on any scientific, technical, or other specialized knowledge he had prior to this investigation. For all of the foregoing reasons, the decision below should be reversed.

## ARGUMENT

### **I. IN A CRIMINAL CONSPIRACY, FEDERAL RULE OF EVIDENCE 804(B)(6) PERMITS ADMISSION OF A MURDERED DECLARANT’S HEARSAY STATEMENTS AGAINST A DEFENDANT WHEN THE DEFENDANT KNEW THAT HIS COCONSPIRATOR WOULD MURDER THE DECLARANT TO SILENCE HIM AS A WITNESS.**

The Court of Appeals for the Fourteenth Circuit erred as a matter of law when it sidestepped a matter of statutory interpretation and affirmed the district court’s decision to preclude admission of Reardon’s hearsay statements under Rule 804(b)(6). The court below relied on the purportedly “plain, clear” words of *Giles v. California*, 554 U.S. 353 (2008) to reject the “reasonably foreseeable” standard and require proof that the Defendant intended to procure Reardon’s unavailability. (R. 27.) However, the plain, clear words of Rule 804(b)(6) require the opposite result.

#### **A. The Plain Language of Rule 804(b)(6) Expressly States that a Defendant’s Acquiescence Will Trigger Forfeiture-by-Wrongdoing.**

Rule 804(b)(6) provides that if the declarant is unavailable as a witness, the rule against hearsay does not exclude “[a] statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant’s unavailability as a witness and did so intending that result.” Fed. R. Evid. 804(b)(6). The Federal Rules of Evidence are a legislative enactment, so courts use traditional tools of statutory construction to interpret their provisions. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (internal citation omitted). The starting point, however, must be the language of the Rule itself. *Id.*

To “acquiesce” is “[t]o accept tacitly or passively; to give implied consent to (an act).” *Black’s Law Dictionary* 25 (9th ed. 2009). In 2011, the Federal Rules of Evidence were amended “to make them more easily understood.” Fed. R. Evid. 804 advisory committee’s note. To render Rule 804(b)(6) more easily understood, the drafters added dashes on either side of the

phrase “or acquiesced in wrongfully causing” to emphasize that the Rule is plainly triggered where a party acquiesces to another’s plan to render the declarant unavailable as a witness. *See* Fed. R. Evid. 804(b)(6).

Accordingly, the term “acquiesced,” as used in the Rule, “encompasses wrongdoing that, while not directly caused by a defendant coconspirator, is nevertheless attributable to that defendant because he accepted or tacitly approved the wrongdoing.” *United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) (citing *United States v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002)). Indeed, “[r]eckless indifference to whether the declarant will be available to be called as a witness may also be a sufficient reason to bar the hearsay.” Jack B. Weinstein & Margaret Berger, 3 *Weinstein’s Federal Evidence*, § 5-804.03 (Joseph M. McClaughlin, 2d ed., 2009).

Here, the court of appeals erred in its narrow construction of Rule 804(b)(6) for two reasons. First, Rule 804(b)(6)’s use of the term “acquiesced” supports the application of vicarious coconspirator liability principles in the context of forfeiture-by-wrongdoing. Second, Reardon’s hearsay declarations are admissible against the Defendant under the Rule because Anderson’s murder of Reardon was in furtherance, within the scope, and a reasonably foreseeable consequence of the conspiracy.

- 1. The acquiescence language in Rule 804(b)(6) allows the application of *Pinkerton* liability principles to prompt a defendant’s forfeiture of his hearsay objection.**

Under the *Pinkerton* doctrine of vicarious coconspirator liability, a defendant is liable for his coconspirator’s substantive offenses when those offenses are reasonably foreseeable and in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). In *United States v. Cherry*, the Tenth Circuit Court of Appeals became the first of several circuit courts to apply *Pinkerton* liability principles to forfeiture-by-wrongdoing. 217 F.3d 811, 820 (10th Cir.

2000). In doing so, it held that a defendant acquiesces within the meaning of Rule 804(b)(6) if his coconspirator intentionally prevents a witness from testifying and “the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” *Id.* (internal citation omitted).

*Cherry* involved five defendants indicted in a drug conspiracy, and a significant amount of the Government’s evidence came from a cooperating witness. *Id.* at 813. However, the witness was murdered prior to trial. *Id.* The Government successfully moved to admit the witness’s hearsay statements under Rule 804(b)(6), on the grounds that the defendants – not all of whom participated in the witness’s murder – wrongfully procured the witness’s unavailability. *Id.* Upholding the trial court’s decision, the court of appeals relied on the plain language of the Rule and reasoned that “the words ‘engaged or acquiesced in wrongdoing’” indicate that “waiver can be imputed under an agency theory of responsibility to a defendant who ‘acquiesced’ in the wrongful procurement of a witness’s unavailability but did not actually ‘engage[]’ in wrongdoing apart from the conspiracy itself.” *Id.* at 816 (quoting Fed. R. Evid. 804(b)(6)).

The circuit courts have widely embraced the *Cherry* doctrine. Indeed, every circuit that has considered the matter has concluded that the “reasonably foreseeable” standard is a sufficient showing of 804(b)(6) acquiescence. *See, e.g., Dinkins*, 691 F.3d 358; *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006); *Thompson*, 286 F.3d 950. After all, “[i]t would make little sense to limit forfeiture of a defendant’s trial rights to a narrower set of facts than would be sufficient to sustain a conviction and corresponding loss of liberty.” *Cherry*, 217 F.3d at 818.

