

No. 12-23

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

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**UNITED STATES OF AMERICA,**

Petitioner,

-against-

**WILLIAM BARNES,**

Respondent.

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ON WRIT OF CERTIORARI TO THE  
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) allow a trial court, as a matter of law, to admit into evidence hearsay testimony of a murdered witness against a defendant under the *Pinkerton* liability doctrine when the defendant in question did not commit the murder, but actively participated in the conspiracy that lead to the murder?
  
- II. Does Federal Rule of Evidence 501 allow for the recognition of a journalist's privilege, when this privilege would keep critical evidence from the jury, and if this privilege is recognized, should the privilege be absolute, even when the interests furthered by disclosure outweigh the interests furthered by the privilege, or should the privilege be qualified?
  
- III. Does Federal Rule of Evidence 701 allow the admission of lay witness testimony about alleged code words and phrases used in intercepted phone conversations, when the witness did not participate or observe these conversations, but read transcripts and interpreted these transcripts based on the context of the conversations and further investigatory work done by the witness?

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## **OPINIONS BELOW**

The opinion of the United States District Court for the Southern District of Boerum is unreported and the relevant case number is Cr. No. 11-76. The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported and the relevant case number is Cr. No. 12-647.

## **STANDARDS OF REVIEW**

Evidentiary rulings are reviewed under an abuse of discretion standard. *United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008). The court's legal conclusions regarding constitutional claims are reviewed de novo. *Id.*

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *U.S. Const. amend. I*

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." *U.S. Const. amend. VI*

Federal Rule of Evidence 501 provides, "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. ”Federal Rule of Evidence 602 provides, “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.” Fed. R. Evid. 501

Federal Rule of Evidence 701 provides, “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. 701

Federal Rule of Evidence 804(a) and 804(b)(6) provide in relevant part, “A declarant is considered to be unavailable as a witness if the declarant . . . cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness,” and “the following are not excluded by the rule against hearsay if the declarant is unavailable as a witness . . . 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(a) and Fed. R. Evid. 804(b)(6)

## STATEMENT OF THE CASE

### **I. Facts**

Defendant-Respondent, William Barnes (“Defendant”), inherited Big Top Circus in May 2000. (R. at 1). At the time, Big Top Circus, was a highly profitable enterprise known its herd of elephants. (R. at 21). By July 2011, Big Top Circus had lost all profitability and was facing imminent bankruptcy. *Id.* Determined to wring what little profit he could from Big Top Circus before it collapsed, the defendant conceived of a scheme to invite two smaller circuses to “winter” on his sizeable elephant grazing grounds and perform in special holiday shows with Big Top Circus. (R. at 2).

Defendant then contacted Alfred Anderson (“Anderson”), defendant’s collaborator in prior illegal acts. (R. at 1). Defendant offered Anderson the opportunity to hunt elephants on Big Top’s property and a share in the harvesting and sale of the elephants’ extremely valuable ivory. (R. at 2). Anderson agreed and suggested that they find a third hunter. *Id.* In September 2011, Anderson informed Defendant that his long-term acquaintance, James Reardon (“Reardon”) was interested in participating in the elephant-hunting scheme. *Id.* Reardon did not learn of the full nature of the conspiracy until early November 2011. (R. at 21).

In an effort to make the planned holiday spectacular show appear legitimate, in August 2011, the defendant invited Kara Crawley (“Crawley”) from the Boerum Times to tour Big Top Circus and write an article that would raise the profile of the planned holiday spectacular. (R. at 2). Crawley agreed, with the intent of gaining information on animal treatment at the circus. (R. at 22). She was granted unlimited access to the circus’s employees, facilities, and animals. *Id.* Standard procedure required extensive security clearance to access facilities, and originally the

defendant guided Crawley in her tour of the circus. (R. at 22). It was only when Crawley took charge of her tour, requested access to the caging areas, and visited them by herself, that Crawley met an employee who wished to reveal information about the planned elephant hunt. *Id.* Though the employee asked remain anonymous, the employee allowed Crawley to videotape him or her without altering his or her appearance or voice. *Id.* In December 2011, Crawley published an exposé of Barnes and his elephant-poaching plot, based off of the information obtained from the employee. *Id.*

On or about October 2, 2011, Defendant contacted Weapons Unlimited, a registered and licensed Texas firearms dealer, to purchase automatic weapons for the “hunt.” (R. at 22). Unbeknownst to the defendant, the “employee” he spoke with at Weapons Unlimited was an undercover agent for the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), Jason Lamberti (“Lamberti”). *Id.* Defendant informed Lamberti that he wanted three unregistered and fully automatic AK-47s to be delivered to him on December 5, 2011. (R. at 22-23). The defendant then provided his credit card information to Lamberti (R. at 23). Based upon that exchange, the FBI obtained a warrant to tap the defendant’s telephone line. (R. at 2). The government executed the warrant on October 4, 2011 and the defendant’s conversations were intercepted through December 1, 2011, when the defendant was arrested. (R. at 23).

