
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 RESPONDENT

QUESTIONS PRESENTED

- I. Does Federal Rule of Evidence 804(b)(6) allow admission of otherwise inadmissible hearsay declarations of a murder victim under *Giles v. California*, where there is no evidence that the defendant intended to procure the unavailability of the declarant?

- II. Should this Court recognize a reporter's privilege protecting Crawley from being coerced into revealing her confidential source under Federal Rule of Evidence 501 as interpreted by *Jaffee v. Redmond* where the majority of states and the majority of Circuits have adopted such a privilege, and should the privilege be absolute or qualified?

- III. Does Federal Rule of Evidence 701 allow the government to circumvent the foundation requirements of Federal Rule of Evidence 702 by admitting lay opinion testimony where a federal agent uses his training and experience to review transcripts and interview witnesses in order to formulate that opinion?

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STATEMENT OF THE CASE

Statement of Facts

William Barnes (“Barnes”) inherited Big Top Circus, a circus nationally known for their herd of twenty elephants, from his father in May 2000. R. at 1. Big Top Circus is located in rural southern Boerum, on over one-hundred acres of fenced land that provides ideal elephant grazing grounds. R. at 1. Barnes met Alfred Anderson (“Anderson”) at a hunting convention and later established Boerum 4 Animals. R. at 1. Both Barnes and Anderson enjoyed hunting bear. R. at 1. Anderson was convicted of fraud for soliciting donations on behalf of an unregistered charity and using the monetary donations to fund his bear-hunting trips with Barnes. R. at 1. Anderson performed his 100 hours of community service sentence. R. at 1.

On July 10, 2011 Big Top Circus’s accountant informed Barnes that Big Top needed to raise \$500,000 by December 2011 or file for bankruptcy. R. at 1. On July 11, 2011 Barnes invited two other circuses, Boerum City Circus and Flying Feats Circus, to join Big Top in the “greatest elephant show on earth,” which would take place for the month of December. R. 1-2. Boerum City Circus and Flying Feats Circus accepted the offer because they normally travel south to winter their elephants and grazing on Big Top’s land would have reduced this normally expensive practice. R. at 2.

On August 30, Barnes contacted Kara Crawley (“Crawley”), a staff writer and associate producer for the local news section at the Boerum Times. R at 2, 9. Barnes offered her unrestricted access to the circus in exchange for an article that would increase the publicity of the elephant show. R. at 2, 9. Crawley, already strongly interested in animal rights, accepted and had Barnes sign a standard release form, relinquishing Barnes from any legal control on the project. R. at 9. Crawley watched the animals train every day for two weeks and met an

employee who told Crawley that he or she had allegedly overheard a conversation between Barnes and another party concerning a plan to kill the elephants for their ivory. R. at 10 The employee, concerned for his or her safety, asked to remain anonymous during his or her remaining duration of employment at Big Top. R. at 10. In order to capture accurate information for her report, Crawley videotaped her interview with the employee. R. at 10. On December 1, 2011, the Boerum Times published the article revealing what the employee allegedly heard. R. at 11.

On November 15, 2011, the government transcribed a conversation between Barnes and Anderson. R. at 18. In the conversation Anderson tells Barnes that he feels he made a mistake involving James Reardon (“Reardon”) in their plan to hunt. R. at 18. In response to Anderson’s suggestion to “get rid of him,” Barnes asked what Reardon said to make him worry. R. at 18. Anderson said that Reardon was asking legal questions about permits and other matters. R. at 18. In response, Barnes not sharing the same worries as Anderson said, “That’s it?” and followed up with, “Yeah, well, don’t do anything. Not yet. Let me think about it. You’re worried over nothing.” R. at 18. On November 29, 2011, the government transcribed a second conversation between Anderson and Barnes. R. at 19. In this conversation, Barnes’ tried to manage Anderson’s worry with Reardon in several different ways: Barnes told Anderson that he called Reardon the day before and thought he had “smoothed it over,” he suggested Anderson tell Reardon that they called the hunt off and not to worry about it, and he explained that the situation with Reardon was a mess they could avoid. R. at 19. Finally, Barnes pleaded with Anderson to “hold off” and conclusively stated, “I don’t want anything to do with this.” R. at 19. Later that day, Anderson killed Reardon. R. at 7.

Additionally, the government recorded conversations that reveal Reardon had second thoughts about his involvement in the supposed conspiracy and its apparent legality. R. at 24. On November 28, 2011, in an unrecorded telephone conversation, Reardon allegedly contacted Best to explain the supposed conspiracy and to relate his concerns that Anderson may harm him. R. at 24. On May 1, 2012, the government made a pre-trial motion to introduce the out-of-court statements made by Reardon to Best under the Rule 804(b)(6) exception to hearsay. R. at 6. Barnes' attorney, Shuster, contended that Anderson is mentally ill. R. at 8. Shuster alleged that Barnes invited Anderson to join him in an ordinary hunting expedition but that Anderson concocted the "elephant hunt" story when he explained the trip to Reardon. R. at 8.

