

No. 12-23

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM BARNES,

Respondent.

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

BRIEF FOR THE UNITED STATES

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 the 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 witnesses opinion testimony, a witness may testify to alleged code words and phrases in conversations, when the witness neither participated in nor observed the conversation, but merely read transcripts of them and reviewed the investigatory work of other law-enforcement personnel.

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OPINIONS BELOW

The opinion of the court of appeals (R. at 20-35) is not reported. The opinion of the district court (R. at 5-17) is not published.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2012. The petition for writ of certiorari was timely filed; and this Court granted the petition on October 1, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

STATEMENT OF THE CASE

Statement of the Facts

In May 2000, William Barnes (“Respondent”) inherited and became the sole proprietor of Big Top Circus (“Big Top”). (R. at 1). Big Top was located in rural southern Boerum where it sat on over a hundred acres of tropical terrain. Id. These conditions created the perfect environment for the Big Top’s primary attraction, twenty Asian elephants. Id.

Although Big Top was a very profitable business, in July 2011 Respondent was notified that he would have to raise \$500,000 by December 2011 in order to avoid bankruptcy. Id. In an attempt to raise funds, Respondent created a scheme to invite two smaller circuses to participate in a one-month holiday show. (R. at 2). However, Respondent’s true intentions were to kill the elephants and harvest their valuable ivory with the assistance of two co-conspirators. (R. at 1).

In an effort to promote the one-month holiday show, in August 2011 Respondent invited reporter Kara Crawley (“Crawley”) to visit Big Top. (R. at 2, 9). Crawley was given unlimited access to Big Top, without Respondent’s supervision. (R. at 2, 10). During one of her visits, Crawley met an employee who wanted to reveal information he learned in regards to Respondent’s elephant hunt. (R. at 10). The employee agreed to allow Crawley to interview him but asked that she use a pseudonym so that his or her identity was not revealed. Id. However, the employee did allow Crawley to videotape the interview without altering the employee’s appearance or voice under the purported impression that the video would never be shown to the public. Id. In December 2011 Crawley published her exposé of Respondent’s elephant poaching plan based on the information provided to her from the employee. (R. at 11).

Prior to Crawley’s story being published, in October 2011 Respondent purchased automatic weapons from a Texas firearm dealer, Weapons Unlimited. (R. at 2). The Weapons

Unlimited employee who assisted Respondent, Jason Lamberti (“Lamberti”), was an undercover agent from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”). (R. at 22). Upon Respondent’s request, Lamberti agreed to provide unregistered and fully automatic weapons to Respondent for \$500 each. (R. at 23). Based on this transaction, the government obtained a warrant to intercept Respondent’s telephone conversations from October through December 2011. Id.

The original agent who was assigned to investigate Respondent’s telephone conversations died on December 14, 2011. (R. at 23). The following day, Agent Thomas Simandy (“Simandy”) was assigned to the case. Id. Simandy interviewed Lamberti and Alan Klestadt (“Klestadt”) from Copters Corporation Agent. Id. Lamberti informed Simandy of the conversation he had with Respondent on October 2, 2011 in regards to purchasing the guns, and Klestadt disclosed that on October 6, 2011 Respondent had arranged a one-day helicopter rental for December 15, 2011. Id.

During the May 2012 hearings on the Government’s Motion in Limine, the government sought to introduce Simandy’s lay witness opinion testimony concerning code words and phrases used by Respondent and his co-conspirators, Alfred Anderson (“Anderson”) and James Reardon (“Reardon”), during their recorded telephone calls. Id. Simandy testified that Respondent made references to “blood diamonds” and “Charlie tango” in reference to elephant ivory tusks and the helicopter, respectively that would be used in the elephant scheme. (R. at 23, 24). Simandy also testified that Respondent referred to “black cat” as a code word for the three AK-47s that were purchased from Lamberti. (R. at 24).

The recorded telephone conversations also revealed that in November 2011, Reardon voiced concerns to Anderson about participating in the elephant hunt. Id. Anderson then

informed the respondent of Reardon's apprehension to continue with the scheme, and stated that Reardon should be "put out of the picture." Id. Respondent agreed, and told Anderson to "[j]ust shut him up for a while . . . I don't want anything to do with this." Id.

On November 28, 2011, Reardon reached out to his friend, Daniel Best ("Best"), to inform him of the conspiracy, and that he feared for his safety. Id. Reardon also told Best that he was meeting with Anderson the following day. Upon learning of the meeting arrangement, Best drove to Reardon's house on November 29, 2011 where he found Reardon dead, and witnessed Anderson fleeing from the scene. Id. Later that evening, the police apprehended Anderson and he confessed to killing Reardon in order to prevent Reardon from exposing the scheme to the police. (R. at 7).

A few days after Reardon's murder and after Crawley's published article exposed Respondent's plan to kill the elephants, Respondent was taken into federal custody and charged with the following counts: (1) 18 U.S.C.A. §§ 371 and 922(a)(1)(a) -- Conspiracy to Deal Unlawfully in Firearms; (2) 18 U.S.C.A. §§ 43 and 371 -- Conspiracy to Commit a Crime of Violence Against an Animal Enterprise; and (3) 16 U.S.C.A. §§ 371 and 1538 -- Conspiracy to commit unlawful takings under the Endangered Species Act. (R. at 3-4).

Procedural History

On December 1, 2012, Respondent was arrested and taken into federal custody. (R. at 24). On December 4, 2012, the Grand Jury returned an indictment and charged the Respondent with two counts of conspiracy to deal unlawfully in firearms, two counts of conspiracy to commit a crime of violence against an animal enterprise, and one count of conspiracy to commit unlawful takings under the Endangered Species Act. (R. at 1-4).