On October 6, 2011, defendant contacted Copters Corporation and arranged with Alan Klestadt (“Klestadt”) for a one-day helicopter rental for December 15, 2011. (R. at 3). On October 15, 2011, defendant contacted Anderson and informed him that arrangements were complete. *Id.* The defendant and Anderson finalized their deal, agreed that their hunt would take place on December 15, 2011, and Anderson wired \$1,000 on behalf of himself and Reardon to the defendant. *Id.*

Agent Blackstock (“Blackstock”) was originally assigned to the investigations relating to this case. *Id.* Blackstock listened to government’s intercepted conversations between the defendant and his co-conspirators and contemporaneously and transcribed them. (R. at 23). Blackstock then died in unrelated events on December 14, 2011. *Id.* The following day, Agent Thomas Simandy (“Simandy”), was assigned to the case. (R. at 23). Simandy handled “all types of general crimes, mostly drug-related cases,” and had never handled any crimes against animals during his five-year tenure at the FBI. (R. at 14).

After being assigned to the case on December 15, 2011, Simandy spent hours reviewing the transcripts of intercepted conversations between the defendant and his co-conspirators. (R. at 13-14). Simandy also interviewed Lamberti and Klestadt. Using the information gathered, particularly the dates of conversations and events, Lamberti arrived at certain conclusions about code words and phrases used in the intercepted conversations. (R. at 13). The government seeks to introduce Simandy’s lay witness opinion concerning these code words and phrases. (R. at 23).

At the hearing on the government’s motion in limine, Simandy testified that: (1) Defendant’s repeated references to “blood diamonds” referred to elephant ivory tusks, (2) Defendant and his associates’ repeated references to “Charlie tango” referred to the helicopter that Defendant had arranged to rent from Copters Corporation. In particular, on October 8, 2011, Defendant stated “Charlie tango is ready,” (3) Defendant and his co-conspirators’ repeated references to “black cat” referred to the purchase of the three AK-47s from Lombardi. On October 4, 2011, Defendant stated “black cat was arranged.” (R. at 23).

The conversations intercepted by the government also revealed that Reardon had serious second thoughts about the legality of the elephant hunt by mid-November. (R. at 24). He expressed these thoughts to Anderson, who called the defendant to say that Reardon was a

security risk who should be “put out of the picture.” *Id.* Defendant replied, “Just shut him up for a while. ....” *Id.* On November 28, 2011, Reardon called his friend, Daniel Best (“Best”), and related to him a narrative of the conspiracy and his concerns that Anderson might harm him. *Id.* He also informed Best that he planned on inviting Anderson over to speak the following day. *Id.* Best drove to Reardon’s home on the evening of November 29, 2011 and observed Anderson running out of Reardon’s front door. *Id.* Best then found Reardon dead in the home. *Id.* Anderson was caught shortly thereafter and confessed to killing Reardon to prevent him from exposing the conspiracy. *Id.*

## **II. Procedure**

Defendant was taken into federal custody on December 1, 2011. (R. at 24). On December 4, 2011, the Grand Jury returned an indictment charging the defendant with conspiracy to deal unlawfully in firearms, conspiracy to commit crimes of violence against an animal enterprise, and one count of conspiracy to commit unlawful takings under the Endangered Species Act. *Id.*

On May 1 and May 2, 2012, the United States District Court for the Southern District of Boerum heard arguments and evidence concerning three motions: (1) the government’s motion to admit Daniel Best’s conversation with James Reardon under FRE 804(b)(6), the forfeiture-by-wrongdoing hearsay exception; (2) a motion to quash the government’s subpoena seeking journalist Crawley’s sources; and (3) the government’s motion to admit lay witness opinion of Agent Simandy. (R. at 25). On May 2, the District Court ruled against the United States on all three issues. *Id.* On July 12, 2012, the United States Court of Appeals for the Fourteenth Circuit decided an interlocutory appeal, brought by the United States pursuant to 18 U.S.C. § 3731, and affirmed the district court’s rulings on all three issues. (R. at 20). The Fourteenth Circuit held

that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis under Rule 804(b)(6); (2) under Rule 501, a journalist's privilege exists and is absolute; and (3) under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where the agent did not participate or observe the conversations. *Id.* The Government subsequently filed a petition for writ of certiorari and on October 1, 2012, the Supreme Court granted certiorari.

### **SUMMARY OF THE ARGUMENT**

In the present case, both lower courts incorrectly held that: (1) James Reardon's hearsay statements to Daniel Best on the eve of his murder are inadmissible into evidence as a matter of law under Federal Rule of Evidence 804(b)(6); (2) a federal journalist's privilege is absolute and recognized under Federal Rule of Evidence 501, thus the subpoena to Kara Crawley is quashed; and (3) under Federal Rule Evidence 701, the testimony of Agent Simandy is inadmissible as lay witness testimony.

First, the statements by Reardon to Best were improperly denied admission under Federal Rule of Evidence 804(b)(6). As this Court explained in *Davis v. Washington*, Rule 804(b)(6) and its common-law counterpart prevent defendants from hiding behind the Sixth Amendment after procuring a witness' silence. *Giles v. California* mandated that the defendant's act in procuring the witness' silence must be with the intent to prevent the witness from testifying. The sole motivation behind the murder of Reardon was to prevent him from testifying against or about the conspiracy. Though the murder was not committed by the defendant, under the *Pinkerton* doctrine of conspiratorial liability it was done in the scope of and furtherance of the conspiracy and was reasonably foreseeable to the defendant that the murder would be committed. The evidence that the government is seeking to admit are Reardon's hearsay statements regarding the

conspiracy and its planned schemes, as well as Defendant's direct operation within the conspiracy.