**2. Reardon’s hearsay declarations are admissible against the Defendant because the Defendant knew Anderson planned to silence Reardon as a witness and yet did nothing to prevent Reardon’s murder.**

Under the *Cherry* doctrine, a defendant forfeits his hearsay objection under Rule

804(b)(6) if “the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” *Id.* at 820. Here, it is undisputed that the Defendant’s coconspirator Anderson killed Reardon during the elephant-poaching conspiracy to prevent Reardon from exposing the scheme. (R. 7, 24.) It follows that Anderson’s murder of Reardon furthered and came within the scope of their conspiracy.

Reardon’s death was also a reasonably foreseeable consequence of the conspiracy. The Defendant knew that Anderson had misgivings about Reardon’s loyalty to the scheme. (R. 18.) He also knew that Anderson had “a feeling” about Reardon and wanted nothing more than to “get rid of him” and get him “out of the picture.” (R. 19.) Anderson even made clear to the Defendant that he was “doing it” because by November 29, 2011, “they were out of time.” (R. 19.) Thus, not only could the Defendant reasonably foresee that Anderson had plans to silence Reardon to further the aims of the conspiracy, but he could also reasonably foresee that Anderson was going to immediately execute those plans.

Furthermore, it is immaterial that the Defendant claimed he did not “want anything to do with [silencing Reardon],” because he was already involved as a coconspirator in the elephant-poaching scheme. (R. 2, 7, 19, 21.) “[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward.” *Pinkerton*, 328 U.S. at 646-47. Indeed, in *United States v. Mastrangelo*, cited approvingly in the Advisory Committee’s Notes to Rule 804(b)(6), the Court of Appeals for the Second Circuit recognized that “bare knowledge of a plot to kill [the declarant] and a failure to give adequate warning to appropriate authorities is sufficient to constitute a waiver [of hearsay objections].” 693 F.2d 269, 273-74 (2d Cir. 1982).

Here, the Record is void of any evidence that the Defendant took affirmative steps to withdraw from the conspiracy or assure that Anderson would not follow through with his plans

to silence Reardon. To the contrary, the Defendant conceded that Anderson should “shut [Reardon] up for a while.” (R. 19.) This statement not only demonstrates the Defendant’s marked acquiescence to Anderson’s plan to harm Reardon, but also directly links the death of Reardon to his status as a potential witness against the Defendant. For these reasons, Reardon’s highly probative hearsay declarations regarding the Defendant’s crucial role in the elephant-poaching conspiracy are admissible under Rule 804(b)(6).

**B. The Court of Appeals Read *Giles* Out of Its Context in Finding Reardon’s Statements Inadmissible.**

The Fourteenth Circuit Court of Appeals’ wholesale reliance on *Giles*, 554 U.S. 353, to arrive at an unreasonably narrow construction of Rule 804(b)(6) was decidedly misplaced. *Giles* is distinguishable from this case in several important ways, as it presented this Court with significantly different facts and thus a significantly different issue. In *Giles*, the defendant was charged with murdering his former girlfriend during a domestic dispute. *Id.* at 356. Notably, there was no alleged conspiracy. *Id.* The prosecution sought to introduce testimonial statements<sup>1</sup> that the victim made to the police during a domestic-violence call weeks before the shooting. *Id.* at 356-57. Admitting the victim’s testimony in the defendant’s trial, the state courts applied the forfeiture-by-wrongdoing hearsay exception without considering the defendant’s objective in committing the murder. *Id.* at 377.

Based on these facts, this Court faced the threshold issue of whether the forfeiture-by-wrongdoing exception ever applies where the defendant murders the declarant for a reason wholly unrelated to the declarant’s potential status as a witness. *Id.* at 357-58. In holding that

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<sup>1</sup> Under such facts, the foundation of this Court’s analysis in *Giles* was the Confrontation Clause because the hearsay statement at issue was indisputably testimonial. *Id.* at 358; *see Davis v. Washington*, 547 U.S. 813, 821 (2006) (The Confrontation Clause only bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (defining “testimonial as appl[ying] at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations”).

the defendant must have acted with the intent or “design” to procure the unavailability of the declarant to trigger forfeiture-by-wrongdoing, this Court was simply distinguishing between the murder of a victim unrelated to the victim’s status as a witness, versus the murder of a victim related to the victim’s status as a witness. *Id.* Significantly, “*Giles* did not answer the question whether the intent standard in the constitutional forfeiture doctrine matches the intent standard in FRE 804(b)(6), which applies to all hearsay (“testimonial” or not).” Mueller & L. Kirkpatrick, 5 *Federal Evidence* § 8:134 (3d ed. 2007). This alone calls into question the validity of the district court’s and court of appeals’ blanket reliance on *Giles*, which was not only void of any conspiracy facts but involved *testimonial* statements, not nontestimonial statements like the present case.

Furthermore, neither this Court nor the courts of appeals have ever interpreted *Giles*’ holding as doing anything more than foreclosing application of the forfeiture-by-wrongdoing doctrine where a person is rendered unavailable for reasons unrelated to his status as a witness. *See, e.g., Bullcoming v. New Mexico*, --- U.S. ---, 131 S. Ct. 2705, 2727 (2011) (Forfeiture-by-wrongdoing is inapplicable even in cases of well-documented domestic violence “unless that abuser murdered with the specific purpose of foreclosing the testimony.”); *Ponce v. Felker*, 606 F.3d 596, 600 (9th Cir. 2010) (Forfeiture-by-wrongdoing applies “only when the defendant’s conduct was ‘designed’ to prevent testimony,” and not in “every instance in which a defendant’s wrongdoing prevented a witness from testifying.”).