Agent Thomas Simandy ("Simandy") was assigned to Barnes' case on December 15, 2011 after Agent Narvel Blackstock ("Blackstock") died. R. at 12. Simandy has been an agent for the Federal Bureau of Investigation ("FBI") for five years during which he has been assigned to 50 cases, none concerning the poaching of animals. R. at 12, 14. As part of Simandy's investigation, he reviewed the transcripts that Blackstock transcribed from a dozen conversations between Barnes, Anderson, and Reardon, from October 4, 2011 to December 1, 2011. R. at 13, 14. Additionally, Simandy interviewed Agent Jason Lamberti ("Lamberti") from the Bureau of Alcohol, Tobacco and Firearms ("ATF"). R. at 13. Lamberti stated that Barnes contacted him on October 2, 2011 while he was working undercover at Weapons Unlimited and inquired on the price of three assault rifles. R. at 13. After Lamberti quoted the prices and explained there would be a 3-month wait period for the rifle, he explicitly offered Barnes three fully automatic AK-47s for \$500 each if Barnes was willing to make a deal under the table. R. at 2. Anderson wired Barnes \$1,000 on behalf of himself and Reardon to cover the cost of weapons. R. at 3. Simandy also interviewed Alan Klestadt ("Klestadt") from Copters Corporation who arranged for a one-

day rental of a helicopter for December 15, 2011. The supposed hunt was allegedly planned to take place on the same day, December 15, 2011, although Barnes had already scheduled and advertised the joint three circus elephant show to occur during the entire month of December. R. at 2,3. From reviewing all of the transcripts, Simandy believed he was able to de-code certain code words and phrases used based on the context of the conversations. R. at 13.

Procedural History

On December 4, 2011, Barnes was indicted and charged with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922, two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and one count of conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. R. at 21. On May 1, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on three pre-trial motions and on May 2, 2012, the District Court ruled against the government in all three motions. R. at 5. Specifically, the court denied the government's motion to introduce the out of court statements made by Reardon to Best as an exception to the hearsay rules under Rule 804(b)(6) because it found that the government did not meet their burden under *Giles*. R. at 6, 16. The court recognized the existence of an absolute reporter's privilege and approved Crawley's motion to quash the government's subpoena to testify. R. at 6, 17. And third, the court rejected the government's motion in limine to introduce testimony of Agent Simandy as a lay witness under Rule 701. R. at 6, 17.

Pursuant to 18 U.S.C. § 3731, the United States filed an interlocutory appeal with the United States Court of Appeals of the Fourteenth Circuit. R. at 20. On July 12, 2012, the Circuit Court affirmed the decision of the District Court on all issues, holding that (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis; (2) that a journalist's privilege

exists and is absolute; and (3) that under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where the agent neither participated in the conversation nor observed it. R. at 20. The government subsequently filed a petition for writ of certiorari, and on October 1, 2011, this Court granted certiorari on the three issues the Fourteenth Circuit decided. R. at 36.

SUMMARY OF THE ARGUMENT

In the present case, the lower courts both correctly ruled that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis; (2) that a journalist's privilege exists and is absolute; and (3) that under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where the agent neither participated in the conversation nor observed it. First, the government's interpretation of the doctrine of conspiratorial liability derived from *United States v. Cherry* cannot impute Sixth Amendment constitutional rights because it does not pass the test this Court set forth in *Giles v. California*. In *Giles*, this Court recognized that equitable exceptions to the Confrontation Clause must be established in the common law basis of the doctrine of forfeiture. The common law basis from the Framers' time period recognized exceptions that were grounded in a defendant's intent to render a witness unavailable to testify. Thus, this court should affirm the denial of the government's pretrial motion because the government solely relied on the alleged reasonable foreseeability of Anderson's death and did not offer proof of Barnes' intent to murder Anderson. However, even if this Court accepts conspiratorial liability as expanding the doctrine of forfeiture, the government's motion should still be denied because the government did not prove by a preponderance of evidence that Anderson's death was reasonably foreseeable as a natural consequence of an alleged conspiracy to hunt elephants.

Secondly, under the test established by this Court in *Jaffee v. Redmond* for identifying privileges under Federal Rule of Evidence 501, this Court should recognize a reporter's privilege. This Court favors a privilege in its "reason and experience" where, as here, the majority of states have already established that privilege. The test balances the interests fostered

by the privilege against the need for probative evidence, and where the former outweighs the latter, this Court recognizes a privilege.

Here, this Court should favor recognizing a reporter's privilege because a majority of both states and Circuits already recognize this privilege. Further, the interest in an unfettered communication of information by the journalist to the public outweighs the need for probative evidence because reporters depend upon confidential sources to provide much of the news to the public. If reporters are not protected by this privilege, it will create a chilling effect and many of their confidential sources will refrain from providing information for fear of losing their anonymity. As a result, the public will lose access to critical information. Additionally, this privilege, as this Court in *Jaffee* explained, should be absolute because otherwise the participants in a confidential conversation would be unable to predict with any degree of certainty whether their conversations would be protected.

However, even if this Court chooses to recognize a qualified privilege, Crawley would still be protected because she was a reporter as defined in the *Von Bulow* test and she began her investigation into Big Top Circus with the intent to publish a story. Finally, the government cannot overcome a qualified privilege because it failed to exhaust all reasonable alternative sources. The trial court held that identification of the confidential source would be cumulative evidence, militating against such exhaustion and moreover there is no indication that the government interviewed all of the Big Top Circus employees, of which this confidential source is one. As a result, the government cannot overcome the privilege established by Crawley and this court should affirm the Circuit Court's finding of an absolute journalist's privilege.

Lastly, Simandy's testimony should have been qualified as expert testimony under Federal Rule of Evidence 702, and the trial court properly excluded it, preventing the

government's end run around the foundation requirements of Rule 702. Further, Simandy solely based his testimony on his review of transcripts and his interview with other federal agents and witnesses. This post-hoc assessment does not substitute for personal knowledge and the trial court properly excluded it. Accordingly, this Court should affirm the ruling of the Circuit Court on all issues.

ARGUMENT

I. THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT THE DOCTRINE OF FORFEITURE-BY-WRONGDOING DOES NOT APPLY TO REARDON’S HEARSAY STATEMENTS BECAUSE RESPONDENT DID NOT INTEND TO MAKE REARDON UNAVAILABLE UNDER *GILES V. CALIFORNIA*.