Second, under Federal Rule of Evidence 501, a federal journalist's privilege is not recognized, and even if this privilege is recognized, it is a qualified privilege and does not apply to the subpoenaed testimony of Kara Crawley. This Court explicitly denied any recognition of a federal journalist's privilege in *Branzburg v. Hayes*, and it should abide by this precedent. Further, as this Court reasoned in *Branzburg*, the arguments in favor of this proposed privilege are at best "theoretical and uncertain," and thus unpersuasive. Also, recognizing a federal journalist's privilege would be against the public good, because it would hinder the federal judicial process. However, if this Court does recognize a federal journalist's privilege, it should qualify this privilege and only grant or deny a privilege claim after a proper case-by-case balancing of the facts is performed.

Third, the testimony of Agent Simandy was improperly denied under Federal Rule of Evidence 701, because this testimony satisfies all three of Rule 701's requirements. Simandy's testimony is rationally based on his personal knowledge and perception, which he formed after his thorough review of the intercepted conversation transcripts and further investigation of the case, thus this testimony satisfies Rule 701(a). Rule 701(b) is satisfied, because Simandy's testimony is helpful to determining issues in the case, because the jury is unlikely to understand some of the code words used by the defendant and his co-conspirators, especially without the necessary hours spent reading the transcripts of conversations and without the requisite familiarity with the investigation as a whole (that Simandy possesses). Finally, Simandy's testimony satisfies 701(c), because it is not based on scientific, technical, or other specialized knowledge. Rather this testimony is limited to his perception of the case.

## ARGUMENT

### **I. THE COURT OF APPEALS OF THE FOURTEENTH CIRCUIT IMPROPERLY NARROWED FEDERAL RULE OF EVIDENCE 804(b)(6) IN SAYING THE GILES INTENT REQUIREMENT REQUIRES AN AFFIRMATIVE ACT BY THE DEFENDANT IN QUESTION WHEN DEFENDANT IS ACTIVELY ENGAGED IN A CONSPIRACY TO COMMIT UNLAWFUL ACTS AND CO-CONSPIRATOR HAD REQUISITE INTENT AND COMMITTED THE ACT IN FURTHERANCE OF THE CONSPIRACY.**

The Confrontation Clause of the Sixth Amendment of the United States requires that defendants be allowed to cross-examine any witness who gives testimony against him, except when there is a common-law exception recognized at the founding of the Constitution. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

Federal Rule of Evidence 804 codified the historic common-law hearsay doctrine of forfeiture by wrongdoing as an exception to the general rule barring admission of hearsay evidence. *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). This doctrine recognizes that defendants have a motive to keep witnesses from testifying, but they may not act to suppress the witness.

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.

*Davis v. Washington*, 547 U.S. 813, 833 (2006). Rule 804(a) lists five different means to which a declarant is considered unavailable. The fourth way to be unavailable is the witness “cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness.” Fed. R. Evid. 804(a)(4). Rule 804(b) then lists testimonial exceptions

that “are not excluded by the rule against hearsay if the declarant is unavailable as a witness.” Fed. R. Evid. 804(b). The sixth exception, known as the forfeiture by wrongdoing exception, is “[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). In *Gray*, the Court said in order to apply the forfeiture by wrongdoing exception, a court must find by a preponderance of the evidence, that “(1) the defendant engaged or acquiesced in wrongdoing, (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.” *Gray*, 405 F.3d at 241. As will be demonstrated, both Defendant and Anderson fit the criteria under this test.

When interpreting this rule in *Giles v. California*, the Supreme Court said:

In sum, our interpretation of the common-law forfeiture rule is supported by . . . (3) the common law's uniform exclusion of unfronted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, *but was not shown to have done so for the purpose of preventing testimony* . . . The first two and the last are highly persuasive; *the third is in our view conclusive*.

*Giles v. California*, 554 U.S. 353, 358 (2008)(emphasis added). In *Giles*, the Supreme Court rejected a forfeiture by wrongdoing exception that was enumerated in California State Law. Justice Scalia held that California’s theory of forfeiture by wrongdoing<sup>1</sup> was “. . . an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.” *Giles*, 554 U.S. at 377. *Giles* went on to say that the California court was to consider evidence of the defendant’s intent on remand. *Id.*

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<sup>1</sup> The California Supreme Court had held that defendant forfeits their right to confrontation simply by committing the act that prevents the witness from testifying against the defendant, proving the defendant’s specific intent to prevent the witness from testifying was not required under the forfeiture by wrongdoing standard. *People v. Giles*, 40 Cal.4th 833, 835 (2007).

**A. Rule 804(b)(6) applies to Anderson because Anderson acted with the requisite intent required in Giles by murdering Reardon solely to keep Reardon from testifying about and exposing the conspiracy and Anderson meets the requirements of the three-prong Gray test.**

Anderson confessed to police to killing Reardon to prevent him from exposing the conspiracy. (R. at 24). Admitted into evidence are two separate, recorded phone calls between Anderson and the defendant discussing Anderson's fears that Reardon would expose the conspiracy. (R. at 18-19). Anderson acted with the requisite intent that Justice Scalia required in *Giles*. *Giles*, 554 U.S. at 368 (“[T]he common law's uniform exclusion of unconfessed inculpatory testimony by murder victims in the innumerable cases in which the defendant was on trial for killing the victim, *but was not shown to have done so for the purpose of preventing testimony.*”) (emphasis added); *Id.* at 361 (“An 1858 treatise made the purpose requirement more explicit still, stating that the forfeiture rule applied when a witness had been kept out of the way by the prisoner, or by someone on the prisoner's behalf, *in order to prevent him from giving evidence against him.*”) (emphasis in original) (citations omitted) (internal quotation marks omitted).