In fact, the only federal circuit court to squarely address the interplay between *Giles* and the *Cherry* doctrine has properly found that “[t]he *Giles* decision did not materially alter application of the forfeiture-by-wrongdoing exception.” *Dinkins*, 691 F.3d at 383. Instead, in *Dinkins* the Court of Appeals for the Fourth Circuit maintained that “proper application of

*Pinkerton* liability standards in the forfeiture-by-wrongdoing context generally will be coextensive with the scope of forfeiture by wrongdoing as articulated in *Giles*.” *Id.* at 385. As the court in *Dinkins* clarified, rather than applying where a defendant renders a declarant unavailable for a reason unrelated to the declarant’s status as a witness, the forfeiture exception applies under *Giles* where 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 (emphasis in original)).

Here, it is not disputed that Reardon was murdered for the sole purpose of silencing him as a witness, so *Giles* is not a bar to admitting Reardon’s hearsay statements to Best. (R. 24.) Indeed, although the Defendant did not actually participate in Reardon’s murder, he did evidence a desire to “shut up [Reardon] up for a while.” (R. 19.) The issue before this Court is thus whether the Defendant, by learning of Anderson’s plan to murder Reardon and failing to do anything to stop it, “acquiesced” within the meaning of Rule 804(b)(6). In reaching its decision, the court of appeals ignored that the *Giles* Court never purported to answer that question because, based on the facts before it, it did not have to.

Instead, the court below read *Giles* out of its factual context, and in doing so, read the term “acquiesced” out of Rule 804(b)(6) to arrive at an exceedingly narrow interpretation of the Federal Rules of Evidence. Accordingly, the court of appeals erred when it affirmed the district court’s decision to preclude the Government from admitting Reardon’s hearsay statements under Rule 804(b)(6).

**II. THIS COURT SHOULD NOT RECOGNIZE A PRIVILEGE UNDER RULE 501 THAT ALLOWS A JOURNALIST TO WITHHOLD RELEVANT EVIDENCE OF CRIMINAL ACTS, AND EVEN IF SUCH A PRIVILEGE EXISTS, IT IS MERELY QUALIFIED AND HAS BEEN OVERCOME IN THIS CASE.**

The court of appeals further erred in recognizing a journalist privilege under Federal Rule of Evidence 501, and this Court should reverse its decision. Rule 501 provides that “the common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege.”<sup>2</sup> Fed. R. Evid. 501. Testimonial privileges, however, “are not lightly created nor expansively construed.” *United States v. Nixon*, 418 U.S. 683, 710 (1974). Instead, when deciding a claim of privilege, this Court must “start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional,” as they deviate “from a positive general rule.” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). To justify creating an exemption from that general rule, the proponent of a privilege must show that it serves a “public good transcending all rational means for ascertaining truth.” *Id.* (internal citations omitted). “[O]nly in rare situations” is that standard met. Weinstein & Berger, *supra*, § 501.03[8][a].

Crawley has failed to establish that this is one of those “rare situations.” Furthermore, even if this Court recognizes a journalist privilege, it should join every federal circuit court that has considered the question in holding that the privilege is qualified and can be overcome by a showing of the Government’s need for the evidence, as it has been in this case.

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<sup>2</sup> The initial draft of the Federal Rules of Evidence submitted to Congress defined nine specific privileges the federal courts would have been required to recognize. Fed. R. Evid. 501 advisory committee’s note. While Congress amended Rule 501 to eliminate the Advisory Committee’s enumerated privileges, this Court has determined that the failure of a privilege to be among the nine originally proposed weighs against recognizing the privilege. *United States v. Gollick*, 445 U.S. 360, 367 (1980). Notably, the journalist privilege was not among the nine proposed.

**A. The Journalist Privilege is Inconsistent with This Court’s Precedent, and Crawley’s Speculation about the Need for the Privilege Falls Short of the High Standard for Exempting a Witness from Providing Relevant Testimony.**

The Court of Appeals for the Fourteenth Circuit erred as a matter of law in recognizing a common law journalist privilege under Rule 501 for three reasons. First, this Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) forecloses recognition of a journalist privilege under the common law. Second, Crawley failed to demonstrate with sufficient clarity that the public good purportedly furthered by the journalist privilege outweighs the Government’s need to obtain highly probative evidence of the Defendant’s criminal acts that Crawley gained in her investigation. Third, creating a workable journalist privilege is principally a legislative function, and thus should be deferred to Congress.

**1. *Branzburg’s* rejection of the journalist privilege survived the enactment of Rule 501.**

This Court has already concluded that the privilege Crawley asserts has no basis in the common law, and its pronouncement remains valid even after the enactment of Rule 501. *See id.* at 665. In *Branzburg*, three reporters were subpoenaed to testify before a grand jury about information they obtained while researching news stories.<sup>3</sup> *Id.* at 667-79. The reporters refused to divulge the information, which included the names of confidential sources, and moved to quash the subpoenas. *Id.* at 681. In support of their motion, they claimed “that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.” *Id.*

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<sup>3</sup> While *Branzburg* arose in the context of a grand jury proceeding, any argument that *Branzburg* is limited to the grand jury context is misplaced. In reaching its decision, this Court made clear that journalists must provide testimony “in the course of a valid grand jury investigation *or criminal trial.*” *See Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1971) (emphasis added). “Surely the public has as great an interest in convicting its criminals as it does in indicting them.” *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998).

While the issue in *Branzburg* was framed in terms of the First Amendment, *id.* at 679-81, this Court reached beyond the Constitution in rejecting the reporters' claim of privilege, *see id.* at 685-86. Specifically, this Court surveyed the historical approach to the issue and found that "the great weight of authority" held that reporters were not exempt from providing testimony "relevant to a criminal investigation," under either the First Amendment or at common law. *Id.* at 685. Indeed, as the *Branzburg* Court twice emphasized in its opinion, courts at common law consistently held that journalists have no special protection from revealing the identities of their sources. *Id.* at 685, 698. Importantly, after balancing the reporters' asserted interest in protecting their sources' identities against the Government's need for probative evidence of crimes, this Court not only dismissed the claim of privilege on Constitutional grounds, but also "**reaffirm[ed]**" the common law rule requiring reporters to testify when they have information relevant to a criminal case. *Id.* at 693 (emphasis added).