On May 1, 2012 and May 2, 2012, the District Court of the Southern District of Boerum heard oral arguments for three motions in limine. (R. at 6-16). The motions addressed by the district court were:(1) the government's motion to admit the testimony of Daniel Best's conversation with James Reardon under Federal Rule of Evidence 804(b)(6); (2) Kara Crawley's motion to quash the government's witness subpoena under Rule 501; and (3) the government's motion to admit lay witness testimony of Agent Thomas Simandy's under Rule 701. (R. at 6-16).

On May 2, 2012, following oral arguments, the district court ruled against the government on all three motions. (R. at 16-17). In denying the government's motion to admit testimony pursuant to hearsay exception 804(b)(6), the district court held as a matter of law, that forfeiture-by-wrongdoing applies only when the defendant intended to prevent the witness from testifying, and that mere foreseeability and participation in a conspiracy does not show that a defendant intended to render the witness unavailable. (R. at 16). In granting Crawley's motion to quash, the district court held that an absolute journalist's privilege under 501 exists based upon preserving public interests of encouraging the public to confidentially speak to the press. (R. at 17). Lastly, in denying the government's motion to admit lay witness testimony, the district court held that pursuant to Rule 701, the lay witness's opinion was not rationally based on the witness's first-hand knowledge or experience. (R. at 17). The government then appealed to the United States Court of Appeals for the Fourteenth Circuit. (R. at 20).

The United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit, pursuant to 18 U.S.C. § 3731. On July 12, 2012, the Court of Appeals for the Fourteenth Circuit affirmed the District Court's decision on all three issues and held that: (1) conspiracy liability is not applicable to forfeiture-by-wrongdoing analysis under Rule 804(b)(6) of the Federal Rules of Evidence; (2) the journalist's privilege exists and is absolute

under Rule 501; and (3) lay opinion testimony as to the meaning of code words is inadmissible where the agent neither participates in, nor observed the conversation pursuant to Rule 701. (R. at 20).

The government then wrote a petition for writ of certiorari to the Supreme Court of the United States, which was granted on October 1, 2012. (R. at 36-37).

SUMMARY ARGUMENT

In the present case, the lower courts both incorrectly held that: (1) a trial court cannot admit hearsay evidence against a defendant when his co-conspirator procured the unavailability of the declarant in furtherance of the conspiracy; (2) information gathered during a journalist investigation is protected under an “absolute” privilege; and (3) a FBI agent should not be allowed to decode word and phrases in a conversation, if the agent neither participated in or observed the conversation. First, the lower courts incorrectly relied on Giles v. California, 554 U.S. 353 (2008) and read the Court’s decision too narrowly to bar Reardon’s statements even though Rule 804(b)(6) is applicable. In this case of first impression this Court should rely on the Cherry doctrine established in United States v. Cherry, 271 F.3d 811 (10th Cir. 2000). The Cherry doctrine is a better fit for the factual background in the instant matter; and if adopted by this Court, would remove a potential windfall for defendants by keeping defendants accountable for their co-conspirators actions.

Second, the lower courts failed to provide any cogent analysis for the evidentiary privilege they created pursuant to Rule 501. This Court in Branzburg v. Hayes, 408 U.S. 666 (1972) has already foreclosed on the possibility of an evidentiary privilege for journalists. However, even if this Court were to afford journalists with an evidentiary privilege, the privilege should be qualified, rather than absolute. Thus, this Court should find that the Fourteenth Circuit

incorrectly held that an absolute evidentiary privilege for journalists applied to the information gathered during Crawley's journalistic investigation.

Lastly, the lower courts erred when they decided that even when an agent has personal knowledge of a conversation through reading transcripts that quoted the individual speakers verbatim, the opinions based on those transcripts do not fall under Rule 701. This Court should find that under Rule 701 law witness's testimony is admissible when the witness provides an opinion that is (1) rationally based on personal knowledge and established by sufficient evidence; (2) helpful to the jury understanding the facts of the case; and (3) not based on scientific, technical, or specialized knowledge. The testimony of Simandy, which was rationally based on knowledge gained through the review of verbatim transcripts and several interviews, meets all the requirements of Rule 701, and thus should be admitted into evidence.

Accordingly, this Court should reverse the ruling of the circuit court on all issues.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 804(B)(6) PERMITS THE ADMISSION OF OTHERWISE INADMISSIBLE HEARSAY EVIDENCE FROM A MURDER VICTIM WHEN THE DEFENDANT COULD REASONABLY FORESEE THAT HIS CO-CONSPIRATOR WOULD CAUSE THE DECLARANT'S UNAVAILABILITY BECAUSE PINKERTON CONSPIRATORIAL LIABILITY IS APPLICABLE IN A FORFEITURE DOCTRINE ANALYSIS.

Federal Rule of Evidence 802 explains that "hearsay" evidence is not admissible unless otherwise provided by a federal statute, the Federal Rules of Evidence, or other rules allowed by the Supreme Court. Fed. R. Evid. 802. Rule 801(c) defines "Hearsay" as any out of court statement being offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Rule 804(b)(6) provides an exception to the rule against hearsay when a statement is offered against a party that wrongfully causes the declarant's unavailability. Fed. R. Evid. 804(b)(6). Rule 804(b)(6) was added to provide that "a party forfeits the right to object on hearsay grounds to the

admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence procured the unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6) advisory committee's note. This rule was created because courts recognized the need for a prophylactic rule to deal with the "abhorrent behavior which strikes at the heart of the system of justice itself." Id. (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

A. The Lower Courts' Reliance On Giles v. California, 554 U.S. 353 (2008), Is Misplaced.

The District Court of the Southern District of Boerum and the Fourteenth Circuit solely relied on this Court's decision in Giles v. California, 554 U.S. 353 (2008). The government argues that Giles provides no clarity for the instant matter. The issue in Giles was whether the forfeiture-by-wrongdoing exception applies where a defendant murdered a victim for a reason wholly independent of the victim's status as a witness. Id. at 356. In Giles, the defendant murdered his girlfriend when he thought she was engaged in an affair; the state subsequently sought to introduce the victim's prior statements to the police in Giles's murder trial. Id. There appeared to be no dispute in Giles that the motivation behind the murder was not to keep the victim from testifying at trial, rather the killing was out of rage. As such, this Court held that the forfeiture-by-wrongdoing exception allowed unopposed testimony if the defendant intended to prevent a witness from testifying. Id.

