

No. 12-23

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

--against--

WILLIAMS BARNES
Respondent

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

BRIEF FOR RESPONDENT

Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether Federal Rule of Evidence 804(b)(6) is satisfied by way of conspirator liability when lower courts are trending toward requiring the individual the defendant's intent to procure unavailability, and the defendant did not himself murder the witness, even expressly telling his co-conspirator not to carry out the murder and that he wanted "nothing to do with it."

- II. Whether, under the Federal Rule of Evidence 501, an absolute evidentiary privilege for information gathered in a journalist's investigation should be recognized where 1) public and private interests will be served by fostering a flow of confidential and truthful communication between the community and the press, 2) there will be a low burden on the court's truth seeking function by limiting the privilege to those who can prove the requisite intent of the journalist, and 3) reason and experience provide 31 states that recognize a journalist privilege.

- III. Whether as a matter of law under Federal Rule of Evidence 701 governing lay witness opinion testimony, an FBI agent may testify to alleged code words and phrases intercepted and recorded from telephone conversations, when the agent 1) reviewed previously-transcribed transcripts, but did not participate in the surveillance or listen to the recordings at anytime, and 2) lacks training and experience in cases similar to the instant case.

TABLE OF CONTENTS

QUESTIONS PRESENTEDi

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE CASE.....1

Statement of Facts.....1

Procedural History.....5

SUMMARY OF ARGUMENT.....5

ARGUMENT.....7

I. STRICT INTERPRETATION OF THE REQUIREMENTS OF FORFEITURE BY WRONGDOING MUST BE RESPECTED WHEN APPLYING CONSPIRATOR LIABILITY TO FORFEITURE BY WRONGDOING, SUCH THAT THE DEFENDANT’S ACTUAL INTENT MUST BE PROVEN.....7

 A. The circuit courts are trending toward a strict, narrow interpretation of forfeiture by wrongdoing by way of conspiracy liability, requiring that a defendant show actual intent to procure the unavailability of the witness in order for waiver of the right to confrontation to attach.....8

 B. Because Mr. Barnes was neither involved in, nor did he design to, procure the unavailability of Mr. Reardon, and there is no indication Mr. Barnes intended for Mr. Reardon’s life to be cut short, he is not liable for forfeiture by wrongdoing by way of conspiratorial liability.....12

II. BECAUSE AN ABSOLUTE JOURNALIST PRIVILEGE IS IN CONFORMITY WITH THIS COURT’S ADOPTION OF OTHER PRIVILEGES, AND BECAUSE IT PROMOTES IMPORTANT PUBLIC INTERESTS, AND PROVIDES AN EFFICIENT, UNIFORM FRAMEWORK FOR APPLICATION, ADOPTION OF SUCH A PRIVILEGE IS APPROPRIATE.....16

A.	<u>Because there are significant public and private interests in recognizing a journalist privilege, which are not outweighed by the burden on the court’s truth-seeking function, and because reason and experience suggest recognition of such a privilege is appropriate, the journalist privilege here should be upheld and Ms. Crawley should not be required to turn over the identity of the BTC employee</u>	17
i.	Public and Private Interests.....	17
ii.	Burden Upon Court’s Truth-Seeking Function.....	21
iii.	Reason and Experience.....	23
B.	<u>In the interest of judicial efficiency, and to properly promote the interests underlying the journalist privilege, adoption of an absolute journalist privilege is appropriate</u>	24
III.	AGENT SIMANDY’S TESTIMONY REGARDING CODED WORDS AND PHRASES IS INADMISSIBLE BECAUSE HE LACKS FIRSTHAND KNOWLEDGE OF THE INFORMATION TO WHICH HE IS TESTIFYING, AND HE DOES NOT HAVE EXTENSIVE ENOUGH TRAINING AND EXPERIENCE IN SIMILAR INVESTIGATIONS TO OVERCOME THIS LACK OF KNOWLEDGE.....	26
	<u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

I. UNITED STATE SUPREME COURT CASES

<i>Beech Aircraft Corp v. Rainey</i> , 488 U.S. 153 (1988).....	28,29
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972).....	16
<i>Crawford v. Washington</i> , 541 U.S. (2004).....	7
<i>Giles v. California</i> , 554 U.S. 353 (2008).....	<i>passim</i>
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947).....	18
<i>Jaffee v. Redmon</i> , 518 U.S. 1 (1996).....	<i>passim</i>
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946).....	<i>passim</i>
<i>Trammel v. United States</i> , 445 U.S. 40 (1980).....	<i>passim</i>
<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981).....	<i>passim</i>
<i>Wiborg v. United States</i> , 163 U.S. 632 (1896).....	12

II. UNITED STATES COURTS OF APPEALS CASES

<i>Baker v. F & F Investment</i> , 470 F.2d 778 (2d Cir. 1972).....	21
<i>Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.</i> , 332 F.3d 976, (6th Cir. 2003).....	17
<i>In re Grand Jury Proceedings</i> , 810 F.2d 580 (6th Cir. 1987).....	23
<i>In re Petroleum Products Antitrust Litigation v. Arizona</i> , 680 F.2d 5 (2nd Cir. 1982).....	21
<i>Silkwood v. Kerr-McGee Corp.</i> , 563 F.2d 433 (10th Cir. 1977).....	21
<i>The New York Times Company v. Gonzalez</i> , 459 F.3d 160 (2nd Cir. 2006).....	21
<i>United States v. Carson</i> , 455 F.3d 336 (D.C. Cir. 2006).....	<i>passim</i>
<i>United States v. Cherry</i> , 217 F.3d 811 (10th Cir. 2000).....	<i>passim</i>
<i>United States v. Dinkins</i> , 691 F.3d 358 (4th Cir. 2012).....	<i>passim</i>
<i>United States v. Gray</i> , 405 F.3d 227 (4th Cir. 2005).....	13,14
<i>United States v. Jayyousi</i> , 657 F.3d 1085 (2011).....	27,28
<i>United States v. Johnson</i> , 219 F.3d 349 (4th Cir. 2000).....	13
<i>United State v. Johnson</i> , 617 F.3d 286 (4th Cir. 2010).....	27
<i>United States v. Mastrangelo</i> , 693 F.2d 269 (2d Cir. 1982).....	<i>passim</i>

TABLE OF AUTHORITIES—Continued

United States v. Peoples, 250 F.3d 630 (8th Cir. 2001).....27
United States v. Thompson, 286 F.3d 950 (7th Cir. 2002).....*passim*
United States v. White, 838 F.Supp 618 (D.C. Cir. 1993).....9,10
von Bulow v. von Bulow, 811 F.2d 136 (2nd Cir. 1987).....18,19,22
Zerilli v. Smith, 656 F.2d 705 (D.C.Cir.1981).....21

III. UNITED STATES DISTRICT COURT CASES

Folb v. Motion Pictures Industries Pension and Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).....17

IV. CONSTITUTIONAL PROVISIONS:

U.S. CONST., amend. VI.....7

V. STATUTORY PROVISIONS

16 U.S.C.A §§ 3715
16 U.S.C.A §§ 1538.....5
18 U.S.C.A. §§ 371.....5
18 U.S.C.A. §§ 922(a)(1)(a).....5

18 U.S.C.A. §§ 43.....5
18 U.S.C.A. §§ 371.....5

VI. RULES AND REGULATIONS:

Fed. R. Evid. 501.....*passim*
Fed. R. Evid. 602.....*passim*
Fed. R. Evid. 701.....*passim*
Fed. R. Evid. 804(b)(6).....*passim*