Federal Rule of Evidence 804(b)(6) codified the common law doctrine of forfeiture-by-wrongdoing (hereinafter doctrine of forfeiture) as an exception to otherwise inadmissible hearsay evidence. Fed. R. Evid. 804(b)(6). Rule 804(b)(6) states that the exception applies to 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). This rule represents a principle of equity that supports the general notion that a person should not be able to profit from his wrongdoing. *See Giles v. California*, 554 U.S. 353, 365 (2008). From this idea of fairness, courts rationalize a balance by determining that if an individual participates in conduct designed to prevent a witness from testifying then he forfeits his Sixth Amendment rights to confrontation. *Id.*

While public policy concerns for witness intimidation rightfully give weight to the scale, what a defendant stands to lose cannot be trivialized. *Id.* This Court noted that:

There is nothing mysterious about courts’ refusal to carry the rationale any further [than deterring against intimidating witnesses]. The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’”

Id. (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)). A Sixth Amendment right is a personal right and a constitutional guarantee that is deemed essential to a fair trial. *Id.*

The Tenth Circuit in *United States v. Cherry* tipped the balanced scale to favor public policy. 217 F.3d 811, 816 (10th Cir. 2000). The court extended the waiver of constitutional rights to an individual for his co-conspirator's actions, but only if the co-conspirator's misconduct was in the scope of, and a reasonably foreseeable consequence of, the conspiracy. *Id.* at 820. However, the court remanded the case and created an unclear standard vulnerable to manipulation. *Id.* at 821. This Court in *Crawford v. Washington* narrowed the *Cherry* doctrine by recognizing only equitable exceptions based on common law to the confrontation requirement. 541 U.S. at 53-54. In 2008, this Court in *Giles v. California* further clarified the scope of the forfeiture exception, and required a showing of the defendant's intent to procure the witnesses' unavailability. 554 U.S. at 360.

Rule 804(b)(6) should be construed in accordance with the standard set forth in *Giles*, to compel admission of evidence that would otherwise be admissible *only if* the defendant directly involved himself in the murder of a potential witness or in the conspiracy of a murder of a potential witness. 554 U.S. at 360. This Court should hold that expanding the scope of the forfeiture doctrine to what satisfies the Government's needs in this case would not serve the purpose of Rule 804(b)(6) because a showing of intent would be made irrelevant.

Accordingly, the District Court judge properly denied the hearsay evidence because: (1) the Government's theory that the *Cherry* doctrine does not require a showing of the defendant's intent to procure the unavailability of the declarant and therefore cannot meet the standard set forth in *Giles* and (2) even if the Government's expansion of Rule 804(b)(6) is accepted, Anderson's death was not a foreseeable consequence of the conspiracy and does not meet the standards set forth in *Cherry*.

A. *Giles* Does Not Support the Government’s Interpretation of the *Cherry* Doctrine Because Admitting Reardon’s Hearsay Declarations Would Make the Intent Requirement Irrelevant and Therefore the Exception to the Confrontation Clause Would No Longer Be Established in the Common Law Basis of the Doctrine of Forfeiture.

1. The purpose of the Confrontation Clause requires a showing of intent in order for the doctrine of forfeiture to impute constitutional rights under the Sixth Amendment

An historical analysis of the Confrontation Clause reveals that in order for the doctrine of forfeiture to impute constitutional rights, a party must present evidence that the defendant intended to prevent a witness from testifying. *See Giles*, 554 U.S. at 359. The Sixth Amendment establishes that in a criminal prosecution, a defendant has a right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. In 2004, this Court overruled the *Roberts* rule to remain faithful to the Confrontation Clause’s original meaning. *Crawford*, 541 U.S. at 37. The *Roberts* Rule allowed evidence that would violate a defendant’s confrontation rights to be admitted if the statement bore an “adequate ‘indicia of reliability.’” *Ohio v. Roberts*, 448 U.S. 56, 66, 100 (1980). This Court in *Crawford* recognized that the vague *Roberts* standard could allow for violations against the Confrontation Clause. 541 U.S. at 53. Because the text of the Sixth Amendment “does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts” the *Roberts* rule was unconstitutional. *Id.* Instead, in order to create a new test, this Court returned to the purpose of a Sixth Amendment right and found that it is “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” *Id.* at 54. The historical test replaced the vague *Roberts* rule, and this Court recognized the doctrine of forfeiture among the equitable

exceptions to confrontation rights. *Id.* at 62. However, the scope of the doctrine remained unclear because the Court in *Crawford* declined to define testimonial statements¹ *Id.* at 68.

This Court again relied on an historical analysis of the Confrontation Clause in its opinion in *Giles*. 554 U.S. at 359. In *Giles*, the defendant argued that he shot and killed his girlfriend in self-defense and wanted to suppress incriminating statements she made to a police officer. *Id.* at 353. The California Supreme Court held that the defendant forfeited his Confrontation Clause objection by killing his girlfriend, regardless of whether he specifically intended to do so to keep her from testifying. *Id.* This Court employed the *Crawford* test, and analyzed whether the California Supreme Court’s theory was an exception established in the common law basis of the forfeiture by wrongdoing rule. *Id.* at 359.

Within *Giles*, the Court analyzed a decision from 1666, *Lord Morley’s Case*. *Id.* In this historical case, the doctrine of forfeiture required that a witness have been “detained by the means or procurement of the prisoner.” *Id.* (citing *Lord Morley’s Case*, 6 How. St. Tr. 769, 770-771). In determining the definition of procurement from cases and treaties from that time, this Court held that “unconfronted testimony would not be admitted without a showing that the defendant *intended* to prevent a witness from testifying.” *Id.* at 360. The Court did not approve of California’s exception to the Confrontation Clause because it was “unheard of at the time of the founding or for 200 years thereafter.” *Id.* at 377.