In this case, however, the defendants conspired to commit a federal offense and one of the co-conspirators killed a witness. (R. at 24). The motivation for Anderson's killing of Reardon on November 29, 2011 was to prevent him from testifying as a witness. Id. The Fourteenth Circuit's attempt to analogize the facts and issue presented in this case and Giles is inappropriate because the motives behind the killings in these two cases are different.

B. Instead Of Relying On Giles, This Court Should Adopt The Cherry Doctrine Established In United States v. Cherry, 217 F.3d 811 (10th Cir. 2000).

In the Fourteenth Circuit’s split decision, Judge Zhu noted in his dissent “if a defendant may be convicted of a murder based upon a foreseeable act of a co-conspirator, it is at the very least incongruous that hearsay evidence may not be admitted against him on the same basis.” (R. at 33). The Cherry doctrine answered this concern by applying the forfeiture-by-wrongdoing exception to the defendant under the standard applicable to conspiracy cases. United States v. Cherry, 217 F.3d 811, 817 (10th Cir. 2000) (finding that the defendant involved in a conspiracy to procure the unavailability of a witness cannot object to the witness’s testimony). Since Cherry, every circuit court confronted with this same issue has adopted the Cherry doctrine. See, e.g., United States v. Johnson, 495 F.3d 951, 971 (8th Cir. 2007) (permitting testimonial statements by a witness that was made unavailable based on the defendant’s role as an aider and abettor); see also United States v. Carson, 455 F.3d 336, 364 & n.24 (D.C. Cir. 2006) (“[T]he reasons why a defendant forfeits his confrontation rights apply with equal force to a defendant whose co-conspirators render the witness unavailable, so long as their misconduct was within the scope of the conspiracy.”); United States v. Rivera, 412 F.3d 562, 567 (4th Cir. 2005); (United States v. Rodriguez-Moarrero, 390 F.3d 1, 17 & n.8 (1st Cir. 2004) (noting that “[w]hile [Cherry] may represent a sensible rule of law,” not applying it because the government failed to argue it and the district court failed to “make any factual finding on the applicability of conspiratorial liability.”); United States v. Thompson, 286 F.3d 950, 963 (7th Cir. 2002) (“if a murder is reasonably foreseeable to a conspirator and within the scope and in furtherance of the conspiracy, the [fellow co-conspirator] waives the right to confront the witness just as if he killed the witness himself.”).

State courts have also adopted the Cherry doctrine. See, e.g., State v. Poole, 232 P.3d 519, 527 (Utah 2010) (finding that testimonial statements are admissible when the defendant’s wife pressured the testifying witness into refusing to testify); Commonwealth v. Edwards, 830 N.E.2d 158, 175 (Mass. 2005) (declaring that the defendants forfeited their rights because their co-conspirators procured the unavailability of the witness in furtherance of the conspiracy).

In Cherry, the government charged five defendants with involvement in a drug conspiracy. 271 F.3d at 813. Much of the evidence came through a cooperating witness. Id. However, prior to trial, the cooperating witness was murdered. Id. The government moved to admit the hearsay statements of the cooperating witness pursuant to Federal Rules of Evidence 804(b)(6), on the grounds that the defendants wrongfully procured the cooperating witness’s unavailability. Id. The court found that there was no evidence that three of the five defendants participated in the planning of the cooperating witness’s murder. Id. at 822. However, the Cherry court determined that the traditional notions of Pinkerton liability¹ apply in the context of forfeiture-by-wrongdoing and that as a result, if the murder was “within the scope” and “reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy,” then hearsay statements of the murdered witness could be admitted against those three defendants. Id. at 820.

The Cherry court provided a compelling rationale to extend Pinkerton liability in the forfeiture-by-wrongdoing context. The court stated that “[f]ailure to consider Pinkerton conspiratorial responsibility affords too much weight to the Confrontation Clause values in balancing those values against the importance of preventing witness tampering.” Id. (citing United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979)). The court was correct when it

¹ It is well-established that actions of a defendant’s co-conspirator can be imputed to the defendant in a conspiracy. Pinkerton v. United States, 328 U.S. 640, 646-47 (1946).

stated that “the applicability of agency concepts and permitting admission of the testimony of an unavailable witness against a co-conspirator involved in, but not necessarily immediately responsible for, procuring the witness’s unavailability, a Pinkerton theory strikes a better balance between the conflicting principles at stake.” Id. As a result, the court in Cherry removed a potential windfall to defendants and respected the fundamental principle that courts will not allow a party to profit by his own wrongdoing by determining that the “acquiescence” prong of Federal Rule of Evidence 804(b)(6) could be satisfied by either direct participation in planning or procuring the declarant’s unavailability, or by satisfying the Pinkerton standard. Id.

The Fourteenth Circuit’s decision below is an outlier for the issue at bar. Since all the other circuit courts that have considered this issue have adopted the Cherry doctrine, this Court should abandon the Fourteenth Circuit’s rationale and employ the Cherry doctrine as well.