The First and Ninth Circuit Courts of Appeals have properly interpreted *Branzburg* as foreclosing a journalist privilege under Rule 501. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (noting that the *Branzburg* Court "flatly rejected" the journalist privilege "whether by virtue of the First Amendment or of a newly hewn common law"); *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975) (finding that it would be difficult to recognize a common law journalist privilege based on the *Branzburg* Court's "authoritative statement that the general common law rejects such a privilege"). Judge Posner, writing for the Seventh Circuit, has also doubted whether a journalist privilege could possibly coexist with *Branzburg*. *See McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003) ("[W]e do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.").

Conversely, the few courts that have recognized a common law journalist privilege despite *Branzburg* have done so on suspect grounds. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980). In *Cuthbertson*, the Third Circuit Court of Appeals based its holding that journalists have a qualified privilege in part on the *Branzburg* Court’s purported “acknowledg[ment of] the existence of first amendment protection for newsgathering.” *Id.* at 146. The court of appeals, however, simply misread *Branzburg*, ignoring this Court’s pronouncement that the First Amendment does not prevent a reporter from having to release the identities of his sources as part of a criminal investigation. *Branzburg*, 408 U.S. at 708. The Third Circuit Court of Appeals further erred in finding “an independent and congruent basis” for the privilege in the Pennsylvania and New Jersey shield laws. *Cuthbertson*, 630 F.2d at 146 n.1 (internal citations omitted). In fact, state privilege laws have no force in federal criminal proceedings, as the Court of Appeals for the Third Circuit has itself recognized. See *In re Grand Jury Investigation*, 918 F.2d 374, 379 n.6 (3d Cir. 1990) (Rule 501 “always prescribes the application of federal privilege law in federal criminal cases.”).

In this case, the court below effectively undid the careful balancing undertaken in *Branzburg* and adopted the very same privilege the *Branzburg* Court “flatly rejected.” See *In re Special Proceedings*, 373 F.3d at 44. In doing so, it ignored that the enactment of the Federal Rules of Evidence three years after *Branzburg* “left the law of privileges in its present state.” Fed. R. Evid. 501 advisory committee’s note. Rule 501, therefore, incorporated the *Branzburg* Court’s rejection of the common law journalist privilege.

Significantly, though the Rule allowed for the development of new privileges, nothing in its text empowered the court below to veer from this Court’s precedent. See *In re Grand Jury Proceeding*, 5 F.3d 397, 403 n.3 (9th Cir. 1993) (finding that “nothing in the text of Rule 501. . .

sanctions the creation of privileges by federal courts in contradiction of the Supreme Court’s mandate”); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1155 (D.C. Cir. 2006) (Sentelle, J., concurring) (explaining that “Rule 501 cannot by itself work any change in the law which should empower us to depart from the Supreme Court's clear precedent in *Branzburg*”). Thus, the Court of Appeals for the Fourteenth Circuit erred when it departed from *Branzburg* and adopted the claimed privilege under Rule 501. This Court should reverse that decision and once more reaffirm that there is no journalist privilege under federal common law.

**2. The public’s interest in prosecuting crime outweighs the speculative burden on newsgathering that might result from denial of the privilege.**

This Court has instructed that any new privilege under Rule 501 must “promote[] sufficiently important interests to outweigh the need for probative evidence.” *Jaffee*, 518 U.S. at 9-10 (internal citation and quotation marks omitted). This is a high standard, requiring the proponent of a privilege to “come forward with a compelling empirical case” for its necessity. *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998) (citing *United States v. Gillock*, 445 U.S. 360, 375 (1980)). In other words, the proponent must “demonstrate with a **high degree of clarity and certainty** that the proposed privilege will effectively advance a public good.” *Id.* (emphasis added); *see also* Weinstein & Berger, *supra*, § 501[2][a] (“Courts are constrained not to recognize any privilege unless the need for it is clear and convincing.”).

Because of that high standard, this Court has routinely refused to create a privilege allowing witnesses to withhold relevant evidence when the public good allegedly furthered by the privilege is purely speculative. *See, e.g., Univ. of Pa. v. EEOC*, 493 U.S. 182, 200 (1990) (declining to recognize a privilege for academic peer review materials because “[i]n addition to being remote and attenuated, the injury to academic freedom claimed by petitioner is also

speculative”); *Gillock*, 445 U.S. at 374 (refusing to recognize a legislative acts privilege because “only speculative benefit[s]” would inure to the legislative process if the Court recognized the privilege); *Herbert v. Lando*, 441 U.S. 153, 169-70 (1979) (finding arguments in favor of First Amendment-based editorial process privilege insufficiently “clear and convincing”).

To the contrary, the *Jaffee* Court, in recognizing the psychotherapist-patient privilege, noted that “there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.” *Jaffee*, 518 U.S. at 10 (internal citations omitted). Significantly, this Court cited to an array of “studies and authorities,” which plainly indicated that “the mere possibility of disclosure may impede . . . successful treatment.” *Id.*

In this case, unlike in *Jaffee*, Crawley has provided no evidence whatsoever to support her contention that confidential sources will be deterred from speaking to journalists in the absence of a privilege.<sup>4</sup> Instead, she has resorted to “pure fear-mongering,” as Circuit Judge Zhu noted in the dissent below and as this Court previously recognized in *Branzburg*, 408 U.S. at 694 (stating that the effects of not recognizing a journalist privilege are “to a great extent speculative”). More recent commentators have echoed the *Branzburg* Court’s skepticism. *See, e.g.*, Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: the Misguided Pursuit of a Reporters Privilege*, 24 *Cardozo Arts & Ent. L.J.* 385, 418 (2006) (“No one can say for certain whether any significant number of confidential sources will be deterred from coming forward in the absence of a privilege.”).