¹ Although both *Giles* and *Crawford* involved testimonial statements, this Court did not preclude Sixth Amendment protections to non-testimonial statements. Within *Crawford*, this Court stated that in *White*, it previously *rejected* the proposal to “apply Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law” and that it “need not definitively resolve whether it survives” their decision after *Crawford*. 541 U.S. at 61 (quoting *White v. Illinois*, 502 U.S. 346, 352 (1992)). Instead this Court chose to support actions that would align with the purpose of the Confrontation Clause, finding that “admitting statements deemed reliable by a judge is fundamentally at odds with the right of the confrontation.” *Id.* Because this purpose does not distinguish between testimonial and non-testimonial statements, this is not a conclusive factor in determining if the doctrine of forfeiture applies.

2. The *Cherry* Doctrine can impute a waiver of constitutional confrontation rights only if there is a requirement to show intent to render or acquiesce in a witness' unavailability to testify.

Expanding the scope of Rule 804(b)(6) to include the government's interpretation of the *Cherry* doctrine violates the Confrontation Clause as construed by *Crawford* and *Giles* because it would include an exception to the confrontation right that was not recognized at the time of the founding. 541 U.S. at 53-54; 554 U.S. at 359. In 2000, the Tenth Circuit in *United States v. Cherry* expanded the waiver of Sixth Amendment rights to include defendants who were culpable as co-conspirators under the *Pinkerton* liability doctrine. 217 F.3d at 820. The court found that the plain meaning of the words "engaged or acquiesced in wrongdoing" within Rule 804(b)(6) encompassed *Pinkerton* conspiratorial responsibility and this theory would "strike a better balance between the conflicting principles at stake." *Cherry*, 217 F.3d at 816. The Tenth Circuit went as far as to say that a "failure to consider the *Pinkerton* conspiratorial responsibility affords too much weight to Confrontation Clause values in balancing those values against the importance of witness tampering." *Id.* at 820 (emphasis added). As a result, the Tenth Circuit felt justified in tipping the scale balanced by this Court. *Id.* As previously mentioned, this importance of a balance was raised again in 2008 in *Giles*, and there this Court reemphasized that the rightful weight constitutional guarantees must hold in doctrine of forfeiture analysis. 554 U.S. at 365. This Court left open the direct decision on whether the *Cherry* doctrine would be a permitted expansion of Rule 804(b)(6), but it did provide a clear rule that the Framers' required a showing of intent. *Giles*, 554 U.S. at 360.

The facts of the present case illustrate why the application of the *Cherry* doctrine without a requirement of intent, cannot expand the scope of Rule 804(b)(6)'s forfeiture doctrine without violating the confrontation clause. In the present case, under the Government's interpretation of

the *Cherry* doctrine, Barnes would be held liable for Anderson's acts solely if it is determined that he could reasonably have foreseen that Anderson would murder the declarant in order to silence him, regardless if he had the intent to render the declarant unavailable. R. at 8. Similarly, the California Supreme Court in *Giles*, found that the defendant's intent of acting in self-defense was irrelevant under their interpretation of the forfeiture doctrine because it was shown that Giles committed the declarant's murder, for which he was on trial, and because it was his intentional criminal act that made the witness unavailable to testify. *Id.* at 354, 357. As this Court rejected the California Supreme Court's interpretation of a doctrine of forfeiture rule that resulted in making the requirement of intent irrelevant in *Giles*, this Court should again reject the government's interpretation before us today, that relies solely on reasonable foreseeability and does not require intent. *Id.* at 354.

An interpretation of the *Cherry* doctrine that does not require intent not only goes against Supreme Court precedent but it also conflicts with the plain meaning of Rule 804(b)(6). Rule 804(b)(6) states that the exception applies only when the defendant engaged or acquiesced in acts that were "*intended to, and did, procure the unavailability of the declarant as a witness.*" Fed. R. Evid. 804(b)(6) (emphasis added). Every commentator has concluded that the intent requirement is satisfied only if the defendant has in his mind the purpose of making a witness unavailable. *Giles*, 554 U.S. at 367. Allowing a test that requires reasonable foreseeability would encompass defendants who may have had knowledge that a crime could occur but had zero intention of committing or aiding in that crime. See Adrienne Rose, *Forfeiture of Confrontation Rights Post-Giles: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U.J. Legis. & Pub. Pol'y. 281, 316-317 (2011).

For example, in the current case, while it is true that Barnes had knowledge that Anderson wanted to harm Reardon, this fact should not impute a waiver of Barnes's constitutional right to confrontation. R. at 18-19. The record does not show that Barnes ever agreed with Anderson's statement to "get rid of" Reardon, but rather indicates twice that he never intended to harm Reardon. R. at 18-19. Barnes directly told Anderson, "don't do anything" and that he did not "want anything to do with this." R. at 18-19. Additionally, Barnes told Anderson to tell Reardon they called off the hunt and personally called Reardon in an effort to "smooth it over." R. at 19. Because the evidence shows that Barnes was trying to *prevent* Anderson from "getting rid of" Reardon, the government would be forced to rely solely on Reardon's knowledge from Best's statements to prove reasonable foreseeability. R. at 18. Therefore, in order for the government to follow the standard set forth in *Giles*, it would have to argue that a showing of knowledge satisfies the intent requirement. *See*, 554 U.S. at 367. However, this Court has already addressed and denied the argument that knowledge satisfies intent by saying that this "is emphatically *not* the modern view." *Id.* at 367.