“[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.” *Davis*, 547 U.S. at 833. Anderson admitted that the only reason he had to murder Reardon was to prevent him from testifying. (R. at 24). “While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.” *Davis*, 547 U.S. at 833. (emphasis in original) (internal citations omitted).

Anderson meets the requirements in the three-prong test under *Gray* to qualify under the forfeiture by wrongdoing exception. First, Anderson was involved in an active, illegal conspiracy and had made several substantial steps in furtherance of the conspiracy. (R. at 3). Second, Anderson's entire motivation for murdering Reardon was to prevent Reardon from acting as a witness against the conspiracy. (R. at 24). Third, Anderson's actions did, in fact, render Reardon unavailable as a witness. (R. at 24). A court would admit Reardon's statements to Best regarding the conspiracy and his fears of Anderson's action in a trial against Anderson. (R. at 8).

**B. Under *Pinkerton*, evidence that is admissible against one defendant in the conspiracy should be considered admissible against the other co-conspirators.**

Anderson is not the defendant in question. Anderson is the co-conspirator to the defendant, Barnes. The Court of Appeals required that defendant would have exhibit actual intent to commit the murder, which the Court said was not present on the record. According to *Pinkerton*, "it is settled that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Pinkerton v. United States*, 328 U.S. 640, 646-647 (1946). "The criminal intent to do the act is established by the formation of the conspiracy." *Id.* at 647 (citation omitted). "Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective." *Id.* (citation omitted). "The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project." *Id.* (citation omitted). *Pinkerton* sets the precedent that a member of a conspiracy may be charged with all of the substantive crimes committed in furtherance of that conspiracy, whether or not that particular defendant had knowledge of the crime to be committed or actually aided in committing the crime.

Recently, the Fourth Circuit decided an identical issue with even more extreme facts. In *United States v. Dinkins*, the Court stated:

We have not yet considered the question whether hearsay statements may be admitted under the forfeiture-by-wrongdoing exception pursuant to a conspiracy theory of liability, when a defendant's co-conspirators engaged in the wrongdoing that ultimately rendered the declarant unavailable as a witness. *We now conclude that traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis.*

*United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) (emphasis added). In *Dinkins*, the facts showed that when the victim at issue was murdered, Dinkins had been in jail for almost a year and there was no evidence to show that he participated in the murder. *Id.* Even the complete inaccessibility of Dinkins to the victim did not stop the Fourth Circuit from upholding the lower court's decision to admit the hearsay statements into evidence against Dinkins as an ongoing member of the conspiracy. *Id.* The Court did state that there needed to be more than just a conspiracy to admit the evidence.

Mere participation in a conspiracy will not trigger the admission of testimonial statements under a forfeiture-by-wrongdoing theory. Instead, a defendant in such circumstances would only waive his Confrontation Clause rights when . . . the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.

*Id.* at 385 (citation omitted). Under the facts on the record, the murder was within the scope of and in furtherance of the conspiracy. (R. at 18-19). It was also reasonably foreseeable to defendant that Anderson would silence Reardon, because Anderson told Defendant that he would. *Id.*

Moreover, the defendant independently meets the three-prong test required under *Gray*. First, the defendant was actively involved in the conspiracy and took substantial steps in furtherance of the conspiracy. (R. at 2, 3). Defendant engaged in and acquiesced in the conspiratorial wrongdoing, considering he was the mastermind of the conspiracy. (R. at 1, 2). Defendant also knew that Anderson was considering murdering Reardon to get him “out of the picture.” (R. at 19). Second, the wrongdoing was intended to render Reardon unavailable as a witness, Defendant acknowledged that it would be “unavoidable” to murder Reardon if they feared he would speak about the conspiracy. (R. at 19). Considering the reason Anderson murdered Reardon was to prevent him from speaking, Defendant also acknowledged that there was a motive to murder Reardon to make him unavailable as a witness. (R. at 19, 24). Third, Reardon is in fact dead and therefore rendered unavailable as a witness. (R. at 24). “[W]e conclude that co-conspirators can be deemed to have waived confrontation and hearsay objections as a result of certain actions that are in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” *United States v. Cherry*, 217 F.3d 811, 813 (10th Cir. 2000)

Thus, in light of the opinion in *Dinkins* as well as the analysis of Federal Rule of Evidence 804 under *Giles* and *Gray*, the Court of Appeals for the Fourteenth Circuit improperly upheld the District Court’s denial to admit Reardon’s hearsay statements to Best.

**II. THE LOWER COURTS ERRED IN RECOGNIZING A FEDERAL JOURNALIST’S PRIVILEGE, CONTRADICTING BINDING PRECEDENT, JUSTIFYING THIS PROPOSED PRIVILEGE WITH THEORETICAL AND UNCERTAIN RHETORIC, THEREBY STIFLING THE FEDERAL JUDICIAL PROCESS. HOWEVER, IF THIS COURT RECOGNIZES THE PROPOSED PRIVILEGE, THEN THE PRIVILEGE SHOULD BE QUALIFIED.**

Federal Rule of Evidence 501 provides, “ 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. 501.