TABLE OF AUTHORITIES—Continued

VII. SECONDARY SOURCES

Achal, Mehra, *Newsmen’s Privilege: An Empirical Study*, 59 *Journ. Q.* 560 (1982)
http://www.rcfp.org/reporters-committee-releases-survey-incidence-media-subpoenas.....20

Advisory Committee’s Notes to Proposed Rules, 56 *F.R.D.* 183 (1972).....18

Anthony L. Fargo, Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist’s Privilege Problem*, 33 *Wm. Mitchell L. Rev.* 1347.....22,23,24

Rule 701: Opinion Testimony By Law Witnesses, 12 *Touro L. Rev.* 513, 516 (1996).....30

Ladd, *Expert Testimony*, 5 *Vand. L. Rev.* 414, 417 (1952).....30

STATEMENT OF CASE

Statement of Facts

William Barnes (“Mr. Barnes” or “respondent”) is the owner of Big Top Circus (“BTC”), which he inherited from his father in May 2000. (R.1). Located in Southern Boerum, Mr. Barnes’s family had long taken advantage of the Southern Boerum habitat by raising elephants for BTC. (R.1).

Mr. Barnes is also a founder and co-owner of the charity, Boerum 4 Animals (“B4A”). (R.1). After meeting at a hunting convention, Mr. Barnes and Alfred Anderson (“Mr. Anderson”) established the currently unregistered charity. (R. 1). Although Mr. Anderson was held liable for mismanagement of funds in connection with the charity’s donation system and spending patterns, Mr. Barnes was not involved in the proceedings. (R.1).

BTC experienced financial setbacks in the months leading up to July 2011, when Mr. Barnes’s accountant informed Mr. Barnes that he would need five hundred thousand dollars (\$500,000) to avoid bankruptcy. (R.1). Upon realizing the gravity of the situation and in an attempt to make a last-minute profit, Mr. Barnes invited Boerum City Circus (“BCC”) and Flying Feats Circus (“FFC”) to put on a series of large-scale elephant shows. (R.1-2). The agreement between the three circuses was mutually beneficial. (R.2). Because both BCC and FFC already moved their elephant herds from Northern Boerum to Southern Boerum each winter, the performances presented a convenient opportunity for both to profit. (R.2, 21).

The allegations that give rise to the instant case began in July 2011. (R.2). In response to his desperate financial situation, Mr. Barnes solicited Mr. Anderson and James Reardon (“Mr. Reardon”) to assist him in killing BTC’s, BCC’s and FFC’s elephants to gather the ivory for sale.

(R.2, 21). Mr. Reardon was included in the group because he was an acquaintance of Mr. Anderson. (R.2). On October 1, 2011, Mr. Anderson and Mr. Reardon formally accepted Mr. Barnes offer to participate in the elephant hunting plan, conditional upon Mr. Barnes providing the necessary equipment. (R.2).

The group agreed that they would use a helicopter and rifles to carry out their plan, and Mr. Barnes commenced settling the details. (R.2). On October 2, 2011, Mr. Barnes contacted Weapons Unlimited, located in Texas, to secure the necessary firearms. (R.2). Mr. Barnes was unaware when he made the deal to buy the weapons “under the table,” that the firearms dealer was undercover Alcohol, Tobacco and Firearms (“ATF”) Agent, Jason Lamberti (“Agent Lamberti”). (R.2). Mr. Barnes secured the helicopter rental from Texas dealer, Alan Klestadt (“Mr. Klestadt”) of Copters Corporation (“Copters”). (R.2).

Mr. Reardon’s Murder

Using the minimal details of the “under the table” firearm’s purchase, Agent Lamberti secured a wire-tapping warrant for Mr. Barnes’s telephone calls. (R.2). Through the use of this warrant, agents intercepted two incoming phone calls from Mr. Anderson to Mr. Barnes. (R.18, 19). In these phone calls, Mr. Anderson communicates concern that Mr. Reardon is not going to follow through with the trio’s plan. (R.18, 19). In the first phone call on November 15, 2011, Mr. Anderson expresses his desire to remove Mr. Reardon from the plan. (R.18). Mr. Barnes tells Mr. Anderson to refrain from doing anything to Mr. Reardon. (R.18). Mr. Barnes is more clear in the early morning, November 29 phone call, stating that he does not want Mr. Anderson to harm Mr. Reardon. (R.19). Mr. Barnes told Mr. Anderson to keep Mr. Reardon quiet, but when Mr. Anderson pushed the issue, Mr. Barnes clearly states he does not “want anything to do with this.” (R.19).

On the evening of November 29, 2011, Daniel Best (“Mr. Best”) observed Mr. Anderson running from Mr. Reardon’s apartment. (R.7). Mr. Best went to Mr. Reardon’s home after Mr. Reardon confided his involvement in the elephant hunt to Mr. Best, and expressed his concern that Mr. Anderson may try to harm him. (R.24). When Mr. Best entered Mr. Reardon’s home, he found Mr. Reardon deceased. (R.24). Mr. Anderson was later apprehended and confessed to killing Mr. Reardon to prevent him from exposing the elephant poaching scheme. (R.7).

Ms. Crawley’s Testimony

In an attempt to legitimize the three-circus elephant shows, Mr. Barnes contacted Kara Crawley (“Ms. Crawley”), a reporter at the Boerum Times. (R.2). In exchange for her publishing a favorable article in the Boerum Times, Mr. Barnes offered Ms. Crawley unrestricted access to the planning and training for the elephant show. (R.2). Hoping to gather information on how the animals were treated at Big Top, Ms. Crawley agreed. (R.9). She asked Mr. Barnes to sign a release that eliminated Mr. Barnes’s legal control over the final article. (R.9).

During Ms. Crawley’s two-week investigation into BTC, which included tours of the BTC facilities and visits with the animals, one employee was particularly helpful in gathering information. (R.10). Although the employee was aware that Ms. Crawley was working in conjunction with BTC to publish a story about the upcoming elephant shows, the employee approached Ms. Crawley for advice on a sensitive topic. (R.10). The employee was particularly secretive about the topic, speaking in hushed tones and asking for Ms. Crawley’s confidence. (R.10). The employee requested a pseudonym be used in the published article and went as far as to request that (s)he not be identified as an employee of BTC. (R.10).

Ms. Crawley agreed, and arranged a video-recorded interview with the employee. (R.10). Ms. Crawley intended to use the contents of the videotape only for her notes for the

article. (R.10). The employee revealed during the interview, a conversation that (s)he overheard between Mr. Barnes and another party about their plan to kill the elephants for their ivory.

(R.10). Ms. Crawly published the information regarding the elephant poaching scheme in her December 1, 2011 article published in the Boerum Times. (R.11).

Agent Simandy's Testimony

Thomas Simandy ("Agent Simandy"), a five-year agent with the Federal Bureau of Investigation ("FBI"), was assigned to Mr. Barnes's case for just one year before he was called to testify. (R.12). Though Agent Simandy usually handled drug-related investigations, he was assigned this investigation after Agent Narvel Blackstock passed away. (R.12,14). Agent Simandy reviewed approximately 12 telephone conversation transcripts of calls that took place from October to December, 2011. (R.13). Agent Blackstock originally reviewed and transcribed the conversations. (R.13).