Contrary to Crawley’s doomsday predictions, the flow of information from confidential sources will not “in fact dry up” simply because some sources may – in a very limited number of cases – later be called to testify in a criminal trial. *Branzburg*, 408 U.S. at 694. As the

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<sup>4</sup> Crawley’s own views on whether confidential sources would be reluctant to come forward without a journalist privilege are entitled to little weight, as they “must be viewed in the light of [her] professional self-interest.” *Branzburg*, 408 U.S. at 695.

*Branzburg* Court explained, “the relationship of many informants to the press is a symbiotic one.” *Id.* at 695. Informants often belong to dissident groups that rely on the media to spread their views. *Id.* at 694-95. Even without a privilege, these informants will likely continue to leak information “to propagate [the group’s] views, publicize its aims, and magnify its exposure to the public.” *Id.* Indeed, though neither the Constitution nor the common law recognized a journalist privilege, “the press has flourished” for hundreds of years. *Id.* 698-99.

Furthermore, journalists and their confidential sources are not without other forms of protection, which diminish the chances that Crawley’s dire predictions will come true. *See Branzburg*, 408 U.S. at 706. For example, the Department of Justice has adopted guidelines limiting the use of subpoenas on the press. 28 C.F.R. § 50.10. Though these guidelines do not create a private cause of action, *id.* § 50.10(n), they are an alternative means of advancing the societal interests Crawley argues will be advanced by the privilege, *see Branzburg*, 408 U.S. at 706. Additionally, “courts should simply make sure that a subpoena duces tecum directed to the media . . . is reasonable in the circumstances,” as they would in any other case. *McKevitt*, 339 F.3d at 533. If a subpoena amounts to “[o]fficial harassment . . . undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources,” then it should be quashed. *Branzburg*, 408 U.S. at 707-08.

Even if Crawley could demonstrate with any degree of “clarity and certainty” that sources will refuse to talk to the press because a limited number of them might be later called to testify in a criminal trial, this Court has already concluded that “the public interest in possible future news about crime from undisclosed, unverified sources” is outweighed by “the public interest in pursuing and prosecuting th[e] crimes reported to the press by informants.” *Id.* at 695. The creation of a privilege to suppress specific evidence relevant to those crimes would “totally

frustrate[]” the Government’s prosecutorial efforts. *Nixon*, 518 U.S. at 713. Indeed, that would be especially true with regard to cases in which the leak to a journalist is itself unlawful. *See Miller*, 438 F.3d at 1173 (Tatel, J., concurring). This Court should, therefore, refuse to place the Government in such an untenable position and decline to recognize a privilege allowing journalists to withhold probative evidence of clear violations of federal law.

**3. A judicially created journalist privilege would be unworkable, and the task of creating the privilege should thus be left to Congress.**

While Rule 501 provides for the development of privilege law by the courts, it also instructs that “reason and experience” should serve as guideposts in determining whether to recognize a new privilege. Fed. R. Evid. 501. Both “reason and experience” caution against judicially creating a journalist privilege.

The “conceptual and practical difficulties” of administering a judicially created journalist privilege suggest that if journalists and their sources are in need of protection, that protection should come from Congress. *See Branzburg*, 408 U.S. at 703-04. As the *Branzburg* Court explained, adopting the privilege would make it “necessary to define those categories of newsmen” that come within its scope, a difficult task because the First Amendment applies with equal force to “the lonely pamphleteer” and the “large metropolitan publisher.” *Id.* This is even truer now than when the *Branzburg* Court was writing 40 years ago. *See Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 139 (D.D.C. 2005). “The proliferation of communications media in the modern world makes it impossible to construct a reasonable or useful definition of who would be a ‘reporter’ eligible to claim protection from a newly minted common law privilege.” *Id.* As Circuit Judge Sentelle has observed, along with traditional print and broadcast journalists, “does the privilege also protect . . . ‘the stereotypical blogger’ sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to

browse his way?” *Miller*, 438 F.3d at 1156 (Sentelle, J., concurring). Resolving that question would essentially require this Court to become a licenser of the press, which would directly run afoul of the First Amendment. *Id.*

The experience of the States in balancing those complexities is instructive. Although most States do recognize some form of journalist privilege, the vast majority of them have done so legislatively. *See, e.g.*, Ariz. Rev. Stat. § 12-2214(D); Minn. Stat. Ann. § 595.024(2)(1); Colo. Rev. Stat. Ann. § 13-90-119(2)(d); Fla. Stat. § 90.5015(2). That so many States have deferred this task to their legislatures “suggests that the matter has been found not to lend itself to judicial treatment – perhaps because the pros and cons of adopting the privilege, or of giving it one or another shape, are not that clear.” *Jaffee*, 518 U.S. at 26 (Scalia, J., dissenting). Indeed, balancing the competing interests at stake in this case – prosecuting crimes versus potentially limiting the flow of information to the public – “is particularly a legislative function.” *Univ. of Pa.*, 493 U.S. at 189 (citing *Branzburg*, 408 U.S. at 706); *see Miller*, 438 F.3d at 1158 (Henderson, J., concurring) (explaining that “the Legislature remains the more appropriate institution” for crafting a workable journalist privilege). Therefore, “reason and experience” should guide this Court to refuse to recognize the vast, ill-defined privilege proposed by Crawley and defer to Congress to draft a workable alternative.