**A. The justifications for recognition of a federal journalist’s privilege ignore binding precedent and are theoretical and uncertain.**

Although the legislative branch has not fully passed any journalist’s privilege statute, the Constitution speaks of no such privilege, and this Court has explicitly ruled against recognizing a federal journalist’s privilege, proponents of this privilege often frame their arguments with “lofty rhetoric about the free press and the First Amendment”. Randall D. Eliason, *The Problem With Reporter’s Privilege*, 57 Am. U. L. Rev. 1341 (2008). Proponents claim that the relationship between a journalist and her sources rests on trust and that the lack of privilege will dissuade people from talking to the press, thereby stifling the Constitutional right to free speech and the ability of the press to disseminate information. (R. at 11). Further, proponents of a federal journalist’s privilege claim that if this privilege is not recognized, sources who do speak to journalists will self-censor their stories, potentially leaving out important information, thus providing the public with an incomplete or distorted account. *Id.*

However, in the seminal case on this subject, *Branzburg v. Hayes*, this Court explicitly rejected claims of a federal journalist’s privilege and debunked the oft-quoted arguments featured above. *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Branzburg* was a consolidation of four cases from various courts. The first two cases involved Branzburg, a staff reporter for a daily newspaper published in Kentucky, and arose out of two published stories that Branzburg wrote after observing drug sales and drug usage in two Kentucky areas. *Id.* at 670. The third case

involved a newsman-photographer, Pappas, who worked for a Massachusetts television station, and arose out of visits to the Black Panther headquarters, during which Pappas recorded and photographed a prepared statement by one of the Black Panther leaders, but later wrote no story on these visits and published none of the taken photographs. *Id.* at 672. The final case reviewed by this Court in *Branzburg* involved Earl Caldwell, a New York Times reporter, who was assigned to cover the Black Panther Party and other black militant groups. *Id.* at 675. All of these journalists promised not to reveal the identities of those with whom they interacted; all of these journalists were issued grand jury subpoenas; and all of these journalists moved to quash these subpoenas by asserting a journalist's privilege. *Id.* at 665.

This Court declined to recognize a privilege for all of these journalists on grounds also applicable to the case at bar. First, as this Court stated, "requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment." *Branzburg*, 408 U.S. at 665. As one of the lower courts appealed from in *Branzburg* stated, and this Court agreed, any adverse effect upon the free dissemination of news by virtue of a journalist being called to testify is "indirect, theoretical, and uncertain." *Id.* at 674. After all, prior to the recognition of even a common law journalist's privilege, the news industry flourished. *Id.* at 681-82, 698-99. Even after this privilege continues to be denied by courts, the news industry continues to flourish, because sources continue to share information with journalists. Additionally, as this Court said:

We do not question the significance of free speech, press, or assembly to the country's welfare...[b]ut these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to

publish its sources of information or indiscriminately to disclose them on request.

*Id.* at 681-82. Ultimately, journalists are merely held to the same standard as any other person, to act within the bounds of the law and appear when summoned by the federal courts. *Crawley* should be held to this standard.

Further, contrary to the contentions of journalist's privilege proponents, a lack of privilege will not leave journalists open to floods of frivolous subpoenas. Rather, journalists will continue to remain protected by the rules of procedure and traditional respect for witnesses. "Supervision of the presiding judge as to the propriety, purposes, and scope" of the judicial inquiry and the pertinence of the probable testimony will continue to apply in every case. *Id.* at 709. And, as the Seventh Circuit stated in *McKevitt v. Pallasch*, "rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances." 339 F.3d 530, 533 (7th Cir. 2003). This court-provided protection is sufficient and negates any purported need to recognize a federal journalist's privilege.

**B. The public is best served by not recognizing a federal journalist's privilege, which respects the federal judicial process**

The importance of the grand jury process and the court's recognition of how even a qualified privilege would stifle this process is the next overarching reason for this Court's denial of a federal journalist's privilege in *Branzburg*, and the reason why it should deny this privilege in the case at bar. As this Court explained, grand juries have "the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg*, 408 U.S. at 665. Also, this Court recognized that fair and effective law enforcement aimed at providing security for the person and

property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in that process. *Id.* at 690. Further, “[t]he public has a right to every man's evidence before a grand jury except for those persons protected by a constitutional, common law, or statutory privilege”. *Id.* at 665. Thus, this Court concluded that, “news reporters have the same obligation as other citizens to respond to grand jury subpoenas and to answer questions relevant to an investigation into the commission of crime,” ending the argument that journalists have a Constitutional, common law, or statutory privilege. *See, Id.*

Just as this Court recognized the importance of journalists’ testimony in the grand jury context, it should recognize the same in the context of federal criminal trials. In a case that involves the prosecution of serious federal offenses, like the one at bar, the jury has the difficult task of deciding the case based on the evidence and testimony presented to it. The more evidence and testimony presented to the jury, the more well-informed the jury will be in making its decision. Therefore, from a practical standpoint, allowing a journalist’s privilege to exclude pertinent evidence from the jury will hinder the jury’s constitutionally mandated role. *See U.S. Const. amend. VI.* This hindrance would be against the public interest. One can infer that without vital information, juries will be more likely to make incorrect decisions, thereby threatening both the freedom of the innocent and the safety of the public-at-large.