C. In A Cherry Doctrine Analysis, The Hearsay Statements Are Admissible Under The Forfeiture By Wrongdoing Exception.

The Confrontation Clause of the United States Constitution mandates that the accused be afforded the opportunity to cross-examine any witness who gives testimony against a defendant, except where there is a common law exception recognized at the founding of the Constitution. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The forfeiture-by-wrongdoing doctrine as codified in Federal Rule of Evidence 804(b)(6) has been examined and upheld by the Supreme Court as one of the few exceptions to the Confrontation Clause. Davis v. Washington, 547 U.S. 813, 833 (2006) (“[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses the Sixth Amendment does not require courts to acquiesce.”). In order to apply the forfeiture-by-wrongdoing exception, the Cherry court and its progeny determined that the government must prove by preponderance of the evidence that either the defendant or his co-conspirators: (1) engaged or acquiesced in wrongdoing; (2) intended to

render the declarant unavailable as a witness; and (3) rendered the declarant unavailable. Cherry, 271 F.3d at 822; United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005).

1. Respondent and his co-conspirators engaged in and acquiesced in wrongdoing.

First, Respondent and his co-conspirators were involved in a conspiracy to kill elephants, harvest their ivory, and sell it in violation of 16 U.S.C.A. §§ 371 and 1538. (R. at 21). On November 25, 2011, Anderson explained to Respondent that he was having second thoughts about Reardon's participation in the conspiracy. (R. at 18). On November 29, 2011, it became clear to Anderson that Reardon would betray his fellow conspirators; and Anderson informed Respondent that he was going to "take care of [Reardon]." (R. at 19). Later on November 29, 2011, at approximately 7:30 p.m., Best sees Anderson running from Reardon's apartment. (R. at 7). As Best enters Reardon's apartment, he immediately sees Reardon dead on the floor, thus rendering Reardon unavailable as a witness. Id.

2. The wrongdoing was intended to render Reardon unavailable as a witness.

Second, the circumstances, timing of the attack, and Anderson's admission leave no doubt that the purpose of the attack was to eliminate Reardon as a witness. Anderson was attempting to prevent Reardon from sharing any information against himself and the Respondent. On November 15, 2011, around 1:00 a.m. Anderson told Respondent that they "[s]houldn't have used him." (R. at 18). Anderson also stated "Let's get rid of him." Id. On the day of Reardon's murder, Anderson told the Respondent "We're out of time. We need him out of the picture . . . I'm gonna take care of him." (R. at 19). More importantly, when Anderson was captured by law enforcement, he was given his Miranda warnings and spoke to the police voluntarily. (R. at 7). It was during his conversation with the police that Anderson confessed to killing Reardon in order to prevent him from exposing the scheme to the police. (R. at 7).

3. The wrongdoing did in fact render Reardon unavailable as a witness.

Third, the wrongdoing ensured that Reardon would not testify as a witness. Mr. Reardon was weary of the conspiracy to hunt elephants. (R. at 24). He was calling Best and not only described the planned scheme but explained in detail the conversations he had with Anderson and Reardon. Id. Reardon was prevented from testifying in court by Anderson, who acting on behalf of his co-conspirator, the Respondent, killed Reardon on November 29, 2011.

Respondent may argue that he was no longer a member of the conspiracy because he stated “I don’t want anything to do with this.” (R. at 19). However, the Respondent remained a member of the conspiracy even after Reardon’s murder. It is well-established that a defendant who joins a conspiracy remains a member of that conspiracy until he takes affirmative action to withdraw or disavow the entire conspiracy. Smith v. United States, 133 S. Ct. 714, 715 (2013); see Hyde v. United States, 225 U.S. 347, 369 (1912) (“a defendant who has joined a conspiracy continues to violate the law through every moment of [the conspiracy’s] existence.”).

The Respondent is unable to cite to any evidence to establish that he had taken the requisite affirmative action from the conspiracy after his arrest. See Hyde, 225 U.S. at 369 ([T]o avert a continuing criminality there must be affirmative action . . . to disavow or defeat the purpose of the conspiracy.”). The burden of proving withdrawal is on the defendant. Id. Absent any proof of withdrawal, the Pinkerton principles are applicable to the defendant in this context. See generally Cherry, 271 F.3d at 820.

Accordingly, this Court should rule that the lower courts erred in barring the hearsay statements of Best and hold that Pinkerton conspiratorial liability is applicable in a forfeiture-by-wrongdoing analysis under Federal Rule of Evidence 804(b)(6).

II. UNDER FEDERAL RULE OF EVIDENCE 501, AN EVIDENTIARY PRIVILEGE FOR INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION SHOULD NOT BE RECOGNIZED.

Federal Rule of Evidence 501 generally provides that “the privilege of a person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Fed. R. Evid. 501. An evidentiary privilege for journalists would provide “reporters protection under constitutional or statutory law from being compelled to testify about confidential information or sources.” Black’s Law Dictionary (9th ed. 2009). Federal Courts have declined to afford an evidentiary privilege for journalists because it poses the threat of excluding potentially relevant evidence, and blocking the judicial fact-finding function. United States v. Nixon, 418 U.S. 683, 710 (1974). Moreover, this Court has noted that the exceptions and privileges that do exist, as it pertains to evidence, are extremely narrow in scope because they serve as an exemption from the search of truth. Id. Keeping these principles of privilege interpretation in mind, this Court should find that an evidentiary privilege for journalist does not exist under Rule 501 of the Federal Rules of Evidence.

A. Federal Rule Of Evidence 501 Does Not Afford An Evidentiary Privilege For Crawley To Conceal Her Confidential Source From A Grand Jury.