**B. Even if a Journalist Privilege Exists, it is Qualified and Has Been Overcome in this Case by the Government’s Strong Need for Crawley’s Highly Probative Testimony, Which Cannot be Replicated by Other Means.**

This Court should reverse the decision below because assuming, *arguendo*, that a journalist privilege exists under Rule 501, the court of appeals nonetheless erred in holding that such privilege is absolute. Contrary to the court of appeals’ finding that an absolute privilege is necessary to establish certainty, (R. 30), “it cannot be stated with confidence that an absolute

privilege provides any greater certainty or predictability than would a carefully drafted qualified privilege.” 23 Charles Alan Wright et al., *Federal Practice & Procedure Evidence* § 5426 (1st ed. 2012). Even with an absolute privilege, a confidential source faces several risks of exposure. For example, the journalist could always waive the privilege and expose the source’s identity, either purposely or inadvertently. *Id.* Moreover, third parties may be able to determine the source’s identity simply by reading the article in which the leaked information appears. Eliason, *supra*, at 425. Accordingly, “[e]ven if there were an ironclad, absolute privilege law, a reporter could not truly guarantee confidentiality, and a source could hardly breathe easily.” *Id.*

Furthermore, the court of appeals mistakenly found a qualified privilege inconsistent with *Jaffee*. “The *Jaffee* Court did not envision the psychotherapist-patient privilege as absolute or immutable.” *In re Grand Jury Proceedings*, 183 F.3d 71, 74 (1st Cir. 1999). Instead, this Court acknowledged that “there are situations in which the privilege must give way . . . .” *Jaffee*, 518 U.S. at 18 n.19. That must also be the case with the journalist privilege, for providing absolute protection would render the prosecution of leak cases, which often involve important matters of national security, virtually impossible. *See Miller*, 438 F.3d at 1173 (Tatel, J., concurring) (explaining that the privilege must give way in cases involving leaks of a “design for a top secret nuclear weapon, for example, or plans for an imminent military strike”).

Recognizing the importance of flexibility, the federal circuit courts uniformly agree that if a journalist privilege exists, it is not absolute. *See, e.g., N.Y. Times v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006); *Cuthbertson*, 630 F.2d at 147 (citing *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979)); *Miller*, 438 F.3d at 1150. Notably, most states with statutory privilege laws provide only qualified protection. *See N.Y. Times*, 459 F.3d at 169. While the contours of the privilege differ among the circuits, courts generally balance “the policies which give rise to the

privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained.” *Riley*, 612 F.2d at 716. This requires the Court to consider: (1) the relevancy of the evidence; (2) the availability of the evidence through other means; and (3) the Government’s need for the evidence. *LaRouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986).

In this case, all three elements are met. First, it cannot be disputed that the information Crawley gathered during her investigation is relevant, as her source provided direct proof of the charges against the Defendant. (R. 10.) Second, the information in Crawley’s possession cannot be obtained by alternative means: it would be impossible for the Government replicate the content of the recorded interview with Crawley’s confidential source, for the recording contains “unique bits of evidence that are frozen at a particular place and time.” *Cuthbertson*, 630 F.2d at 147. Third, the Government’s need for the information in Crawley’s possession is strong and outweighs her purported interest in maintaining confidentiality with her source, which Crawley already compromised by failing to obscure the source’s identity in the videotaped interview. (R. 10.) For two weeks, Crawley was granted “unlimited access” to Big Top, from where the Defendant launched his conspiracy. (R. 9.) Thus, she was one of just a few people to gain an inside look at the Defendant’s unlawful scheme to violently kill 40 elephants protected under the Endangered Species Act. (R. 10.) Without learning Crawley’s source’s identity and having an opportunity to review the recorded interview and Crawley’s notes, the Government’s ability to prove the existence of the Defendant’s scheme will be undermined. *See Nixon*, 518 U.S. at 712-13 (recognizing that the allowance of privilege may “totally frustrate” the Government’s prosecutorial efforts).

Crawley must, therefore, be ordered to comply with the otherwise reasonable subpoena, and the decision below should be reversed. This Court’s precedent, Crawley’s failure to offer

anything more than rank speculation in support of her privilege claim, and “reason and experience” require that result.

**III. FEDERAL RULE OF EVIDENCE 701 PERMITS A LAY WITNESS TO TESTIFY TO THE MEANING OF CODE WORDS AND PHRASES IN WIRETAPPED CONVERSATIONS BASED ON THE WITNESS’S PERSONAL REVIEW OF CERTIFIED WIRETAP TRANSCRIPTS AND OTHER INFORMATION HE GATHERS DURING HIS INVESTIGATION OF THE UNDERLYING CASE.**

Federal Rule of Evidence 701 provides that a lay witness’s “testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of 702.” Fed. R. Evid. 701. Unlike expert testimony, which “results from a process of reasoning which can be mastered only by specialists in the field,” lay opinion testimony “results from a process of reasoning familiar in everyday life.” Fed. R. Evid. 701 advisory committee’s note (internal citation and quotation marks omitted). Its aim is to “put[] the trier of fact in possession of an accurate reproduction of the event” at issue. *Id.*

In keeping with the text and legislative history of Rule 701, this Court should reverse the court of appeals’ holding because Agent Simandy’s opinions satisfy the liberal three-pronged standard for admitting lay opinion testimony under Rule 701. It is (A) rationally based on his perception, (B) helpful to the jury, and (C) based on the information he gleaned from his investigation of this case, and not on prior scientific, technical, or other specialized knowledge.