**C. Even if this Court recognizes a federal journalist’s privilege, this privilege should be qualified and only granted or denied after the court engages in a case-by-case balancing of facts.**

This Court should abide by its precedent and continue to absolutely deny any recognition of a federal journalist’s privilege. If this Court decides to recognize this proposed privilege, the privilege should be qualified. In line with Justice Powell’s concurrence in *Branzburg*, “the asserted claim to privilege should be judged on its facts by the striking of a proper balance

between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” 408 U.S. 665, 710. In other words, what the court would have to weigh against the freedom of the press is the interest of individuals in receiving fair and effective law enforcement, the interest of the fact finder in receiving the whole picture in each case, and the interest of the public in being secure from criminals. Needless to say, the purported harm to the free press that would be faced by requiring journalists to comply with federal orders for disclosure is at best miniscule when weighed against the burden that recognizing every journalist’s privilege would place on the federal judicial system. Thus, the government’s subpoena to Crawley should succeed even if this Court recognizes a limited journalist’s privilege and qualifies it based on a balancing of interests, because the interests of the government in obtaining the testimony are substantial.

Moreover, all of the states that recognize a federal journalist’s privilege qualify this privilege based on some variation of a case-by-case balancing test. For example, in *Gonzales v. National Broadcasting Company, Inc.*, the Second Circuit emphasized that a civil litigant seeking compelled disclosure of non-confidential materials from a non-party press entity may overcome the qualified journalist’s privilege upon showing that materials are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources. 194 F. 3d 29 (2d Cir. 1999). Also, the D.C. District Court stated in *U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Companies, Inc.* that “the balancing test for applying the reporter's privilege under the First Amendment requires evaluation of two factors: the need for the information and whether the party seeking the information has exhausted all reasonably available alternative sources.” 390 F. Supp. 2d 27 (D.D.C. 2005). Further, even in courts that recognize a federal journalist’s privilege, this privilege is curtailed in criminal cases. For

example, the Fifth Circuit stated that “news reporters enjoy no qualified privilege not to disclose non-confidential information in criminal cases,” in *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

Even if this Court chooses to recognize a qualified privilege and considers a similar balancing of the factors above, the United States should still prevail on its subpoena for Crawley’s testimony. Considering the first factor, the need and relevance of the information sought in relation to a significant issue in the case, Crawley’s testimony about her sources is relevant to proving the defendant’s culpability, and the revelation of her sources is necessary for the United States to meet its evidentiary burden. A witness who can testify about overhearing conversations between Barnes and other parties is indispensable. Considering the second factor, the search for other reasonable alternatives, the record reflects that Big Top Circus was a heavily secured place, requiring “extensive security clearance” to even enter the circus’s facilities. (R. at 22). The record also reflects that Barnes was clever enough to use code words and phrases when engaging in his conspiracy. (R. at 23). One can infer from these facts that the defendant was careful not to glibly discuss his exploits within his circus, many likely cannot attest to hearing key conversations about these exploits. This is why Crawley’s rare source is necessary to this case. Considering this reasonable inference, the second factor of the balancing test weighs in favor of the government, and weighs against a finding of privilege.

Finally, because the source in question allowed Crawley to videotape him or her without any voice or face distortion, it is apparent that this source did not truly expect this communication and his or her identity to be kept confidential. One truly expecting confidentiality would have taken greater precautions than those taken here, such as requesting facial and voice distortion or refusing to be recorded on video. Therefore, in line with the reasoning of courts like

those in the Fifth Circuit that recognize no privilege for non-confidential information in the criminal context, this Court should weigh this fact against a finding of privilege for Crawley.

**III. THE LOWER COURTS ERRED IN EXCLUDING THE LAY TESTIMONY OF AGENT SIMANDY, BECAUSE FEDERAL RULE OF EVIDENCE 701 ALLOWS LAY TESTIMONY ABOUT ALLEGED CODE WORDS AND PHRASES OF A CONVERSATION, WHEN THE WITNESS RATIONALLY BASES THIS TESTIMONY ON HIS EXPERIENCE WITH A PARTICULAR INVESTIGATION, EVEN WHEN THE WITNESS DID NOT PARTICIPATE IN OR OBSERVE THE CONVERSATIONS**

Federal Rule of Evidence 701 provides, “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. 701.

**A. Simandy’s testimony satisfies all three of Rule 701’s requirements.**

- i. Simandy’s testimony is rationally based on his personal knowledge and perception, which he formed after his thorough review of the intercepted conversation transcripts and further investigation of the case, thus this testimony satisfies 701(a).**

Rule 701(a) corresponds to Federal Rule of Evidence Rule 602, which provides “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.” Fed. R. Evid. 602. In interpreting this requirement, courts have held “ a witness has personal knowledge only when testifying about events perceived through physical senses or when testifying about opinions rationally based on personal observation and experience.” *De La*

*Torre v. Merck Enters., Inc.*, 540 F. Supp. 2d 1066 (D. Ariz. 2008). Along these lines, Justice Zhu, the Fourteenth Circuit dissenter, correctly reasoned, that:

When a witness like Simandy reviews certified transcripts of conversations and then testifies as to his conclusions concerning the use of terms in those conversations, that testimony is based on first-hand knowledge of the records. That is all that is meant by the requirement of Rule 701(a) that opinion be ‘rationally based on the witness’s perception.