Additionally, Agent Simandy interviewed Agent Lamberti, the undercover agent at Weapons Unlimited, and Alan Klestadt, the representative at Copters. (R.13). From these two interviews, Agent Simandy gathered information regarding Mr. Barnes's inquiry into the purchase of three assault rifles and arrangements for the one-day helicopter rental. (R.13).

Using the information gleaned from the phone calls and his interviews with witnesses, Agent Simandy concluded that certain code words and phrases were used in the intercepted telephone conversations. (R.13). At the District Court hearing, Agent Simandy testified that the trio made repeated references to 'blood diamonds,' which Agent Simandy interpreted to be 'ivory tusks,' 'Charlie tango' referring to the helicopter rental, and 'black cat' to refer to the rifles. (R. 13). During the course of Agent Simandy's testimony, he admitted that he neither participated in nor listened to the conversations as they occurred. (R.14).

Procedural History

Mr. Barnes was taken into federal custody on December 1, 2011. (R.3). On December 4, 2011 a grand jury indicted Mr. Barnes charging him with one count of conspiracy to deal unlawful firearms under 18 U.S.C.A. §§371 and 922(a)(1)(a), two counts of conspiracy to commit crimes of violence against an animal enterprise under 18 U.S.C.A. §§43 and 371, and one count to unlawfully take forty animals protected under the Endangered Species Act under 16 U.S.C.A §§371 and 1538. (R.3).

On May 2, 2012, the United States District Court for the Southern District of Boerum conducted a hearing and ruled on the three evidentiary motions that give rise to the instant case. (R.16). First, Judge Jennifer Wu (“Judge Wu”) denied the government’s motion in limine, which sought to introduce Mr. Best’s testimony under the Federal Rule of Evidence 804(b)(6) exception to the rule against hearsay. (R.16). Second, the court recognized a journalist privilege, and granted Ms. Crawley’s motion to quash the subpoena to produce the recorded conversations between her and the BTC employee. (R.8,17). Finally, the court denied the government’s motion to introduce the testimony of Agent Simandy as a lay witness under Federal Rule of Evidence 701. (R.12,17).

Following an unsuccessful appeal in the Fourteenth Circuit, the government filed a petition for writ of certiorari. (R.25,28,30,36). On October 1, 2012, the Supreme Court of the United States granted the petition on the three aforementioned evidence issues. (R.36).

SUMMARY OF ARGUMENT

In the instant action, the District Court in the Southern District of Boerum and the Court of Appeal for the Fourteenth Circuit correctly held that 1) Mr. Best’s testimony is inadmissible, as it does not satisfy the Federal Rule of Evidence 804(b)(6) requirements; 2) Ms. Crawley may

invoke the journalist privilege to resist disclosure of her confidential source, pursuant to Federal Rule of Evidence 501, a privilege that is absolute; and 3) Agent Simandy may not testify as to the meaning of coded words and phrases because he does not meet the requirements set forth for Federal Rules of Evidence 701 and 602.

First, Mr. Best's testimony regarding Mr. Reardon's disclosures is inadmissible under Rule 804(b)(6). Though the area of law is trending toward allowing a finding of forfeiture by wrongdoing by way of conspiracy liability, the Circuit Courts have been strict in their application. The most recent cases recognize a need for the defendant-conspirator to have the requisite intent under the second prong of the forfeiture by wrongdoing rule—intent to procure the unavailability of the witness. Because Mr. Barnes does not satisfy that intent element, he cannot be held to have waived his constitutional right to confrontation.

Next, the lower court properly concluded that Ms. Crawley could claim journalist privilege, thus protecting her from being compelled to reveal her confidential source's identity. Journalist privilege may be adopted via common law, pursuant to Rule 501. Because journalist privilege promotes a serious public interest by promoting freedom of communication, an interest not outweighed by the burden upon the court's truth-seeking function, and because reason and experience—by way of states' action on the matter—dictate that recognition of a right is appropriate, common law adoption by this Court of the journalist privilege is necessary. Additionally, to promote judicial efficiency and fairness in application, the journalist privilege rule must be absolute.

Finally, Agent Simandy's testimony was properly excluded per Rules 701 and 602. The question presented limits the scope of the 701 analysis to prong two—whether the lay witness has firsthand knowledge of that to which he is opining. Analysis of that prong requires use of

Rule 602, the rule for determining what is firsthand knowledge. Because Agent Simandy neither participated in the surveillance, nor transcribed the recorded phone calls taken during that surveillance, he does not have sufficient firsthand knowledge to share his opinion as a lay witness. Also, based on Agent Simandy's relatively short tenure with the FBI and his experience in drug cases rather than animal poaching cases, in addition to the short time he spent on this particular case, Agent Simandy's background and experience were not enough to overcome the firsthand knowledge requirement.

Based on the foregoing, we respectfully request this Court affirm the lower court's ruling and find that 1) Mr. Best's hearsay testimony is inadmissible, 2) Ms. Crawley may claim journalist privilege, and 3) Agent Simandy's lay opinion testimony on the meaning of coded words and phrases be excluded.

ARGUMENT

I. STRICT INTERPRETATION OF THE REQUIREMENTS OF FORFEITURE BY WRONGDOING MUST BE RESPECTED WHEN APPLYING CONSPIRATOR LIABILITY TO FORFEITURE BY WRONGDOING, SUCH THAT THE DEFENDANT'S ACTUAL INTENT MUST BE PROVEN.

Underlying the rule against hearsay is the Confrontation Clause of the Sixth Amendment to the United States Constitution. U.S.C.A. Const. Amend. VI. This provides that criminally accused shall have a right to confront any witness against him, and it applies to both in-court statements and out-of-court testimony offered at trial. *Crawford v. Washington*, 541 U.S. 36, 42 (2003). However, the Court has recognized two instances where unopposed testimony is admissible—dying declarations and forfeiture by wrongdoing. *United States v. Giles*, 554 U.S. 352, 359-60 (2008).

Forfeiture by wrongdoing effectively waives a defendant's right to exclude a witness's prior testimony, where that defendant is found to have procured the unavailability of the witness.

Id. at 359. Referring to the forfeiture by wrongdoing exception, the Advisory Committee Notes to Federal Rule of Evidence 804 explain that the rationale behind such an exception is to provide a “prophylactic rule to deal with abhorrent behavior ‘that strikes at the heart of the system of justice itself.’” Fed. R. Evid. 804, *citing United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

At issue here is the forfeiture by wrongdoing exception, particularly whether this forfeiture may be proved by way of conspirator liability. Conspirator liability holds the members of an ongoing conspiracy liable for each co-conspirator’s actions, when the actions are within the scope of the conspiracy and reasonably foreseeable. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946). Although this is a case of first impression for this Court, many circuit courts have addressed the issue. *See generally Mastrangelo*, 693 F.2d 269; *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002); *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006); *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012).

A. The circuit courts are trending toward a strict, narrow interpretation of forfeiture by wrongdoing by way of conspiracy liability, requiring that a defendant show actual intent to procure the unavailability of the witness in order for waiver of the right to confrontation to attach.