The Respondent argued that the federal common law recognized a journalist’s privilege under Rule 501. (R. at 8). The government disagrees. The lower courts incorrectly relied on Jaffe v. Redmond, 518 U.S. 1 (1996), which involved a psychotherapist and their patients, instead of Branzburg v. Hayes, 408 U.S. 665 (1972), which is more analogous to this instant matter. In Jaffe, this Court undoubtedly aimed to protect the intense private moments and topics between the psychotherapist and patient. Jaffe, 518 U.S. at 11, while Crawley merely aimed to

distribute and publish the information she obtained. Consequently, this Court should find that the facts of this case are materially indistinguishable from those in Branzburg, where this Court rejected a journalist's claim of privilege. Id. at 752.

This Court in Branzburg consolidated three petitions that involved confidential sources and the news media. See generally Id. The Court carefully examined the facts and law in (1) Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970); (2) In re Pappas, 266 N.E.2d 297 (Mass. 1971); and (3) Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

In Branzburg, the petitioner, Branzburg, was held in contempt in two related proceedings, arising from one journalistic investigation. Id. at 668. The first contempt proceeding arose from an article published by Branzburg's employer, a daily newspaper, describing Branzburg's observation of two Kentucky residents synthesizing marijuana hashish as part of an illegal drug operation. Id. at 667. The article included a picture of hands working above a laboratory table with the substance identified as hashish. Id. A Kentucky grand jury subpoenaed Branzburg, but he refused to identify the individuals he saw possessing marijuana and the persons he saw making hashish. Id. at 668. Branzburg also refused to testify by claiming privilege under the First Amendment and various state provisions and was found in contempt. Id.

The second proceeding involving Branzburg arose out of another article published by Branzburg's employer, which described the use of drugs in Frankfort, Kentucky. Id. at 669. The article detailed how Branzburg spent two weeks interviewing drug users in the area. Id. The article further reported that he had seen some of his sources smoking marijuana and witnessed conversations of unidentified drug users. Id. Branzburg was subpoenaed to appear before a Kentucky grand jury once again, and was asked, to testify concerning the use and sale of drugs. Id. Branzburg moved to quash the subpoena, but the motion was denied. Id. He then claimed

that if he were forced to go before the grand jury or answer questions regarding the identity of his informants, his effectiveness as a reporter would be greatly damaged. Id. at 670. However, the Kentucky Court of Appeals rejected Branzburg's claim of a journalist's privilege. Id. Branzburg then petitioned for certiorari to the Supreme Court to review both judgments of the Kentucky Court of Appeals. Id. at 671.

In re Pappas revolved around the petitioner, Pappas, who was a news photographer for a Massachusetts television station. Id. Pappas was invited to the headquarters of the Black Panther Party, after agreeing that he would not disclose anything he saw or heard inside the headquarters. Id. Two months later, Pappas was subpoenaed to appear before a Massachusetts grand jury regarding his visit. Id. at 673. Although Pappas appeared before the court, he refused to answer any questions about what had taken place inside the Black Panther headquarters by claiming a privilege to protect confidential informants and their information. Id. at 673. The Massachusetts trial court denied Pappas' motion to quash and ruled that a journalist had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons that were observed. Id.

The last case to be reviewed by the Court in Branzburg was Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). In Caldwell, the Ninth Circuit recognized a qualified testimonial privilege for journalists arising from the First Amendment, and allowed a reporter to refuse to testify before a grand jury investigation. Branzburg, 408 U.S. at 675. The reporter in Caldwell had participated in a journalistic investigation of the Black Panthers when they were suspected of committing crimes against the President of the United States. Id. at 678. Caldwell claimed that the information he obtained was from confidential informants. Id.

The Court rejected these claims and held that requiring a journalist to testify before a

grand jury did not abridge the freedom of speech guaranteed by the First Amendment. Id. at 671. In declining to afford an evidentiary privilege for journalists, this Court relied heavily on the fact that “at common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.” Id. at 685. Furthermore, this Court recognized that journalists are not exempt from appearing before a grand jury and answering questions relevant to a criminal investigation. Id.

The material facts in Branzburg are nearly identical to the facts in the case at bar. First, similarly to the three reporters in Branzburg who claimed to have received communications from confidential sources, Crawley also claimed to have a confidential communication. (R. at 10). Second, each of the reporter’s motion to quash was denied, just as Crawley’s should have been. (R. at 8). Finally, the record before us shows that there is at least sufficient allegation to warrant grand jury inquiry pertaining to the heinous nature of the alleged crime of elephant poaching. (R. at 11). If this Court follows the same logic for this case, which contains analogous facts, then it must necessarily come to the same conclusion that a journalist privilege does not exist.

Indeed, this Court explained its policy judgment for declining to create a privilege for journalists. The Court noted that the grand jury’s authority to subpoena witnesses was essential, and acknowledged that the public has a right to evidence. Branzburg, 408 U.S. at 689. The Court then expressly declined to grant a testimonial privilege to journalists, because this was a privilege that other citizens would not have. Id. at 690. Similar to Branzburg, the disclosure of the identity of Respondent’s employee, in this case, should overcome Crawley’s agreement to conceal information that would further criminal conduct.

Additionally, this Court specifically addressed situations where a source has information suggesting that other people are engaged in illegal conduct. Id. at 693. Even under these

circumstances, the Court did not accept the argument that the public interest in maintaining the confidence of informants took precedence over the public interest in pursuing and prosecuting crimes reported by informants. Id. at 695.

There is no distinction between the facts before this Court in Branzburg and those before the Court today. This Court used Branzburg to establish that there is no evidentiary privilege protecting journalists from appearing before a grand jury, from testifying before a grand jury, or providing evidence to a grand jury, regardless of the confidentiality promised by the reporter to a source. As such, Crawley should be required to provide the grand jury with the identity of the employer who had information regarding the elephant-poaching scheme and should not be afforded an evidentiary privilege.

B. Even If This Court Were To Find That An Evidentiary Privilege For Journalists Exists, This Evidentiary Privilege is Qualified Rather Than Absolute.