The government's theory of the *Cherry* doctrine confuses constitutional and evidence standards which is *exactly* what this Court warned against in *Crawford* by stating "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." 541 U.S. at 61. It is reasonable for the *Cherry* doctrine to waive a hearsay objection under the language of Rule 804(b)(6) but this principle should not be extended to impute a waiver of constitutional confrontation rights without a showing of intent because, as stated in *Crawford* and *Giles*, this is not what the Framers intended. Allowing a waiver of a constitutional right is vastly more severe than merely denying an evidentiary objection. *See* Rose, 14 N.Y.U.J. Legis. & Pub. Pol'y. at 305. To expand this standard to also include a waiver

of constitutional rights based solely on a defendant's participation in a conspiracy, as the Government purports to do, is too expansive and goes against the fundamental rules of fairness. In order to effectively balance constitutional rights and public policy, there needs to be a more direct nexus between the participation in the conspiracy and the loss of rights. Accordingly the standard for waiving a constitutional right should be much higher than the waiver of an evidentiary rule.

Judge Zhu, in the lower court's dissent, correctly asserts that every circuit that has considered this issue accepted the *Pinkerton* conspiratorial liability in the context of rule 804(b)(6). R. at 32; *see e.g., United States v. Dinkins* 691 F.3d 358, 384 (4th Cir. 2012) (finding that their holding to use the *Cherry* doctrine "is supported by decisions of our sister circuits applying principles of conspiratorial liability in this context."). However, this reliance on current circuit court approval is irrelevant because *Giles* dictates that hearsay exceptions need to have a basis in common law, at the time the Framers were creating the Clause. 554 U.S. at 361, 377. And this Court stated that it is unaware of any case from that time period "in which the exception was invoked although the defendant had not *engaged in conduct designed* to prevent a witness from testifying." *Id.* at 361 (emphasis added). Thus, this Court should affirm the denial of the government's expansion of Rule 804(b)(6) because it does not require the necessary element of intent.

B. Even If This Court Allows for the Government's Expansion of the Scope of Rule 804(b)(6), the Government Did Not Prove by a Preponderance of Evidence That Anderson's Death Was Reasonably Foreseeable As a Natural Consequence of the Conspiracy.

Mere participation in a conspiracy does not constitute a waiver of constitutional confrontation rights. *See Cherry*, 217 F.3d at 821. The Tenth Circuit in *Cherry* remanded to the district court to see whether the facts of the case fall within the *Pinkerton* factors of conspiracy.

Id. at 821. The court in *Cherry* found that the defendant would waive his Confrontation Clause rights when (1) the defendant participated directly in planning or procuring the declarant's unavailability through wrongdoing, or (2) the wrongful procurement was in furtherance, within the scope and reasonably foreseeable as a necessary or natural consequence of the conspiracy.

Id. at 820. Reasonable foreseeability cannot extend the doctrine to substantive crimes that occur as a result of an unintended turn of events. *See id.* at 817. It can only result in making co-conspirators responsible for crimes that are committed "within the scope of the unlawful project." *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

Further, in order to comply with *Giles*, courts have found that the second prong of the *Cherry* test must be supported by evidence that the "defendant engaged in conduct *designed* to prevent the witness from testifying." *Dinkins*, 691 F.3d at 385 (citing *Giles*, 554 U.S. at 359). In *Dinkins*, the court applied the *Cherry* doctrine to expand the scope of Rule 804(b)(6) to co-conspirators who did not directly participate in killing the declarant. *Id.* The court found that the record supported that the murder of an informant was in furtherance, within the scope and reasonably foreseeable as a natural consequence of an ongoing drug trafficking conspiracy of which the defendant was a member. *Id.*

In contrast, the court in *United States v. White* found that a lack of evidence in the record to indicate anything beyond the existence of a conspiracy would not be sufficient to waive constitutional rights. 838 F.Supp. 618, 623 (D.D.C. 1993), *aff'd*, 116 F.3d 903 (D.C.Cir. 1997). In *White*, the government sought to admit statements from a murdered police informant against co-conspirators in a drug conspiracy, based solely on their participation in the conspiracy. *Id.* at 622-24. The court held that the government was required "to show that the particular defendant participated in some manner in the planning or execution of the murder" because "mere failure to

prevent the murder, or mere participation in the alleged drug conspiracy at the heart of the case, must surely be insufficient to constitute a waiver of a defendant's constitutional confrontation rights." *Id.* at 623.

Because Barnes did not participate in any manner in the death of Reardon, the government could not meet the first prong of the test and would need to satisfy the second prong and show reasonable foreseeability. *Cherry*, 217 F.3d at 820. In the present case, the record contains the following facts that indicate a conspiracy to hunt elephants: a disgruntled employee's story to a reporter hired by Barnes himself and the hearsay statements from Best, recounting a phone call he had with Reardon. R. at 8-10. Mr. Shuster, Barnes' trial lawyer, offered an alternative explanation to the unusual events, stating that Anderson confessed to killing Reardon, and further, that he was a disturbed man who came up with a "fantastical story". R. at 7. The record shows that Barnes had a history of hunting bears with Anderson. R. at 1, 7. It seems reasonable that Barnes and Anderson planned to go on a common bear-hunting trip, rather than the fantastical scheme to kill elephants right after a highly publicized, at Barnes's own will, elephant show. R. at 1, 2. The government pieced together a conspiracy using a string of inadmissible evidence and gun conspiracy charges based on entrapment. R. at 2. This is remarkably different than the case in *Dinkins*, where it was "well supported by the record" that the defendants were members of a narcotics trafficking organization in Baltimore, and that the organization frequently practiced the act of making declarant's unavailable for testifying. 691 F.3d at 385. In the present case, it is not well supported that the conspiracy even existed, let alone that it was reasonable to think a declarant would be killed in furtherance of the conspiracy.