Circuit courts have addressed how conspirator liability should be applied to forfeiture by wrongdoing with increasing frequency in the past decade. *See generally Mastrangelo*, 693 F.2d 269; *Cherry*, 217 F.3d 811; *Thompson*, 286 F.3d 950; *Carson*, 455 F.3d 336; *Dinkins*, 691 F.3d 358. Although *Mastrangelo* started the discussion with a broad approach in 1982, circuit courts have been narrowing conspirator liability’s applicability to forfeiture by wrongdoing in recent years, culminating with *Dinkins* in 2012. *Id.* We ask this court to follow the circuit courts’ trend, and adopt a narrow rule that requires a showing of an individual defendant’s actual intent to procure the unavailability of a witness for waiver to apply.

The Second Circuit was among the first circuit court to consider conspirator liability in a forfeiture by wrongdoing analysis. *Mastrangelo*, 693 F.2d 269. There, the defendant was in custody when the prosecution’s chief witness was murdered. *Id.* at 271. The court held that waiver of the right to confrontation may be proved not only by “knowledge, complicity, planning,” but by other misconduct within the conspiracy as well. *Id.* at 272-73. The Second Circuit’s rule essentially automatically imputed the acts of co-conspirators to one another for purposes of the forfeiture by wrongdoing analysis. *Id.* at 273-74. *But see United States v. White*, 838 F. Supp 618, 623 (requiring that the government “show that the particular defendant participated in some manner in the planning or execution of the (witness’s) murder”).

In 1993, the court in *United States v. White* criticized the Second Circuit for adopting such an expansive approach for conspirator liability. 838 F.Supp at 623. Respondent’s contentions are consistent with the *White* court majority. Where a constitutional right is concerned, the court must provide greater protections than the type of “catchall approach” in *Mastrangelo*. *Id.* Failure to do so undermines the language of the forfeiture by wrongdoing statute itself. Fed. R. Evid. 804(b)(6). Rule 804(b)(6) requires that the defendant against whom waiver is being sought be the person who procured, or at least acquiesced to the procurement of, the witness. *Id.* Additionally, such procurement or acquiescence must be with the intent of rendering the witness unavailable. *Id.* By allowing mere membership in a conspiracy to impute waiver, the Second Circuit ignored the requirements set forth in the rule itself. *Id.*

The *Mastrangelo* interpretation flies in the face of this Court’s decisions on conspirator liability as well by failing to take into consideration the requirements under conspirator liability—that an act within a conspiracy only imputes to co-conspirators upon a showing that the act was within the scope of the conspiracy and reasonably foreseeable. *Pinkerton*, 328 U.S. at

645. Automatic imputation of waiver ignores any analysis regarding the scope of the conspiracy and reasonable foreseeability, as expressly promulgated as requirements for conspirator liability by this Court in *Pinkerton*. *Id.*

Thus more recently, other circuits have imposed a stricter standard. The Tenth Circuit, in *United States v. Cherry*, held that conspiratorial liability may be considered in the determination of forfeiture by wrongdoing. 217 F.3d 811 at 818. *Cherry* involved a drug conspiracy prosecution of five defendants, and one cooperating witness. *Id.* at 813. The witness was murdered prior to trial, and the prosecution sought to admit the witness's prior testimony against all five co-conspirators, based on a forfeiture by wrongdoing theory, despite only two of the participants direct involvement in the murder. *Id.* 814-15. The court held that a witness's murder may be imputed to all co-conspirators if the murder was reasonably foreseeable. *Id.* at 822. Judge Holloway dissented because the court took too "expansive" a view of forfeiture by wrongdoing by not allowing for a consideration of the individual defendant's intent regarding the witness's unavailability. *Id.* See also, *United States v. Carson*, 455 F.3d 336, 364 (D.C. Cir. 2006)(wherein the D.C. Circuit ignored the intent requirement, finding waiver by forfeiture by wrongdoing as applied to all co-conspirators because the witness's murder was merely reasonably foreseeable).

Thus, by requiring an analysis of reasonable foreseeability, the Tenth Circuit addressed part of the concerns the *White* court had with *Mastrangelo*. Still, under this construct, the Tenth Circuit emphasized only half the conspirator liability test, and virtually ignored the intent element of the forfeiture by wrongdoing elements. As noted by the dissent in *Cherry*, without additional considerations regarding the forfeiture by wrongdoing analysis, the Tenth Circuit fails to give appropriate weight to the plain language of the statute.

The Seventh Circuit narrowed the application of conspirator liability to forfeiture by wrongdoing. *Thompson*, 286 F.3d 950 at 964. In examining whether a witness's murder by co-conspirator's should be imputed to the other conspirators, the court held that the murder must satisfy both the elements of forfeiture by wrongdoing and those required under conspirator liability. *Id.* at 964-65. The court held that the "mere membership in a conspiracy should not be sufficient to establish waiver." *Id.* at 964, citing *Cherry, J. Holloway, dissenting*. Rather, there must be some showing of the individual's intent to procure the unavailability of the witness. *Id.* at 965.

The court in *United States v. Dinkins* also applied the traditional conspirator liability elements to its forfeiture by wrongdoing analysis, finding that while a defendant need not *participate* in procuring a witness's unavailability, he must have designed, intended and acquiesced to rendering the witness unavailable. 691 F.3d 358 at 384 (*emphasis added*). In *Dinkins*, the defendant sought to exclude the prior testimony a deceased witness based on his right to confrontation. *Id.* at 366. Before being taken into custody, the defendant made a failed attempt on the witness's life. *Id.* at 365. Later, although the defendant did not carry out the successful murder of the witness, members in his street gang did. *Id.* The court held that the forfeiture by wrongdoing requirement, that the defendant "design" to make the witness unavailable, did not require actual participation. *Id.* at 384, citing *Giles*, 554 U.S. at 359. It interpreted "acquiesced" to mean acceptance or even tacit approval of a co-conspirator's murderous actions. *Id.* Lastly the court held that mere participation in a conspiracy is not sufficient to demonstrate intent to render a witness unavailable. *Id.* at 385. Rather, evidence of a design within the scope of the conspiracy that defendant acquiesced to is needed to prove intent. *Id.* at 384.

Based on the intensifying discussion of conspirator liability as applied to forfeiture by wrongdoing, and the importance of safeguarding our constitutional protections, we ask this court to follow the reasoning in *Dinkin*. Although the analysis is intricate when it properly respects both the elements under conspirator liability and the elements required by forfeiture by wrongdoing, proper determination under these tests could result in the denial of a constitutional right. As such, precise application of established law is a must. Such a finding will ensure that a defendant is not denied constitutional protection by being held liable for acts that he neither carried out himself nor intended for another to carry out.

- B. Because Mr. Barnes was neither involved in, nor did he design to procure the unavailability of Mr. Reardon, and there is no indication Mr. Barnes intended for Mr. Reardon's life to be cut short, he is not liable for forfeiture by wrongdoing by way of conspiratorial liability.

One of this Court's earliest recognitions of conspirator liability was in 1896 in *Wiborg v. United States*, wherein the Court held that so long as an organized criminal enterprise is ongoing, acts by any one of the members are admissible against all members. 163 U.S. 632, 651. Since then, the rule has been narrowed and defined. Now for a conspirator to be held liable for the acts of a co-conspirator, the act 1) must have been within the scope of the conspiracy, and 2) must have been reasonably foreseeable. *Pinkerton*, 328 U.S. at 645.