**A. Agent Simandy’s Opinion as to the Meaning of the Coded Language is Rationally Based on His Perception of the Certified Wiretap Transcripts.**

“Although first-hand observation is obviously the most common form of personal knowledge, that is not the only basis for it.” Weinstein & Berger, *supra*, § 602.03[1][a].

Accordingly, the court below erred for two reasons when it found Agent Simandy’s testimony

inadmissible under an exceedingly narrow construction of Rule 701(a). First, Agent Simandy's testimony satisfied the "rationally based" standard of the Rule because his opinions on the meaning of the conspirators' coded language derived from his extensive review of the wiretap transcripts and his interviews with Agent Lamberti and Alan Klestadt. Second, the court of appeals mistakenly applied an unreasonably restrictive "contemporaneous observation" requirement found nowhere in the text of Rules 701 and 602.

**1. A witness testifying to the meaning of coded language in a wiretapped conversation satisfies Rule 701's requirement of personal knowledge by reviewing the records about which he offers an opinion.**

Agent Simandy's opinions about the conspirators' coded language was rationally based on his own "perception," Fed. R. Evid. 701(a), because it was founded upon his first-hand review, over a period of several months, of the certified wiretap transcripts and interviews conducted for this specific investigation, (R. 13-14). The drafters of the Rule made clear that subsection (a) of Rule 701 simply reflects "the familiar requirement of first-hand knowledge or observation." Fed. R. Evid. 701 advisory committee's note; *see* Fed. R. Evid. 602 (requiring lay witness to have "personal knowledge of the matter" to offer testimony). Thus, as long as an investigatory agent has first-hand knowledge of documents about which he plans to testify, such as the wiretap transcripts in this case, he can offer an opinion as to the meaning of those documents. *See, e.g., United States v. Jayyousi*, 657 F.3d 1085, 1102-03 (11th Cir. 2011). Importantly, he need not actually participate in or observe wiretapped conversations to offer his lay opinion on the *transcripts* of those conversations. *Id.*

In *Jayyousi*, the FBI agent whose testimony was at issue had started working on the case six months after the charged conduct had begun. *Id.* at 1091, 1095. Yet, "while investigating this case for five years [the agent] read thousands of wiretap summaries plus hundreds of

verbatim transcripts, as well as faxes, publications, and speeches.” *Id.* at 1102. The agent also listened to recordings of the wiretapped calls. *Id.* Affirming the district court’s decision to admit the agent’s testimony under Rule 701, the court of appeals explained that his testimony “was rationally based on his perception” of the documents relevant to the investigation. *Id.* (analogizing to *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006), in which the court admitted the testimony of an FBI financial analyst who reviewed financial documents and records to form his lay opinion). Thus, the testimony satisfied the requirements of Rule 701(a).

Here, Agent Simandy offered lay opinions based on the personal knowledge he gained through his first-hand examination of the transcripts. Like the agent in *Jayyousi*, Agent Simandy’s personal review of the documents along with his investigatory interviews allowed him to determine by contextual clues the meaning of the conspirators’ coded conversations. (R. 13-14); *see Jayyousi*, 657 F.3d at 1104. As a result, his opinions are rationally based on his perception of the documents he examined.

**2. A witness need not be a contemporaneous observer of wiretapped conversations to provide lay opinion testimony about those conversations.**

The court of appeals improperly concluded that Rule 701(a) requires a lay witness to be an eye-witness or contemporaneous observer of a matter to offer lay opinions about it. Such a restrictive requirement is found nowhere in the text of the Rule. In reaching such a narrow construction of Rule 701, the court of appeals relied on the Eighth Circuit Court of Appeals’ distortion of the Rule in *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001). In *Peoples*, the trial court admitted an FBI agent’s lay opinion testimony about the meaning of coded language in wiretapped conversations. *Id.* at 639. The agent had neither heard the wiretapped conversations as they occurred nor observed the events discussed in those conversations. *Id.* at

640.

The Eighth Circuit Court of Appeals found that the agent “lacked first-hand knowledge” because “her opinions were based on her investigation after the fact, not on her perception of the facts.” *Id.* at 641. According to the court of appeals, a law enforcement officer may only offer lay opinions on the meaning of coded language used during intercepted calls if she “is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.” *Id.*

That restrictive standard has no basis in Rule 701. Rather, the Advisory Committee’s Notes to the Rule make clear that lay opinion testimony may be based on either “first-hand knowledge *or observation*.” Fed. R. Evid. 701 advisory committee’s note (emphasis added). Indeed, Rule 602 requires only that a lay witness have “personal knowledge of the matter,” and “the threshold for admitting testimony under [the Rule] is low.” *United States v. Kelsor*, 665 F.3d 684, 698 (6th Cir. 2011); *see, e.g., United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011) (admitting lay opinion testimony about meaning of wiretapped conversations and recorded videos when based on agent’s ensuing investigation); *Kelsor*, 655 F.3d at 697-698 (rejecting argument that witnesses per se could not testify with personal knowledge about recorded calls to which they were not a party); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1217-22 (10th Cir. 2007) (admitting lay opinion testimony of agent’s interpretation of transcripts and identification of defendant, based on agent’s post-wiretap investigation). Had the drafters of Rule 701 intended personal knowledge to mean nothing more than in-person “observation,” it would render meaningless the drafter’s inclusion of the phrase “first-hand knowledge” in their explanatory notes on the Rule. *See* Fed. R. Evid. 701 advisory committee’s note.