(R. at 33) (citation omitted). Thus, in analyzing this first factor when testimony of agents is involved, courts should look to whether the agent’s testimony is limited to his personal perceptions from investigation of this case, instead of whether the agent was present during the conversations (as the lower courts erroneously did). *Id.*

This method of analysis was also correctly applied by the Eleventh Circuit in a case starkly similar to the case at bar. In *Jayyousi*, three defendants were charged with conspiring to support terrorist activities (such as murder and kidnapping) abroad and with actually providing material support for these activities. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011) *cert. denied*, 133 S. Ct. 29, 183 L. Ed. 2d 694 (U.S. 2012) and *cert. denied*, 133 S. Ct. 29, 183 L. Ed. 2d 681 (U.S. 2012). The defendants claimed that they only provided humanitarian aid to oppressed Muslims. *Id.* At trial, over defense objections, an FBI agent gave lay opinion testimony regarding his interpretation of code words used by defendants in intercepted telephone calls. *Id.* This interpretation, the court noted, was based on the agent’s extensive experience with the investigation, which included his review of thousands of wiretap summaries, review of hundreds of verbatim transcripts, and review of faxes, publications, speeches, and other documents related to the case. *Id.* at 1102. The agent did not participate or observe any conversations as they occurred. Based on the agent’s experience with the investigation, he interpreted words such as “football” and “soccer” for jihad; “tourist” for mujahideen; “sneakers”

for support; “going on the picnic” for travel to jihad; “open up a market” for opening a group in support of jihad; “joint venture” for a group of mujahideen; and other code words with underlying meanings. *Id.* at 1095. The agent testified that he knew the speakers were using code words because on some occasions the speakers said they were, and at other times the agent could detect the use of code words by the context of the conversations. *Id.* The defendants challenged the admissibility of this testimony under Rule 701, arguing that the agent “did not personally observe or participate in the defendants' conversations and based his testimony largely on documents admitted into evidence.” *Id.* at 1102. However, the trial court and the Eleventh Circuit disagreed with this argument, stating:

We have never held that a lay witness must be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation. We have allowed a lay witness to base his opinion testimony on his examination of documents even when the witness was not involved in the activity about which he testified.

*Id.* at 1102-03.

Like in the Eleventh Circuit, agent testimony about code words based on after-the-fact review and context has been repeatedly admitted as lay testimony in other courts. *See United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011), *as revised* (Dec. 27, 2011), *cert. denied*, 133 S. Ct. 525, 184 L. Ed. 2d 338 (U.S. 2012) (upholding agent testimony to meaning of code words used in terrorist-aid case, because of agent's “extensive participation in the investigation of this conspiracy” allowed the agent to “form opinions” about the code words “based on his personal perceptions”); *State v. Santiago*, 560 F.3d 62 (1st Cir. 2009) (upholding agent testimony to the meaning of code words used in intercepted conversations of large-scale heroin distribution ring, because the agent had listened to over ninety percent of the intercepts, and the meanings of various code words were detected out of the conduct of the defendants); *United States v.*

*Miranda*, 248 F.3d 434 (5th Cir. 2001) (upholding lay testimony pursuant to Rule 701 because the agent's "extensive participation in the investigation of this conspiracy... allowed him to form opinions concerning the meaning of certain code words used in this drug ring based on his personal perceptions"). See also *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007) (lay witness testimony permitted as to the meaning of ambiguous statements in intercepted phone calls where the witness's understanding "was based on his direct perception of several hours of intercepted conversations – in some instances coupled with direct observation of the speakers – and other facts he learned during the investigation); *United States v. Zepeda-Lopez*, 478 F.3d 1213 (10th Cir. 2007) (upholding the admission of investigating agent's voice and visual identification of defendant, as well as interpretation of translated transcripts, based on agent's having played recordings multiple times).

In line with *Jayysoui* and the abundance of cases using the same 701(a) rationale, this Court should rule in favor of admitting Simandy's testimony as a lay witness. Like the agents in *Jayysoui*, Simandy spent hours reviewing the transcripts of intercepted phone calls after they were transcribed by another agent. (R. at 13). And, like the agent in *Jayysoui* and the agents in the cases above, Simandy combined this thorough review of the transcribed phone calls with further investigatory work (i.e. the interviews of Lamberti and Klestadt), to interpret the meanings of alleged code words used in the defendant's conversations. Simandy's interpretation of these words, like the Eleventh Circuit emphasized in *Jayysoui*, corresponds to undisputed facts of the case. Simandy's testimony is rationally based on his personal perception, which is formed by his involvement in the case at bar, therefore Simandy satisfies Rule 701(a).

Further, the lower courts' interpretation of Rule 701(a)'s "perception" requirement would have absurd results. These courts admit that had Simandy's testimony been based on

conversations he was either a participant in, or observed while happening, the courts would have been comfortable approving Simandy's testimony. Yet, no meaningful distinction is made regarding the difference between an agent who, for instance, listens to a conversation using code words, versus an agent who reads a conversation using code words. In both scenarios, the agent, through his oratory or visual experience with the conversation can reasonably form rational opinions about the meanings of code words in the conversations. Both agents can and likely will use further investigation and a familiarization with the facts of the investigation to form these rational opinions. To give credit and allow admittance of one of these opinions (i.e. the opinion by the agent who listened to a conversation) and not the other opinion (i.e. the opinion by the agent who read transcripts) is nonsensical.