Conspirator liability has been revisited in recent years coupled with the forfeiture by wrongdoing theory. *See generally* *Mastrangelo*, 693 F.2d 269; *Cherry*, 217 F.3d 811; *Thompson*, 286 F.3d 950; *Carson*, 455 F.3d 336; *Dinkins*, 691 F.3d 358. As discussed in section I.A., *supra*, forfeiture by wrongdoing is one of two exceptions to the right of the accused to confront witness against him. *Giles*, 554 U.S. at 358-59. Forfeiture by wrongdoing requires that the defendant 1) engaged in or acquiesced to wrongdoing, 2) have the intent for the wrongdoing to render the witness unavailable, and 3) actually cause the unavailability through wrongdoing. *United States*

v. Gray, 405 F.3d 227, 241 (2005); *See also Giles*, 554 U.S. at 360 (holding that intent to render a witness unavailable can also be thought of as actions “designed” to render a witness unavailable.)

Mr. Anderson confessed to murdering Mr. Reardon for the purpose of excluding Mr. Reardon’s exculpatory evidence. (R.24). And there is no doubt that Mr. Reardon is now unavailable to testify because he is deceased. (R.24). Thus, only the intent element is at issue as to Mr. Barnes. As required under the *Dinkins* construct of forfeiture by wrongdoing and conspirator liability, the defendant himself must have designed, intended and acquiesced to rendering the witness unavailable.

United States v. Gray provides a useful application of the intent element of forfeiture by wrongdoing. 405 F.3d 227. There, the defendant was accused of defrauding insurance companies by collecting insurance money on the men she murdered. *Id.* at 231. When the defendant’s second husband became aware that the defendant murdered her first husband and subsequently made attempts on his life, he filed criminal charges. *Id.* Before trial began, the defendant killed the second husband. *Id.* 231-32. When the defendant objected to the admission of the second husband’s prior testimony, the court applied the forfeiture by wrongdoing rule in overruling her objection. *Id.* at 241. The court focused on the second element, intent to render the witness unavailable for trial. *Id.* It held that the rule applied, so long as the defendant intended to render the witness unavailable for *any* testimony against her. *Id.* *See also United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000)(holding that intent is satisfied where murder of the witness was motivated “at least in part” on the desire to preclude the witness’s testimony).

Here, Mr. Barnes’s actions do not meet the intent requirement. Unlike the defendant in *Dinkins*, who had made an attempt on the witness’s life prior to being taken into custody, here

Mr. Barnes did not ever attempt to harm Mr. Reardon. Despite Mr. Barnes being out of custody at the time of the murder, and despite his apparent access to firearms, Mr. Barnes still did not attempt to kill Mr. Reardon. Additionally, Mr. Barnes's actions are unlike those in *Gray*, where the defendant killed the witness herself in an effort to prevent him from giving any testimony. Instead, even in the face of Mr. Reardon's second thoughts regarding the trio's plan, Mr. Barnes discouraged and denied Mr. Anderson's suggestions that they kill Mr. Reardon.

Because Mr. Barnes explicitly expressed his intent that Mr. Reardon *not* be harmed, he also did not acquiesce to the murder. (R.24). *Ditkins* provides, acquiescence can be thought of tacit approval or acceptance of a co-conspirators plan to procure the unavailability of the witness. Unlike that case, where there was tacit approval based on the common purpose of the defendant's street gang to keep witnesses from testifying, here Mr. Barnes expressly objects to killing Mr. Reardon, even going as far as to say, "I don't want anything to do with this" referring to Mr. Reardon's murder. (R.24). That express rejection of Mr. Anderson's idea to kill Mr. Reardon also suggests that Mr. Reardon's murder was not within the scope of the conspiracy.

The Court in *Pinkerton* held that an act is within the scope of the conspiracy if the act is in furtherance of the illegal objective. 328 U.S. at 646 (1946). There, the co-conspirators were charged with tax fraud, but there was only evidence of one co-conspirator carrying out the substantive offenses. *Id.* at 642. Thus one defendant objected to the imputation of the other's acts. *Id.* The Court upheld the imputation, holding that furtherance of the illegal objective has been interpreted to mean any overt act by a co-conspirator done for the purpose of and essential to, committing the target offense. *Id.* at 647. The Court further opined that absent affirmative withdrawal, each of the co-conspirators may be held liable for the others actions. *Id.* at 646.

Here, Mr. Anderson's actions are outside the scope of the conspiracy. The target offense was elephant poaching, thus activities such as weapons purchase and helicopter rental are within the scope of, or essential to, the criminal enterprise. Unlike *Pinkerton*, where the acts committed by one co-conspirator were essential to committing the target tax fraud offense, here, killing Mr. Reardon was not essential to the elephant hunt. Despite Mr. Anderson's contention that in order to successfully complete the plan, they would need to keep Mr. Reardon from exposing it to the public, there were other means to ensure Mr. Reardon does not derail their conspiracy. In fact, Mr. Barnes, recognizing the need to keep Mr. Reardon from exposing their plan, tells Mr. Anderson to "shut him up," while also telling Mr. Anderson not to kill him. This suggests that Mr. Barnes has considered other ways to keep Mr. Reardon from derailing the plan, while simultaneously recognizing that he does not want Mr. Reardon murdered.

Additionally, Mr. Barnes made clear that he wanted nothing to do with any action against Mr. Reardon. This withdrawal falls squarely in the exception to conspirator liability, which allows a defendant to affirmatively withdraw his consent to the acts of his co-conspirators. When Mr. Barnes told Mr. Anderson that he does not want anything to do with Mr. Reardon's murder, he withdrew his consent, thus foreclosing any opportunity for liability as to the murder.

Therefore, even if this Court observes that the Mr. Reardon's murder was reasonably foreseeable based on the conversations between Mr. Barnes and Mr. Anderson, Mr. Barnes is still not liable for the death of Mr. Reardon because the Mr. Barnes affirmatively withdrew his consent. Although reasonable foreseeability was enough to support a finding of forfeiture by wrongdoing where the defendant himself was not a party to the witness's murder in *Carson*, there the defendant also knew of and acquiesced to the murder. Here again, Mr. Barnes affirmatively withdrew any consent to Mr. Reardon's murder. Additionally, in *Carson*, the

murder was found within the scope of the conspiracy, whereas here, Mr. Reardon's murder is outside that scope.

The appropriate test for forfeiture by wrongdoing by way of conspiracy liability is one that recognizes the need for the defendant's own intent to render the witness unavailable. Given the weight attached to denying a citizen his constitutional rights, mere knowledge of a murder or mere involvement in a conspiracy is not sufficient to establish waiver of the right to confrontation. The circuit court opinions of late illustrate this narrowing in application of the rule.

II. BECAUSE AN ABSOLUTE JOURNALIST PRIVILEGE IS IN CONFORMITY WITH THIS COURT'S ADOPTION OF OTHER PRIVILEGES, AND BECAUSE IT PROMOTES IMPORTANT PUBLIC INTERESTS, AND PROVIDES AN EFFICIENT, UNIFORM FRAMEWORK FOR APPLICATION, ADOPTION OF SUCH A PRIVILEGE IS APPROPRIATE.

Branzburg v. Hayes provides the starting point for the current standard of journalist privilege at the federal level. 408 U.S. 665, 707 (1972). Per *Branzburg*, Congress has the authority to create legislation to address the "evil discerned" by not recognizing a privilege and to modify the same as the passing of time dictates. *Id.* Congress did just that in enacting Federal Rule of Evidence 501, which provides that the common law shall govern all privilege questions, unless otherwise addressed in a superseding document. Fed. R. Evid. 501. Thus the current common law test, as reaffirmed in *Jaffee v. Redmond*, provides that a privilege should exist where honoring such a privilege "promotes sufficiently important interests (that) outweigh the need for probative evidence." 518 U.S. 1 (1996) citing *Trammel v. U.S.*, 445 U.S. 40, 47.