Even if a conspiracy to hunt elephants is found to exist, the facts are distinctive from drug trafficking conspiracies like those in *Cherry* and *Dinkins*, where it was reasonable to

foresee the death of a potential witness, and therefore their rulings do not control. In *Dinkins*, the court noted that it was well known that the defendant was designated as the “enforcer” of the narcotics group and he was responsible for “committing murders for hire.” *Id.* at 363. The declarant that was killed in that case, Dowery, also “became widely known as a ‘snitch’” after contacting law enforcement officers with incriminating information. *Id.* at 364. Dinkins and a co-conspirator had attempted to kill Dowery once but he recovered, only to be killed a year later by two members of the narcotics group, Gilbert and Goods. *Id.* at 364-365. In contrast to the first attempted murder between the co-conspirator and declarant in *Dinkins*, here there is only one mention of Barnes even speaking to Reardon, and that conversation was to smooth things over, not to inflict harm on the declarant. R. at 19. Best stated that when Reardon called him, he said he was afraid Anderson may harm him, but did not include Barnes in this worry. R. at 24. In *Dinkins*, it is reasonable to conclude that the co-conspirator intended to harm and could reasonably foresee the death of the declarant because he attempted to kill him once before himself, and was known to kill “snitches.” 691 F.3d at 364-365. However, the nature of the crime in the present case, allegedly hunting for elephants, coupled with the lack of evidence, does not lead to the conclusion that Barnes should have reasonably foreseen Reardon’s death. This case is analogous to *White*, where the government provided evidence that only supported a *mere participation* in an alleged conspiracy, which cannot allow for a waiver of a constitutional right. 838 F.Supp. at 623.

Further, as previously stated, Barnes took affirmative steps to withdraw from any plan Anderson had to “get rid of” Reardon by telling him not to harm Reardon, offering other solutions to the problem, trying to talk to Reardon himself, and finally by ending all conversation on the topic and telling Anderson he “[didn’t] want anything to do with [it].” R. at 18-19.

Because a defendant is not responsible for his co-conspirator's act if he takes an affirmative step to withdraw, Barnes is not responsible for Anderson's actions. *See Cherry*, 217 F.3d at 821; *see also Hyde v. United States*, 225 U.S. 347, 369 (1912) ("some act to disavow or defeat the purpose" of the conspiracy establishes a withdrawal).

In conclusion, the doctrine of forfeiture does not apply to the hearsay declarations of Best because there is no evidence of a conspiracy, Barnes did not intend to procure the unavailability of Best, Barnes could not reasonably have foreseen that his alleged co-conspirator would murder Best, and Barnes did attempt to withdraw from the alleged conspiracy. Therefore, the Court of Appeals properly affirmed the trial court's refusal to admit hearsay evidence, and for the reasons stated above, this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

II. THE REPORTER'S PRIVILEGE UNDER FRE 501 PROTECTS CRAWLEY, PREVENTING A COURT FROM COMPELLING DISCLOSURE OF HER CONFIDENTIAL SOURCE.

A. Under *Jaffee v. Redmond*, the Interest of Unfettered Communication by a Journalist to the Public Outweighs the Need for Evidence, Therefore This Court Should Recognize a Reporter's Privilege under FRE 501.

Rule 501 tasks the federal courts with creating privileges to protect witnesses where common law principles "in the light of reason and experience" of the courts weigh in favor of establishing a privilege. Fed. R. Evid. 501. This Court recognizes that these common law principles are flexible, and that Rule 501 directs the federal courts to "continue the evolutionary development of testimonial privileges." *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (internal quotations and citation omitted).

In *Jaffee v. Redmond*, this Court laid out the rule for determining whether a Rule 501 privilege exists. 518 U.S. 1 (1996). Under *Jaffee*, a reporter's privilege would protect a reporter

from a court compelling her to reveal her sources if that privilege “promotes sufficiently important interests to outweigh the need for probative evidence. . . .” *Id.* at 9-10 (internal quotations and citation omitted). This Court’s “reason and experience” favors a privilege where the majority of states have adopted that privilege. *See id.* at 12-13. At least 28 states have adopted a reporter’s privilege through both legislation and court action. *See* Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 Gonz. L. Rev. 445, 478-92 (2002). Additionally, the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have all held that a reporter’s privilege exists. *See McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (listing cases).

Under the *Jaffee* test, these “sufficiently important interests,” *Jaffee*, 518 U.S. at 9-10, include “the unfettered communication of information by the journalist to the public.” *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). Many journalists, such as famed reporter Walter Cronkite, rely on confidential sources to supply information for their reports, and these sources may not provide their information should they feel exposed to subpoenas. *Branzburg v. Hayes*, 408 U.S. 665, 730-31, 730 n.8 (1972) (J. Stewart, dissenting). Further, reporters use these sources to gather information and disseminate the news to the public. *Branzburg*, 408 U.S. at 694 n.32; *Von Bulow*, 811 F.2d at 142.

Although this Court addressed the issue of a reporter’s privilege once before in *Branzburg v. Hayes*, it did so prior to Congress’s enactment of Rule 501 in 1974. At the time this Court decided *Branzburg*, the common law “consistently refused to recognize the existence of any” reporter’s privilege, and the prevailing state view also held against a privilege. 408 U.S. at 685-86. However, this Court in *Jaffee* recognized that Rule 501 “did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history.” 518

U.S. at 9. Finally, this Court specifically limited its decision in *Branzburg* to a grand jury subpoena. 408 U.S. at 667. As a result, because this case does not concern a grand jury subpoena, this Court should analyze the reporter's privilege under *Jaffee*.

Because many reporters like Crawley rely on confidential sources and because those sources are more likely to refrain from providing information to reporters without a privilege, the important interest of communicating critical information to the public by the journalist outweighs the need for probative evidence. Further, should these sources diminish due to the threat of subpoenas without a privilege shielding them, this information would also not be available to the government, and the government would be required to rely on its traditional investigative routes. The added benefit of reporters providing information to the public that would not otherwise be available outweighs the resulting dearth of information should there be no privilege.