In Branzburg, this Court held that a journalist does not have an absolute privilege under the First Amendment. 408 U.S. at 665. This was affirmed in Miami Herald Publ'g. Co. v. Morejon, when the Supreme Court of Florida stated that “ordinary citizens would not be excused from testifying as to what they observed, and the First Amendment should not be interpreted to make journalists' testimony privileged simply because they made their observations while on duty as a reporter. Miami Herald Publ'g. Co. v. Morejon, 561 So.2d 577, 581 (Fla. 1990). Thus, if this Court were to recognize that an evidentiary privilege does exist, then this privilege must be qualified.

Although the term “absolute privilege” has been recognized, no evidentiary privilege has offered absolute protection, in the sense of an impermeable shield. Eileen A. Scallen, Relational and Informational Privilege and the Case of the Mysterious Mediation Privilege, 38 LOY. L.A. L. REV. 537, 541 (2004). All evidentiary privileges deemed “absolute” can be waived by parties, or

are subject to multiple exceptions. Id. Therefore, even if Crawley claimed an “absolute” privilege, as a matter of policy, evidence gathered during Crawley’s journalistic investigation would not be withheld from the trier of fact.

When determining whether a privilege exists, most courts divide privileges into two separate categories, testimonial, and confidential communications. Id. at 542. The most common testimonial privilege is the spousal privilege. Trammel v. United States, 445 U.S. 40, 43, 46 (1980). Spouses are not required to testify on any topic, including matters discussed in confidence, in order to stress the public interest in marital harmony. Fed. R. Evid. 505. The relationship in this case, between Crawley and her confidential source, is inconsistent with the relationship between spouses. Spouses are provided a testimonial privilege in order to prevent either spouse from having to testify against one another. Fed. R. Evid. 505. Conversely, a journalist’s privilege would only protect the journalist from testifying, without shielding the informant. Accordingly, Crawley’s evidentiary journalistic privilege would not qualify as a testimonial privilege.

The second privileges category more closely mirrors the issue at hand, confidential communications. This privilege permits a person to testify about certain matters despite the confidential arrangement that has been established. Scallen, supra at 543. Confidential communication privileges are strictly recognized in a few instances: attorney-client, psychotherapist-patient, husband-wife, doctor-patient, and penitent-clergy. Id. As a result, even if Crawley does in fact have a confidential communications privilege, it should still be subject to waiver and exception, just as the other confidential communications. Edward J. Inwinkelried, The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with Modern Humanistic Theories?, 55 ARK. L. REV. 241, 256-57 (2002). Since this

case involves serious criminal conduct, the killing of an endangered species, it is pressing for this Court find that Crawley's investigative material falls within an exception, and deem her privilege qualified.

A qualified privilege would protect information and allow disclosure where a sufficient factual showing of need exists under a balancing test. (R. at 30). Here, the information the government is seeking goes to the very crux of the matter. Crawley had open access to events related to litigation, and filmed material directly related to criminal prosecution. (R. at 9, 10). Despite the fact that Crawley claims that the taped interview with the employee is privileged, the actual testimony that the Petitioner seeks is non-confidential (R. at 11). As such, this Court should follow the Second Circuit in finding that the government is entitled to requested non-confidential materials, if they are relevant to the case. See Gonzales v. Nat'l Broadcasting Co., 194 F.3d 29, 37 (2d Cir. 1999).

In support of the government's argument that Crawley's material is "non-confidential," this Court should consider the lack of preventative measures taken by the employee in order to maintain his or her confidentiality. If the employee, who was filmed by Crawley, attempted to conceal their identity, perhaps a confidentiality issue may have existed. (R. at 10). However, the employee openly spoke to Crawley without trying to prevent their identity from being exposed, or signing a general confidentiality agreement. Id. Consequently, there is no basis in preventing this information from being disclosed to a grand jury and the employee's actions further support the notion that the testimony is non-confidential. (R. 11.)

Additionally, the government's need for the material gathered in Crawley's journalistic investigation is compelling and significant to the criminal proceeding at hand. The videotape of the employee would benefit the public good by holding Crawley and the employee accountable

for what was published in the news article. Id. The taped testimony would also provide the grand jury with detailed information of the employee's account of the alleged elephant-poaching scheme. Id. Furthermore, releasing the footage from the interview would not threaten the safety of the employee in anyway, but would assist the government in safeguarding dangerous individuals from being able to freely kill endangered species. Accordingly, this Court should order a production of Crawley's material from her journalistic investigation and deny her motion to quash the subpoena.

III. UNDER FEDERAL RULES OF EVIDENCE 701, A LAY WITNESS'S OPINION TESTIMONY OF CODE WORDS AND PHRASES USED DURING RECORDED CONVERSATIONS SHOULD BE ADMISSIBLE EVEN IF THE WITNESS NEITHER PARTICIPATED IN NOR OBSERVED THE CONVERSATIONS WHEN ALL THE REQUIREMENTS OF RULE 701 HAVE BEEN MET.

Pursuant to Rule 701, “[i]f a witness is not testifying as an expert, [and is therefore a lay witness,] testimony in the form of an opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful for the jury to clearly understand the witness's testimony or to determine a fact in issue, and (c) not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702,” which would automatically render the witness's statements as expert testimony. Fed. R. Evid. 701; United States v. Jayyousi, 657 F.3d 1085, 1102 (11th Cir. 2011). “Subsection ‘(a) is the familiar requirement of first-hand knowledge or observation. . . .” Fed. R. Evid. 701 advisory committee's note; Jayyousi, 657 F.3d at 1102. Supported by Rule 602, a lay witness "may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Fed. R. Evid. 602. Personal knowledge may be proven by the witness's own testimony. Jayyousi, 657 F.3d at 1102. The limitation in subsection (b) is phrased in terms of requiring that the lay witness's testimony be helpful in resolving issues.” Fed. R. Evid. 701 advisory committee's

note. Subsection (c) is merely a safeguard against misrepresenting expert testimony as lay witness testimony. Id. In the event that the lay witness's testimony meets the three requirements of Rule 701, the lay witness's testimony is admissible. See Jayyousi, F.3d at 1103-04.