The Court has not been reluctant to create new privileges under this framework—recognizing psychotherapist privilege and even extending it to social workers; providing a mediation privilege that protects communications related to proceedings before a neutral

mediator; and articulating a settlement privilege that protects communications made during settlement negotiations. *See generally* *Jaffee*, 518 U.S. 1 (1996); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Folb v. Motion Picture Industries Pension and Health Plans*, 16 F. Supp. 2d 1164, 1170-1180 (C.D. Cal. 1998); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-981 (6th Cir. 2003).

In creating the aforementioned privileges, the Court employed a three-part test. *Jaffee*, 518 U.S. at 9-14. First, the court considered any “significant public and private interests that would be served” by recognition of the privilege. *Id.* at 11. Second, the “relative weights of the interests to be served by the privilege and the burden on the court’s truth-seeking function that might be imposed by it.” *Id.* at 11-12. Last, the court considers “reason and experience,” which has been interpreted to mean the extent to which other jurisdictions recognize the privilege in question. *Id.* at 13. This framework provides an outline for analysis of journalist privilege in the instant case.

- A. Because there are significant public and private interests in recognizing a journalist privilege, which are not outweighed by the burden on the court’s truth-seeking function, and because reason and experience suggest recognition of such a privilege is appropriate, the journalist privilege here should be upheld and Ms. Crawley should not be required to turn over the identity of her source.

Public and Private Interests

The public and private interests that will be served by recognition of a journalist privilege include fostering free communication between public and press, encouraging truth in discussion and reporting, and respecting the established relationship of public and press. Historically, the Court has found these to be significant public and private interests. *See generally* *Upjohn Co.*, 449 U.S. 383; *Trammel*, 445 U.S. 40; *Jaffee*, 518 U.S. 1.

This Court recognized the important interest of free communication in *Upjohn Co.* 449 U.S. at 393. In that case, an attorney interviewed employees of the corporation he represented in the course of a Securities and Exchange Commission (“SEC”) investigation. *Id.* at 386-87. When the Internal Revenue Service (“IRS”) demanded transcripts of the attorney-employee interviews, the employees claimed attorney-client privilege. *Id.* at 388. In allowing the attorney-client privilege claim to prevail, the Court noted that in order to foster free communication between attorney and client, the parties must be able to “predict with some degree of certainty whether particular discussions will be protected.” *Id.* at 393. The Court opined that the risk of narrowing the scope of the attorney-client privilege is the potential that employees of a represented corporation will not freely share information with the company’s attorney if their communications are subject to discovery. *Id.* at 397-98, citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

In *Jaffee*, the Court extended the psychotherapist privilege to social workers upon a finding that the psychotherapist privilege is rooted in the imperative need for confidence and trust. 518 U.S. at 9-10. There, a police officer sought counseling from a social worker following an incident where he shot and killed a man. *Id.* at 3-4. The officer resisted discovery of the social worker’s records regarding their conversation on a psychotherapist-patient privilege theory. *Id.* at 5. The court reasoned that because a psychotherapist’s ability to help depends entirely upon the “patient’s willingness and ability to talk freely,” recognition of a privilege is imperative to the proper functioning of their job. *Id.* at 11 (*citing* Advisory Committee’s Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)). *See also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987)(holding that the right to invoke journalist privilege, “emanates from the

strong public policy supporting the unfettered communication of information by the journalist to the public”).

Additionally, the right to invoke privilege respects certain well-established relationships. *Trammel*, 445 U.S. 40, 51. In *Trammel*, the defendant sought to exclude his wife’s incriminating testimony, despite her willingness to testify. *Id.* at 42. Although the Court’s focused on who can assert marital privilege, it also opined on the existence and importance of recognizing the privilege. *Id.* at 51. It held that marital privilege “furthers an important public interest in marital harmony.” *Id.* at 53. In support of this interest it notes that the “privileges between priest and penitent, attorney and client, and physician and patient...are rooted in the imperative need for confidence and trust.” *Id.* at 51. The Court reasoned that these interests would not be undercut by vesting the privilege in the witness spouse, rather than the defendant. *Id.*

By recognizing a journalist privilege, the Court recognizes the important public interest of fostering free communication. Like in *Upjohn*, where the Court held that in order for an attorney to be able to speak freely with a client, both parties must be able to “predict with some degree of certainty” what communications are protected, here in order for a journalist to be able to speak freely with the public, both parties must be able to rely on their conversation being protected. This is similar to *Jaffee*, wherein the Court recognized a similar need for psychotherapists to be able to encourage their patients to speak freely, as truth-seeking was an essential element of their duties. Likewise, here, in order for a journalist to accurately gather information to report to the public, sources must be assured with a reasonable degree of certainty that their communications will be protected.

An offshoot of fostering free communication is the need to encourage truth in discussion and reporting. Just as the Court in *Jaffee* recognized the most important aspect of therapy is

honest discussion, here, the press's most important duty is honest reporting for the public. The press's role as watchdog will be squelched if journalists cannot assure their sources that any tips will remain protected. Indeed, the court in *von Bulow* noted that "free flow of information to the public emanates from the strong public policy supporting unfettered communication of information by the journalist to the public." This "unfettered" communication, which will enable journalists to publish the truth, can only take place under the protection of a journalist privilege.

Additionally, recognizing a journalist privilege will respect the well-established relationship between press and source. Like *Trammel*, where the court listed other well-established relationships in upholding a marital privilege, here we ask the court to take similar notice in upholding the relationship of press and public sources. Each of the relationships cited in *Trammel* have been recognized in some form for centuries, and each depends upon free exchange of information for success. Accordingly, the relationship between those professionals disseminating the news and the public from whom the journalists get their information, has also been in existence for centuries, and should accordingly be afforded the same protections as those listed in *Trammel*.

Scholars have also discussed the public interest need for journalist privilege, citing an exponential increase in the number of subpoenas served on reporters over the last 50 years. *See* Achal, Mehra, *Newsmen's Privilege: An Empirical Study*, 59 *Journ. Q.* 560, 561 (1982); Reporters Committee Survey on Incidence of Media Subpoenas, finding 829 subpoenas served on only 319 news organizations who responded, <http://www.rcfp.org/reporters-committee-releases-survey-incidence-media-subpoenas>. As news is reported more quickly, accurately, and exhaustively than even 50 years ago, the information journalists have available to them has also grown exponentially. This creates a situation wherein journalists have amassed a body of

knowledge that is often useful to litigants. Thus litigants, attorneys, and lower courts need a clearly articulated privilege for journalists that may be applied even-handedly in any case.

Not only does the journalist privilege serve important public interests that this Court has already upheld as sufficient to support a common law privilege, but the vast increase in the number of subpoenas on journalists in the past 50 years demands a clearly-applicable rule.