As a result, this Court should protect Crawley's confidential source and uphold the reporter's privilege as held by the Fourteenth Circuit.

B. Under *Jaffee v. Redmond*, an Absolute Reporter's Privilege Protects Crawley's Confidential Source Because Any Qualified Privilege Would Be "Little Better Than No Privilege at All."

Because a reporter's privilege exists under *Jaffee*, this Court should find that privilege to be absolute. This Court has held in both *Upjohn Co. v. U.S.* and *Jaffee* that

[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the [journalist's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Jaffee, 518 U.S. at 17-18 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981)). Without the same protection for journalists, the confidential sources will likewise be unable to predict, with

any certainty, whether that source's conversations are protected, making a reporter's privilege "little better than no privilege at all." *Id.*

C. Even If the Privilege Were Qualified, It Protects Crawley Because She Is a Reporter, and She Gathered the Information from Her Confidential Source with the Intent to Disseminate It to the Public.

Even if this Court holds that the reporter's privilege is qualified, Crawley still falls under the protection of the privilege. The test accepted by the majority of Circuits was laid out in *Von Bulow*. In a two-part test, a court must examine whether the person invoking the privilege is a reporter, whereupon the burden shifts to the party seeking to overcome the privilege to prove that they have exhausted all other reasonable alternative sources. *Shoen v. Shoen*, 5 F.3d 1289, 1294, 1296 (9th Cir. 1993).

1. Crawley is a reporter.

The Second Circuit defines a reporter as an individual who intends to disseminate information to the public at the start of the newsgathering process. *Von Bulow*, 811 F.2d at 144. In *Von Bulow*, the court held that a third party witness could not quash a subpoena under the reporter's privilege because at the time she gathered the information subpoenaed, she did not intend to disseminate it to the public. *Id.* at 145. There, she had gathered information during the criminal trial of Mr. Von Bulow to help establish the credibility of Mrs. Von Bulow's children in her own mind. *Id.* She had also made notes during the criminal trial that she continued to add to even after an agreement to write an article for the New York Post fell through. *Id.* The court reasoned that because the information was gathered for purposes other than to disseminate it to the public, that "otherwise discoverable documents may not be converted into protected documents by taking some subsequent action with respect to them." *Id.* The court also noted that prior journalism experience may be persuasive evidence that the person is a reporter. *Id.* at

144. Finally, the court concluded that the primary relationship between reporter and confidential source “must have as its basis the intent to disseminate the information to the public garnered from that relationship.” *Id.* at 145.

Here, Crawley clearly intended from the beginning of her investigation to disseminate information to the public. Mr. Barnes provided Crawley with unlimited access to Big Top in order to publicize an upcoming event at Big Top Circus. R. at 9. Unlike the third party witness in *Von Bulow*, Crawley’s investigation of Big Top began with the intent to disseminate that information in a news article for her employer, the Boerum Times. Further, Crawley’s interview of her confidential source was for the purpose of disseminating information, which she did when she published her article on December 1, 2011. R. at 10-11. Finally, Crawley is a staff reporter for the Boerum Times, providing persuasive evidence that she intended to disseminate information from her investigation of Big Top. R. at 9.

As a result, this Court should hold that Crawley is a reporter, and is therefore protected by the qualified reporter’s privilege.

2. The government has not exhausted all reasonable alternative sources for the information subpoenaed.

Once Crawley establishes that she is a reporter and protected by a qualified reporter’s privilege, the burden shifts to the government to show that they have “exhausted all reasonable alternative means for obtaining the information.” *Shoen*, 5 F.3d at 1296. Here, the government has failed to exhaust the reasonable alternatives.

In *Shoen*, the sons of the founder of U-Haul sought production of documents and testimony from a book author’s interviews with their father in a defamation case. *Id.* at 1290. There, once the court had identified the book author as a reporter under the *Von Bulow* test, the court examined whether the sons had shown that the information sought was not obtainable by

another source. *Id.* at 1296. The sons had submitted written interrogatories to their father where the father had claimed not to be able to specifically recall all the information. *Id.* at 1297. However, the court reasoned that written interrogatories are not an adequate substitution for a deposition, and since the sons had not sought to depose their father, they had failed to exhaust the reasonable alternative sources. *Id.* The court emphasized that “compelled disclosure from a journalist must be a last result after pursuit of other opportunities has failed.” *Id.* (internal quotations and citations omitted).

Like the sons in *Shoen*, the government has failed to exhaust all reasonable alternatives to obtain the privileged information. *See R.* at 11. Further, the trial court’s order specifically finds that the information sought from Crawley would be purely cumulative. *R.* at 17. There is no need for this Court to even address the privilege if the evidence sought is purely cumulative. As a result, the trial court did not abuse its discretion in excluding cumulative evidence. Even if such evidence is admissible, its cumulative nature fails the test from *Shoen*. Additionally, there is no indication that the government has interviewed all employees at Big Top, especially relevant because Crawley has revealed that her confidential source is an employee there. *R.* at 10. Without any evidence of the government exhausting alternatives, it cannot overcome the *Shoen* test, and therefore the privilege continues to protect Crawley.

Therefore, because Crawley is disseminating information to the public in her capacity as a reporter, and the government did not exhaust all reasonable alternative sources for the information, this Court should affirm the Court of Appeal’s decision to protect Crawley under a reporter’s privilege.

III. THE TRIAL COURT PROPERLY EXCLUDED SIMANDY’S TESTIMONY BECAUSE HIS TESTIMONY SHOULD HAVE BEEN QUALIFIED UNDER FRE 702 AS IT WAS NOT BASED UPON HIS PERSONAL PERCEPTION OF THE FACTS.