Under the facts of this case, “rationally-based on the witness’s perception” means

personal examination of the documents about which Agent Simandy can testify, *i.e.*, the certified transcripts of the wiretapped conversations. *Jayyousi*, 657 F.3d at 1103. Agent Simandy arrived at his conclusions after placing the transcribed conversations into context by comparing the dates of the conversations and the dates that the Defendant contacted Agent Lamberti and Alan Klestadt regarding the AK-47s and the helicopter. (R. 13, 14) Furthermore, Agent Simandy's first-hand knowledge of documents is limited to those certified transcripts he personally examined, and the Government at trial will separately prove that the transcripts accurately represent the content of the Defendant's conversations. (R. 15.) Thus, Agent Simandy's testimony satisfies both the "rationally based" requirement of Rule 701(a) and the traditional objective of the Rule to provide the jury with an accurate reproduction of the events at issue.

**B. Agent Simandy's testimony is helpful to the jury because his extensive experience on the Defendant's case better enables him than the jurors to interpret the meaning of the coded language.**

Lay opinion testimony is admissible if it is "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Fed. R. Evid. 701(b). If the facts of a case "are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appeared to the witness," the witness may offer his interpretation of those facts in the form of lay opinion testimony. *Weinstein & Berger, supra*, § 701.02. Indeed, "lay opinion testimony has been admitted liberally whenever it might conceivably assist the trier of fact in its deliberations." *Id.* § 701.03[3].

Here, Agent Simandy's "extensive[]" work investigating the Defendant's case and thorough review of the certified transcripts allows him, more readily than the jury, to perceive and infer the hidden meaning of the conspirators' language. (R. 14); *see United States v. Rollins*, 544 F.3d 820, 831 (7th Cir. 2008) (finding it helpful to the jury to allow code-word testimony

“from the investigator who became intimately familiar with the unusual manner of communicating used by these conspirators”). Furthermore, Agent Simandy’s explanation of the coded words and phrases will place the Defendant’s conversations in their proper context by connecting the wiretapped calls to the Defendant’s helicopter rental and purchase of assault rifles. Thus, Agent Simandy’s testimony meets the helpfulness standard under Rule 701(b).

**C. Agent Simandy’s opinion testimony is based solely on his investigation of the Defendant’s elephant-poaching scheme and not on any prior scientific, technical, or other specialized knowledge.**

Rule 701(c) requires that lay opinion testimony “not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701(c). The concept of an expert *witness* must be distinguished from expert *testimony*. *United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) (internal citation omitted). A “[w]itness’s specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony ‘expert’ as long as it was based on his investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise.” *Id.*

Thus, while a law enforcement officer may be qualified as an expert witness, once he ceases to apply his expertise and instead interprets code words and phrases based solely on knowledge gained during a particular investigation, he is merely testifying as a lay witness. *United States v. Freeman*, 498 F.3d 893, 902 (9th Cir. 2007) (internal citations omitted); *Rollins*, 544 F.3d at 832-33 (finding agent’s testimony admissible under Rule 701(c) even though the agent had “years of experience as a law enforcement officer” because his understanding of the conversations “was based on his perceptions derived from [that] particular case”); *United States v. Valdivia*, 680 F.3d 33, 50-51 (1st Cir. 2012) (finding agent’s testimony “met the requirements of Rule 701 [] because it was derived from ‘particularized knowledge that [the agent] had

obtained by virtue of his position” as an agent on the investigation).

Conversely, those courts that have refused to allow law enforcement officers to offer lay opinion testimony on the meaning of code words have done so because the officers relied on their past training and experience, and not their familiarity with the particular case. *See, e.g., United States v. Garcia*, 413 F.3d 201, 216 (2d Cir. 2005) (agent’s testimony was based on his training, experience, and review of wiretaps during various narcotics investigations); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (agent’s testimony was based on his “training and experience” and not on his first-hand perceptions during the investigation); *United States v. Johnson*, 617 F.3d 286, 293 (10th Cir. 2010) (agent’s testimony was based on his “credentials and training and not his observations from the surveillance employed in this case”).

Here, unlike in those cases, Agent Simandy repeatedly stated in his testimony before the district court that he developed his opinions solely from what he “learned by extensively investigating” the Defendant’s elephant-poaching scheme. (R. 13-14.) In fact, Agent Simandy admitted that while he had been an FBI agent for five years, he had never investigated a case that involved poaching or other crimes against animals. (R. 14.) As he stated, for him, this was “not a typical case.” (R. 14.) Thus, his own testimony confirms that he could not have relied on any prior “scientific, technical, or other specialized knowledge.” *See* Fed. R. Evid. 701. To the contrary, his conclusions about the meaning of the code words and phrases were based on the particularized knowledge [he had learned] by virtue of his . . . position” as investigator on this case. *See* Fed. R. Evid. 701 advisory committee’s note. In keeping with the liberal standards for establishing personal knowledge and admitting lay opinion testimony, Agent Simandy’s opinion as to the meaning of the conspirators’ coded language is admissible. Thus, this Court should

reject the court of appeals' unreasonably narrow construction of Rule 701 and reverse the decision below.

**CONCLUSION**

For the foregoing reasons, the Petitioner respectfully requests this Honorable Court to **REVERSE** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold that: (1) Reardon's testimony is admissible under Rule 804(b)(6); (2) there is no journalist privilege under Rule 501, and if there is, it is qualified and has been overcome in this case; and (3) Agent Simandy's lay opinions are admissible under Rule 701.

Respectfully Submitted,

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12P  
Counsel for Petitioner

Date: February 20, 2013

## APPENDIX

### Federal Rules of Evidence

#### **Fed. R. Evid. 501. Privilege in General.**

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

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

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

#### **Fed. R. Evid. 701. Opinion by Lay Witnesses.**

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

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

#### **Fed. R. Evid. 804(b)(6). Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness.**

**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

**(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.