Burden Upon Court's Truth-Seeking Function

The burden on the court's truth seeking function is reasonably low under the well-established test employed by circuit courts. In order to overcome the important interest in protecting journalist communications, the propounding party must show that the evidence is highly material and relevant, necessary or critical to the maintenance of the claim and not obtainable from any other source. *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (1982)(citing *Baker v. F & F Investment*, 470 F.2d 778, 783-85 (2d Cir. 1972)); *See also Zerilli v. Smith*, 656 F.2d 705, 713-15 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

The Second Circuit provides a good example of a situation where the burden does outweigh the interest. *New York Times Co. v. Gonzales*, 459 F.3d 160 (2006). In *New York Times*, the journalist sought protection of two phone calls between the journalist and two Islamic charities. *Id.* at 163. The government was planning to freeze the assets and conduct searches of these two charities, but was derailed from doing so when the paper published an exposé of the government's plan. *Id.* The court applied the *In re Petroleum Products* three-part test and held the government's interest in maintaining the secrecy of their plan outweighed the papers interest in protecting the phone calls. *Id.* at 170. Thus, obtaining the phone calls was essential to maintenance of the government's investigation. *Id.* Additionally, the information in the phone

calls could not be obtained from any other source, and the information therein could be material and relevant to the investigation. *Id.*

The seriousness of the information sought in *New York Times* is much greater than the information sought here. Unlike that case, where obtaining the phone calls was essential to maintaining the investigation, here the government already had enough evidence to file charges, suggesting that the journalist's source information is not essential to maintaining the claim. Further, the information sought from the journalist source could be obtained by way of the newspaper article, or the journalist herself, which is unlike *New York Times*, where the phone calls were the only source for the contents therein.

Lastly, the material and relevance to the investigation. Here, the source's information may be material and relevant, but there is no way to know that without first obliterating the journalist privilege. Thus, even if the material is relevant, the interest in protecting confidential journalist-source communications is too great to be overcome.

Lower courts have even developed a test for determining to whom the privilege should apply, thus ensuring the courts are not unduly burdened in application of the privilege. *von Bulow*, 811 F.2d 136. To determine if the journalist is within the scope of those protected, the circuit courts look at the intent of the journalist at the time the information being sought was gathered. *Id.* at 142. And scholars have accepted this test as workable and proper. *Common Law or Shield Law? How Rule 501 Could Solve the Journalist's Privilege Problem*, 33 Wm. Mitchell L. Rev. 1347 at 1384. Thus, a protected journalist is one who had the intent, at the time the information was gathered, to disseminate the same to the public. *Id.*

Because there is not too high a burden on the truth-seeking function by recognizing a journalist privilege, and because there is a workable test for determining to whom the privilege applies, the journalist privilege withstands the burden analysis.

Reason and Experience

Although there is a split of authority among the lower courts as to whether journalist privilege should be recognized, only one court has outright rejected the same. (*In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987). In fact, the trend toward recognition of the privilege is evident in more recent lower court opinions. *Common Law or Shield Law?* 33 Wm. Mitchell L. Rev. 1347. In examining “reason and experience,” the Court looks to the states for guidance. *Jaffee*, 518 U.S. at 13.

The Court in *Jaffee* examined the reason and experience factor in establishing a common law psychotherapist-patient privilege. *Id.* at 13. There, all 50 states had adopted some form of the psychotherapist privilege. *Id.* at 14. The Court noted that although the Judicial Conference Advisory Committee did not specifically address the psychotherapist privilege, it also did not foreclose the opportunity for adoption of a common law rule. *Id.* Upon those findings, the Court adopted the psychotherapist privilege. *Id.* at 15.

The *Trammel* Court also examined the reason and experience element in modifying the marital privilege. 445 U.S. 40. The defendant in *Trammel* wanted to prevent his wife from testifying against him. *Id.* at 43. In holding that a spouse must herself claim exemption from testifying by way of marital privilege, the Court examined the state’s trends on the issue. *Id.* at 48. The Court noted that the number of states that allowed a defendant to keep their adverse spouse from testifying dropped from 31 to 24 in recent years. *Id.* This trend toward vesting marital privilege rights in the testifying spouse compelled the Court to follow suit. *Id.*

Currently, 31 states and the District of Columbia have adopted statutory journalist privilege laws. Two additional states have enacted statutory protection through adoption of a court rule. And in the 18 states without statutory journalist protections, most recognize a common law privilege. *Common Law or Shield Law?* 33 Wm. Mitchell L. Rev. at 1355-1356, fn 55, 56, 57. Thus, all 51 jurisdictions have some form of journalist protection. Just as in *Jaffee*, where the court adopted a psychotherapist privilege based on all 50 states having already done the same, here, all 50 states plus the District of Columbia provide some sort of journalist protection. Additionally, like *Trammel* where the Court noted a trend, here the states have one by one moved toward adopting some form of journalist protection. Because reason and experience are overwhelmingly in favor of formally recognizing a journalist privilege, such a rule should be formally adopted. When combined with the interest-burden balancing test, the benefits of protecting journalists and their sources is too great ignore.

B. In the interest of judicial efficiency, and to properly promote the interests underlying the journalist privilege, adoption of an absolute journalist privilege is appropriate.

In examination of other privileges courts consider the rationale underlying the privilege and the practicality in application of the privilege. *Jaffee*, 518 U.S. 1; *Upjohn*, 449 U.S. 383. Just as those examinations have yielded absolute privileges, so too should the journalist privilege be absolute. *Id.*

Jaffee is again instructive for our examination in the instant case. The Court was tasked with assessing the effectiveness of a balancing test adopted by the lower court, whereby the privilege would attach if the patient's privacy interest outweighed the evidentiary need for disclosure. *Jaffee*, 518 U.S. at 7. The court reasoned that "making the promise of confidentiality contingent upon a trial judge's later evaluation—of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure—would eviscerate the effectiveness of

the privilege.” *Id.* at 17. The court further opined that an “uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Id.* at 18.

The Court examined a similar question in *Upjohn*. There, the lower court adopted a “control group test,” which made attorney-client privilege dependent upon whether the employee was within the control group—defined as those who play a substantial role in the company—at the represented company. *Upjohn*, 449 U.S. at 390. This Court rejected that approach on the grounds that it was unpredictable and inefficient. *Id.* at 393. In making the privilege absolute, the court reasoned that the “attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.” *Id.*

The very same concerns with qualified privilege that existed in *Jaffee* and *Upjohn* are also present here. Just as in *Jaffee*, where the balancing test undermined the effectiveness of the privilege, here, if a journalist’s source cannot rely on confidentiality until a judge makes a determination of whether she qualifies, then the source will not be compelled to share information. This would effectively undermine the very essence of the journalist privilege—encouraging the free exchange of information between public and press.

As *Upjohn* notes, a case-by-case, before-the-fact analysis of whether a person qualifies for a privilege is inefficient and unpredictable. Inefficient in that courts will be compelled to make these preliminary determinations before any disclosure has even occurred, and unpredictable because without an established rule, the results of such determinations will vary by jurisdiction. Additionally, adopting the circuit courts’ test for determining who qualifies as a journalist for purposes of the privilege will narrow the privilege’s applicability, thus reducing the

unpredictability in the courts and supporting absolute protection for those within the scope of the privilege.

The overwhelming trend toward recognition of a journalist privilege is too persuasive in this instance. The ever-growing information and news network requires that this Court promulgate a uniform rule for journalist privilege. The public interest in recognizing such a privilege is great, and is not outweighed by any minimal burden on the court's truth-seeking function. In order to avoid confusion and inefficiency among the lower courts, and to encourage the free exchange of information between public and press, the privilege must be absolute. Under such a construct, the video taken by Ms. Crawley, for her own investigative purposes only, will not be admissible.