A. The Trial Court Properly Excluded Simandy’s Lay Witness Opinion Because He Should Have Been Qualified As an Expert under Rule 702.

Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government to disclose to defendants a summary of expert testimony the government intends to use in its case in chief. Fed. R. Crim. P.16(a)(1)(G). Federal Rule of Evidence 702 lays out foundational requirements for expert witnesses based upon the expert’s “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. As the court in *United States v. Figueroa-Lopez* explained, the government must first establish the required qualifications of an expert witness before that witness may testify.² 125 F.3d 1241, 1246 (9th Cir. 1997); *see also Daubert v. Merrell Dow Pharamceuticals, Inc.*, 509 U.S. 579 (1993). The government may not perform an end-run around Rule 702 by using Rule 701’s lay witness opinion testimony. *Figueroa-Lopez*, 125 F.3d at 1246; *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010).

As the court in *Figueroa-Lopez* noted, without the distinction between Rules 701 and 702, “a layperson witnessing the removal of a bullet from a heart during an autopsy could opine as to the cause of the decedent’s death.” 125 F.3d at 1246. Otherwise, as the court reasoned, the government could “offer all kinds of specialized opinions without pausing first properly to establish the required qualifications of their witnesses.” *Id.*; *see also* Fed. R. Evid. 701 advisory committee notes (explaining that “Rule 701 has been amended to eliminate the risk that the

² Generally the trial court’s exclusion of evidence is reviewed for an abuse of discretion. *See e.g. United States v. Cox*, 633 F.2d 871, 876 (9th Cir. 1980). However, the question certified to this Court asks “Whether as a matter of law . . . a witness may testify” as a lay witness under FRE 701, and therefore this issue is reviewed de novo. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 622 (5th Cir. 2006).

reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing” and specifically cites to *Figueroa-Lopez* as support).

Here, Simandy based his testimony upon his post-hoc investigation, his review of transcripts transcribed by a deceased agent, and his interviews of fellow agents and witnesses. R. at 14. The only way in which Simandy’s testimony could be helpful to the jury, and satisfy Rule 702(b), is if Simandy’s training and experience as a federal agent provided him insight into the meaning of the conversations on the transcript that an ordinary person would not have. This is evident by Simandy’s own explanation that the “context of the conversations made it apparent what the defendant and his co-conspirators were discussing.” R. at 14. If the meaning of the code words was apparent from the context, then any ordinary layperson could have understood the supposed code words in the transcripts without Simandy’s explanation, and therefore Simandy’s testimony was properly excluded because it would not be helpful to the jury. On the other hand, if the ordinary juror could not understand the meaning of any supposed code words without Simandy’s testimony, then Simandy should have been qualified as an expert witness under Rule 702. In either event, the trial court properly excluded Simandy’s testimony.

B. Simandy’s Testimony Was Not Rationally Based upon His Perception Because He Only Viewed Transcripts.

Under Rule 701(a), a court may permit opinion testimony by a lay witness where that witness has personal knowledge of the matter, as laid out in Rule 602. *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. 2005); Fed.R.Evid. 701(a); Fed.R.Evid. 602. However, when an agent instead relies upon a summary of information that agent gathered in an investigation, that information is not based upon personal perception, and is therefore inadmissible under Rule 701. *Garcia*, F.3d at 212.

In *Garcia*, the court held that the government had failed to lay the foundation to support lay witness testimony of a DEA agent under Rule 701(a), (b), and (c). *Id.* at 211. There, the DEA agent had testified to his investigation of a drug conspiracy. *Id.* at 210. The DEA agent based his testimony on information gathered by his team during the investigation, and did not personally witness any interactions with the defendants. *Id.* at 212. The court reasoned that the DEA agent's opinion "drew on the total information developed by all the officials" in the investigation. *Id.* The court explained that where an opinion is based upon the totality of information gathered by various people during an investigation, that opinion may not be admitted as a lay opinion under Rule 701. *Id.* at 213.

Additionally, the court in *Johnson* explained that "post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701." 617 F.3d at 293. There, a DEA agent offered lay opinion testimony as to the meaning of several recorded phone conversations between drug co-conspirators. *Id.* at 289. The court reasoned that the agent based his opinions "not on his own perception, but rather on his experience and training," and as a result, the opinions could not be considered lay opinions under Rule 701. *Id.* at 292. The court went on to distinguish between investigating officers who were at the scene in question and those who did not directly witness the event. *Id.* at 293. The court pointed out that the DEA agent in that case supported his interpretations of the phone conversations with his experience as a federal agent, several post-wiretap interviews, and statements made to him by the defendants. *Id.* The court concluded that such testimony should have been qualified as expert, rather than lay opinion testimony and therefore reversed the trial court's admission of the DEA agent's lay opinion testimony. *Id.* at 293, 299.

Like the DEA agents in both *Garcia* and *Johnson*, Simandy did not personally interact with Barnes, or even observe Barnes during the course of the investigation. R. at 13-14. Just as both DEA agents in *Garcia* and *Johnson*, Simandy also gathered information throughout the investigation from the other agents, including the transcripts created by the deceased agent Blackstock, and by interviewing Lamberti and Klestadt. R. at 13. Because Simandy relied upon his post-hoc assessment of interviews with Lamberti and Klestadt in drawing his conclusion regarding the supposed code words in the transcripts, he based his opinion upon the totality of information developed by his team, and thus the trial court properly excluded that testimony under Rule 701.

As a result, the trial court properly excluded Simandy's lay witness opinion testimony under Rule 701 and this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis without a requirement of intent; (2) that a journalist's privilege exists and is absolute; and (3) that under Rule 701, lay opinion testimony as to the meaning of the code words is inadmissible where the agent neither participated in the conversation nor observed it.

Respectfully Submitted,

Counsel for Respondent, 9

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