A. This Court Should Allow Lay Witness Opinion Testimony Regarding Code Words And Phrases Used In A Recorded Conversation When Sufficient Evidence Is Shown To Prove That The Testimony Is Rationally Based On The Witness's Perception Of The Facts.

Under Rule 701(a), this Court should find that lay witness opinion testimony of code words and phrases transcribed from a recorded conversation is admissible when sufficient evidence shows that the opinion is rationally based on the witness's perception of the facts. See Fed. R. Evid. 701(a); Fed. R. Evid. 602. In Jayyousi, the United States Court of Appeals for the Eleventh Circuit declared that a witness is not required to be a participant or observer of a conversation for opinion testimony pertaining to the meaning of words and phrases used during the conversation to be admitted. 657 F.3d at 1102. In fact, lay witnesses are allowed to base their opinion testimony on the examination of documents that are used to help the witness perceive the facts of a particular issue. Id. When the witness personally examines the records, the witness's opinion testimony then becomes based on first-hand knowledge of the learned information. Jayyousi, 657 F.3d 1085, 1102 (citing United States v. Gold, 743 F.2d 800,817 (11th Cir. 1984)). The first-hand knowledge that is gained through the review and summarization of documents is properly admitted under Rule 701. Jayyousi, 657 F.3d at 1102 (citing United States v. Hamaker, 455 F.3d 1316, 1331-32 (11th Cir. 2006)) (acknowledging that an FBI agent's review of time sheets and other records was an appropriate basis of his lay opinion testimony under Rule 701).

In Jayyousi, the court admitted the testimony of an FBI agent's interpretation of code words based on the agent's review of written transcripts of several conversations between the

defendants who were alleged to have been a part of an international network of radical Islamists. Id. at 1094. The agent in that case did not personally transcribe the information, yet he reviewed thousands of wiretap summaries and hundreds of verbatim transcripts. Id. at 1102. After these reviews, and based on his experience with terrorist-groups, the agent opined as to the meanings of various code words used by the defendants. Id. The agent opined that when the defendants referred to terms such as “football” and “soccer” they were referring to jihad; “sneakers” for support; “married” for martyrdom, and many others. Id. at 1095. The Eleventh Circuit determined that the agent was able to proffer an opinion that was rationally based on his perceived meanings of the code words and phrases that were learned during the investigation because of the agent’s intensive review of the previously recorded documents, and his investigation of the facts. Id. at 1104.

Here, Agent Simandy’s lay opinion testimony was rationally based on his perception of facts learned throughout his investigation period. On December 15, 2011, when Agent Simandy was assigned to the Barnes case following the death of the previously assigned agent, Simandy thoroughly reviewed the transcripts that were created by the previous agent to learn of the facts surrounding the case. (R. at 13, 23). Similar to Jayyousi, the documents that were reviewed by Agent Simandy were verbatim transcripts of the conversations between the Respondent, Anderson, and Reardon, which were recorded on various occasions from October 4, 2011 until December 1, 2011. Id.

During his investigation, Agent Simandy also conducted interviews with Agent Lambarti and Mr. Klestadt in regard to the Respondent and his co-conspirators’ October 2, 2011 procurement of three AK-47s, and October 6, 2011 helicopter rental. Id. After gaining additional information during these two interviews, Agent Simandy rationally perceived that the

words and phrases used by the Respondent and his co-conspirators logically gained their meanings based on the period in which the weapons and the helicopter had been procured. (R. 12-13). Specifically, Agent Simandy testified that when the Respondent stated on October 4, 2011 that “black cat was arranged,” the Respondent was referring the three AK-47’s that were purchased from Agent Lambarti at Weapons Unlimited two days earlier. (R. at 13, 24). Agent Simandy further testified that when the Respondent used the code word “Charlie tango” on October 8, 2011, reference was made to the helicopter that was rented from Mr. Klestadt on October 6, 2011. (R. at 13, 23). The transcripts did not show that the code words deciphered by Agent Simandy had been used at any other point prior to the arrangement of the weapons and the helicopter. Therefore, Agent Simandy’s interpretation of the words and phrases following his review of the transcripts and his interviews were rationally based on his own knowledge of the facts learned during his investigation of the particular case.

B. Lay Witness Opinion Testimony That Is Being Proffered To Help The Jury Understand The Meaning Of Code Words And Phrases Rationally Based Upon The Witness’s Perception Should Be Admissible Under Rule 701(b).

This Court should find that lay witness opinion testimony that is being offered for the purpose of helping the jury clearly understand the meaning of code words and phrases is admissible under Rule 701(b). Subsection (b) of Rule 701 is phrased to require any lay opinion testimony to be helpful in resolving contested issues. Rule 701 advisory committee’s note. The United States Court of Appeals for the Eleventh Circuit provides that lay witnesses may provide interpretation of code words and phrases when meaning “[is] not ‘perfectly clear’ without [the witness’s] explanation of the facts. Jayyousi, 657 F.3d at 1103 (citing United States v. Awan, 966 F.2d 1415, 1430-31 (11th Cir. 1992)).

In Jayyousi, the agent's testimony met the 701(b) requirement because the lay witness's opinion testimony helped the jury understand code words used by the defendants in their conversations related to international terrorism. Id. at 1103. The agent's in-depth knowledge of the facts surrounding the case allowed him to link the recorded calls "to checks, wire transfers, and other discrete acts of material support that put the code words into context." Id. This information revealed the true nature of the defendant's conversations despite the use of code words. Id. Therefore, because the court determined that the jury would have been unfamiliar with the complexities of the code words used by the terrorists, the agents lay witness testimony provided the jury with the necessary information to consider the evidence. Id.