III. AGENT SIMANDY'S TESTIMONY REGARDING CODED WORDS AND PHRASES IS INADMISSIBLE BECAUSE HE LACKS FIRSTHAND KNOWLEDGE OF THE INFORMATION TO WHICH HE IS TESTIFYING, AND HE DOES NOT HAVE EXTENSIVE ENOUGH TRAINING AND EXPERIENCE IN SIMILAR INVESTIGATIONS TO OVERCOME THIS LACK OF KNOWLEDGE.

According to Federal Rule of Evidence 701, opinion testimony that is not categorized as expert, is considered lay opinion testimony. Fed. R. Evid. 701. The admissibility of lay opinion testimony is subject to three elements: 1) "when rationally based on the witness's perception"; 2) "when helpful to clearly understanding the witness's testimony or to determining a fact in issue"; and 3) "when not based on scientific, technical, or other specialized knowledge...". Fed. R. Evid. 701. The question before the Court limits the scope of this examination to the first factor—first-hand witness perception. (R.37).

The advisory notes attached to Rule 701 explain that the witness perception requirement is the "familiar requirement of first-hand knowledge or observation." The Federal Rules of Evidence test for personal knowledge is codified in Rule 602. Fed. R. Evid. 602. That rule

limits testimony to only that which the “witness has personal knowledge of,” and notes that this determination can be based on the witness’s own testimony. *Id.*

In *United States v. Johnson*, the Fourth Circuit held that personal knowledge is not satisfied where the witness is merely making “post-hoc assessments” of another person’s work product. 617 F.3d 286, 293 (2010). There, a federal agent with 18 years experience presented testimony of a legal wiretap investigation. *Id.* at 288-89. He explained the coded meaning of seemingly innocuous phrases used by defendant. *Id.* at 288. The officer’s testimony was based on his years of experience on related cases and his review of various other related sources. *Id.* at 293. In finding this testimony inadmissible, the court reasoned that the officer would need to have participated in the surveillance, or at the very least, listened to the calls himself. *Id.* It further held that after-the-fact assessments are not sufficient to satisfy where there is a personal knowledge requirement. *Id.* See also *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001)(holding that where an officer testifies as to the meaning of criminal jargon, but is not certified as an expert witness, the officer’s testimony is considered lay opinion and is subject to the personal knowledge requirement).

Further, in narrow circumstances where an officer testifies without firsthand knowledge, but has sufficient familiarity with the case otherwise, the officer’s lay opinion testimony may be admitted. *United States v. Jayyousi*, 657 F.3d 1085, 1103 (2011). In *Jayyousi*, the government sought to introduce the testimony of a federal agent regarding the coded meaning of words and phrases used by terrorist organizations. *Id.* at 1093. The agent became familiar with the coded language after working on the case for five years and reviewing hundreds of transcribed phone calls, wiretap summaries, and other publications and speeches. *Id.* The defense’s objection to the testimony, that it was inadmissible because the witness did not rationally perceive it, was

overruled by the court. *Id.* at 1102. The court held that the exhaustive review of related documents and the long-term focus by the agent on this and related case(s), rendered him able to perceive the meaning of coded language that the jury could not discern. *Id.* at 1103. The opinion emphasizes that the testimony in question was learned and tested by the agent over the course of his five-year investigation. *Id.*

Additionally, although opinions and inferences are admissible under 701, such opinions and inferences must be drawn from the witness's firsthand knowledge. *Beech Aircraft Corp v. Rainey*, 488 U.S. 153, 169. In *Beech Aircraft*, both plaintiff and defendant sought to introduce a Judicial Advocate General ("JAG") report detailing facts, opinions, and recommendations as to how the plane crash occurred. *Id.* at 157. In allowing the report, the Court explains the personal knowledge requirement. *Id.* at 169. Specifically, the Court articulates that, "Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact." *Id.* Thus, the report was admissible because it contained opinions and inferences made by the JAG officer following his firsthand investigation. *Id.* at 158.

Agent Simandy lacks the necessary firsthand knowledge that would render his lay opinion to be admissible. Like *Johnson*, where the court excluded the agent's testimony regarding the meaning of coded words and phrases because the agent was neither directly involved in the surveillance nor listened to the recorded calls himself, here Agent Simandy took over for Agent Blackstock in the last year of the investigation, gleaning his opinion from reviewing transcripts, not from his own surveillance or even his own transcription of the calls. This is consistent with this Court's decision in *Beech Aircraft*, wherein a JAG report was admitted despite it containing the agent's opinions, because those opinions were based on the

agent-author's firsthand knowledge from the agent's hands-on participation in the investigation. Thus, also consistent with *Johnson*, had Agent Simandy participated in the surveillance, the opinion testimony would likely be admissible.

Some lower courts rely on an agent's extensive background and training in satisfying the firsthand knowledge requirement, but even that element is missing from the instant case. Agent Simandy is a five-year agent with the FBI and in that time worked mostly on drug-related cases. Compare this to *Johnson*, wherein the court did not find 18 years of experience sufficient to render the agent's opinions admissible. Although *Johnson* does not indicate in what area the agent was trained, this determination only strengthens respondent's position—if the agent had 18 years of a variety of experience and the court excluded his testimony, and here Agent Simandy had only five years varied experience, surely the 13-year difference is enough to render Agent Simandy's testimony inadmissible. If the agent in *Johnson* had 18 years of the same training and experience as the case in question, and the court still excluded his testimony, that strengthens inadmissibility here, where there is not the consistency in Agent Simandy's training and experience.

Compare Agent Simandy's experience with that of the agent in *Jayyousi*. Unlike that case, where the agent worked on the case in question for five years in the course of which he reviewed hundreds of varied documents, here Agent Simandy had only been assigned to the case for one year and only read approximately one dozen call transcripts. Thus, unlike *Jayyousi*, where the agent's extensive training and experience persuaded the court because the agent could discern the meaning of codes and phrases that the jury could not, here Agent Simandy's knowledge is not so much greater than the jury's such that it is strong enough to overcome his lack of firsthand knowledge.

There are certain topics on which lower courts have permitted lay witnesses to express an opinion. They include “the appearance of persons or things, identity, the manner of conduct, competency of a person, feeling, degrees of light or darkness, sound, size, weight, distance ...” Rule 701: Opinion Testimony By Lay Witnesses, 12 Touro L. Rev. 513, 516 (1996)(quoting Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 417 (1952). This is comparable to *Beech Aircraft*, wherein the JAG investigator, upon his firsthand experience at the plane crash site was able to testify as to his opinion on the appearance of the wreckage, presumably including size, weight, and distance calculations. But here, Agent Simandy is limited to making only those assessments that are within the four corners of the transcript he reviewed.

Because Agent Simandy lacks firsthand knowledge, and his training and experience is not extensive enough to overcome that lack, his testimony regarding the coded meaning of certain words and phrase should be inadmissible and the Court of Appeal for the Fourteenth Circuit should be affirmed.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the decision of United States Court of Appeals for the Fourteenth Circuit, and find 1) Mr. Best’s hearsay testimony is inadmissible, 2) Ms. Crawley may claim journalist privilege, and 3) Agent Simandy’s lay opinion testimony on the meaning of coded words and phrases be excluded.