- ii. **Consistent with Rule 701(b) and Rule 701(c), Simandy's testimony about the alleged code words and phrases used in the intercepted conversations of the defendant is helpful to determining issues in the case and is not based on scientific, technical, or other specialized knowledge.**

Prong (b) and (c) of Rule 701, require a lay witness's testimony to be helpful in determining a fact in issue, and require that this testimony not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

Consistent with Rule 701(b), Simandy's testimony will be helpful to the jury in determining issues, because the jury is unlikely to understand some of the code words used by the defendant and his co-conspirators, especially without the necessary hours spent reading the transcripts of conversations and without the requisite familiarity with the investigation as a whole (that Simandy possesses). Without a full understanding of these code words, which Simandy would provide, the jury's fact-finding role will undoubtedly be hindered. This falls in line with the Tenth Circuit's reasoning in *United States v. Zepeda-Lopez*, 478 F.3d 1213 (10th Cir. 2007). In *Zepeda-Lopez*, an FBI agent's lay opinion testimony identified the defendant's

voice on audiotapes of wiretapped telephone conversations alleged to be between defendant and co-conspirator, and the agent identified the defendant's image on videotape alleged to show the defendant taking a toolbox that contained methamphetamine from a vehicle outside the co-conspirator's auto body shop. On appeal, the defendant claimed that this admission was in error and not helpful to a fact in issue, thus failing under 701(b). *Id.* However, the Tenth Circuit affirmed, stating that this testimony “would be helpful to jury, so as to be admissible; although jury could see defendant in courtroom throughout trial, jury did not have opportunity to view videotape numerous times, as agent had done, and although jury heard defendant's voice when he testified, court was not informed that defendant would testify until after agent testified.” *Id.*

In addition to Simandy's testimony being helpful to the jury, it is not based on scientific, technical or other specialized knowledge. Rather, this testimony is based only on Simandy's involvement with this federal investigation. Because Simandy is not qualified as an expert, the scope of his testimony is limited to “his opinions regarding the conspiracy based upon his personal perceptions.” *United States v. Whittington*, 269 Fed. App'x 388, 408 (5th Cir. 2008). If Simandy's interpretation of the calls goes beyond his “perception of the phone calls in this case and is based on specialized knowledge and/or accumulated experience and training, the Government will be required to qualify [him] as [an] expert.” *United States v. Claville*, NO. 07–50097–02, 2008 WL 914492, at \*2 (W.D.La. 2008). That is not the case here.

Further, despite Respondent's likely contention that Simandy's testimony is based on his experience as a federal agent, and thus should be considered in light of the expert testimony requirements of Federal Rule of Evidence 702, a practical analysis of Simandy's background and scope of his testimony proves otherwise. Simandy stated that although he has worked in the FBI on fifty cases prior to the investigation in question, these cases were primarily drug-related cases.

(R. at 14). An argument that Simandy should be qualified as an expert witness would only be applicable in the situation where Simandy is asked to testify about drug-related. Simandy is offering testimony about his personal perceptions of code words used in an animal poaching case, not about his past experience in drug-related crimes. *See, e.g., United States v. Rollins*, 544 F.3d 820, 832–33 (7th Cir. 2008) (holding that a law enforcement agent's testimony was admissible under Rule 701(c), even though the agent had “years of experience as a law enforcement officer,” because “his understanding of the conversations came only as a result of the particular things he perceived from monitoring intercepted calls” and his testimony was based on his “perceptions derived from [that] particular case”). These perceptions were formed not from Simandy’s prior investigations in other fields of criminal law, but rather from his thorough review of the intercepted telephone call transcripts, as well as his interviews of Lamberti and Klestadt.

Even if this Court finds that Simandy’s testimony is influenced by his background, courts have held that “[l]ay witnesses may sometimes give opinions that require specialized knowledge, but the witness must draw straightforward conclusions from observations informed by his own experience.” *El-Mezain*, 664 F.3d 467 at 467. Simandy’s conclusions as to the meanings of code words used by the defendant and his co-conspirators are straightforward and were reasonably made by Simandy based on the investigation that he took part in.

Finally, contrary to the likely contentions of the defendant, Simandy’s testimony will not in any way taint the fact-finder’s abilities. The defendant is still free to contest Simandy’s opinions through cross-examination at trial. The fact finder will be free to believe or disbelieve Simandy’s lay witness testimony as it sees fit. Further, Simandy’s testimony would have been rather confusing, and much less “helpful,” had he been forced to present Defendant’s coded

conversations to the jury without any effort at interpreting these conversations in context. *See, e.g., Rollins*, 544 F.3d at 831 (considering it “helpful” to have testimony about code-word meanings “from the investigator who became intimately familiar with the unusual manner of communicating used by these conspirators”).

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Honorable Court **REVERSE** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) under Federal Rule of Evidence 804(b)(6), James Reardon’s hearsay statements to Daniel Best are admissible into evidence as a matter of law; (2) under Federal Rule of Evidence 501, a federal journalist’s privilege is not recognized, and even if this privilege is recognized, it is a qualified privilege and does not apply to the subpoenaed testimony of Kara Crawley; and (3) under Federal Rule Evidence 701, the testimony of Agent Simandy is admissible as lay witness testimony.

Respectfully Submitted,

Counsel for Petitioner, 16