Here, Agent Simandy's testimony provided an interpretation of unclear code words and phrases that the lower courts wrongly assumed would be perfectly clear to everyone on the grand jury. See Awan, 966 F.2d at 1430-31 (proclaiming that only evidence that is "clear and straightforward" requires no further interpretation). Terms such as "black cat," "Charlie tango," and "blood diamonds" were not clear and straightforward phrases that would have been easily discernible by each member of the grand jury. See Jayyousi 657 F.3d at 1103. Further, Agent Simandy's knowledge of the Respondents' procurement of the helicopter and AK-47s enabled him to draw inferences about the meanings of the code words and phrases. (R. at 14, 34). His testimony helped the grand jury understand that the Respondent and his co-conspirators conversations were related to their plan to carry out the elephant-poaching scheme. (R. at 13, 14, 34). Without Agent Simandy's testimony, the grand jury "would likely be unfamiliar with the complexities" surrounding the arrangements that were made by the Respondent and his co-conspirators. See Awan, 966 F.2d at 1430. Therefore, although Agent Simandy's testimony was derived through the review of transcripts, knowledge gained through his investigation provided

him with the context for his interpretation of the code words and phrases, making it necessary that his testimony be admitted to help the grand jury understand the facts pursuant to Rule 701(b).

C. Lay Witness Opinion Testimony That Is Not Based On Scientific, Technical, Or Other Specialized Knowledge Within The Scope Of Rule 702 Should Be Admitted Because It Satisfies Rule 701(c).

This Court should admit lay witness opinion testimony that interprets code words and phrases in conversations when such evidence is not based on scientific, technical or other specialized knowledge within the scope of Rule 702. See Fed. R. Evid. 701(c). When a witness provides testimony related to a subject where they have no knowledge, skill, experience, training, or education, they do not qualify as expert witnesses. Fed. R. Evid. 702; Hamaker, 455 F.3d at 1331.

The Eleventh Circuit, in Hamaker, admitted as lay testimony the interpretation of financial and business records proffered by an FBI Financial Analyst's because the agent's testimony had the sole purpose of proving a contested fact of relationship between the parties. 455 F.3d at 1331. This testimony was not based on the agent's expertise, nor did he express any expert opinion throughout his testimony. Id. Using Hamaker as its basis, the Eleventh circuit also concluded that the agent's testimony in Jayyousi was admissible because the agent testified to specific facts he learned through his investigation of the defendants in that case, rather than from his expertise. 657 F.3d at 1104. In fact, the lower court confined the agent to only testify about matters related to the investigation of the defendants and their connection to terrorism. Id. at 1104.

Here, similar to both Hamaker and Jayyousi, Agent Simandy did not base his conclusions regarding the interpretations on any extensive research or experience in the field of interpreting

code words. (R. at 14). Agent Simandy had never been assigned to a case that involved interpreting code words and phrases related to animal poaching matters. Id. His conclusions were drawn on the specific investigation of this particular case, which included the review of the transcripts and interviews with two individuals who were aware of the specific actions taken by the Respondent and his co-conspirators. (R. at 23). Based on this investigation, Agent Simandy provided his interpretation of the meanings of the code words within their appropriate context. (R. at 14). Therefore, the requirement that the lay witness opinion testimony not be based on scientific, technical, or other specialized knowledge is satisfied by Agent Simandy's testimony, and it should therefore be admitted into evidence.

D. The Lower Courts Wrongly Excluded The Lay Witness Opinion Testimony Of Agent Simandy Under A Framework That Has Failed To Recognize All Possible Situations In Which Personal Knowledge Can Be Measured Under A Rule 701 Analysis.

The lower courts applied a narrow framework established by the Eighth Circuit in United States v. Peoples, for determining when a lay witness's testimony will be admitted into evidence. 250 F.3d 630, 641 (8th Cir. 2001). In Peoples, the Eighth Circuit declared that the only instances where a lay witness's opinion testimony could be admitted into evidence is when the witness: (1) was a participant, (2) had personal knowledge of the facts being discussed during the conversation, or (3) observed the conversation occurring. Id. (citing United States v. Parsee, 178 F.3d 374, 379 (5th Cir. 1999)); United States v. Saulter, 60 F.3d 270, 276 (7th Cir. 1995); Awan, 966 F.2d at 1430. Notably, however, none of the cases cited by the Eighth Circuit expressly state that these three instances are the only conditions upon which a lay witness may offer opinion testimony. See Peoples, 250 F.3d at 641. In each case, the courts considered the facts in light of whether the witness actually had personal knowledge of the facts that were being disclosed

during the witness's testimony. Id. This is the same consideration that this Court should use in the instant matter.

Here, rather than being a participant in the conversation or observing the conversation as it took place, Agent Simandy thoroughly reviewed the transcripts prepared by the previous agent. (R. at 13). Through the transcripts, Agent Simandy was able to gather the same information that would have been available to him if he had been able to listen to the conversations as they occurred. (R. at 13). Contrary to the lower courts incorrect conclusions drawn under the Peoples framework, there is sufficient evidence, as shown above, that rendered Agent Simandy capable of perceiving the meaning of the code words used by the Respondent and his co-conspirators. See Jayyousi, 657 F.3d at 1102; (R. at 13, 34). Therefore, the narrow framework that has been applied by the lower courts wrongly excludes other instances, such as in this case, where a lay witness would be able to perceive the facts of a case simply by reviewing transcripts of a conversation.

CONCLUSION

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

Respectfully submitted,

33P
Counsel for the United States

Date: February 20, 2013.