No. 12-647

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2012

UNITED STATES OF AMERICA,

Petitioner,

— against —

WILLIAM BARNES,

Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Under Federal Rule of Evidence 804(b)(6), a party forfeits the right to oppose the admission of a hearsay statement if the party caused or acquiesced in procuring the declarant's unavailability. Alfred Anderson, a co-conspirator of the appellee, William Barnes, murdered a witness named James Reardon before the commencement of trial. Are out of court statements made by Reardon admissible against Barnes?

II. Testimonial privileges are governed by Federal Rule of Evidence 501, which does not expressly create a privilege for news reporters. At trial, a news reporter, Kara Crawley, claimed a reporter's privilege when she refused to identify an informant who is the sole source of information that directly incriminates William Barnes. Does a federal reporter's privilege apply and, if so, do the facts of this case warrant an exception to such a privilege?

III. Federal Rule of Evidence 701 permits the admission of lay witness opinions where such opinions are rationally based on the witness's own perceptions, helpful to the jury in understanding the case, and not based on scientific, technical, or specialized knowledge. By reviewing and analyzing transcripts of conversations between William Barnes and his co-conspirator, FBI agent Thomas Simandy formed an opinion about a suspected code used by Barnes. Is Agent Simandy's opinion admissible to assist the jury in understanding the communications between Barnes and his co-conspirator?

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STATEMENT OF THE CASE

Statement of Facts

For decades, Ben Barnes's Big Top Circus brought joy and excitement to audiences nationwide. (R. 1.) The circus's main attraction was majestic Asian elephants, which brought acclaim and financial success to Big Top Circus. (R. 1.) When not performing, the elephants enjoyed grazing in South Boerum's grasslands. (R. 1.)

After Ben passed away in 2000, Ben's son William inherited Big Top Circus. (R. 1.) William Barnes seemed to be a pillar of the community, running the circus and raising charitable donations through "Boerum 4 Animals." (R. 1.) But beneath this carefully crafted façade, "Boerum 4 Animals" was just a front for Barnes and his friend, Alfred Anderson, to fund bear-hunting trips. (R. 2.) When authorities uncovered the scam in 2010, Anderson took the fall. (R. 2.) Barnes escaped with his reputation intact. But trouble was on the horizon.

By 2011, Barnes had nearly bankrupted Big Top Circus. (R. 1.) Still trading on his father's goodwill, Barnes reached out to Boerum City Circus and Flying Feats Circus in July 2011. (R. 1–2.) Barnes proposed staging special holiday performances to feature all three circuses' elephants. (R. 2.) The other two circuses would be allowed to graze their elephants on Big Top Circus's land. (R. 2.) Having no idea about Big Top's financial difficulties, the other circuses accepted. (R. 2.) To build excitement for the holiday spectacular, Barnes contacted Kara Crawley, a reporter with the Boerum Times. (R. 2, 9.) Barnes offered Crawley unrestricted access to give the holiday spectacular free publicity. (R. 9.)

While planning the holiday spectacular, Barnes contacted his old hunting buddy, Alfred Anderson, with a sickening plan. (R. 2, 7.) Barnes proposed that Anderson join him in slaughtering all three circuses' elephants. (R. 2.) Barnes suggested using assault weapons to shoot the defenseless animals from a helicopter before ripping the tusks from their carcasses and illegally selling the highly valuable ivory. (R. 7.) Anderson agreed to the plan and suggested they add James Reardon as a third "hunter." (R. 7.) The plan was set. Barnes would hire a helicopter and acquire the assault rifles.

Thankfully, Barnes's web of deception began to unravel. Barnes unknowingly contacted an undercover ATF agent to purchase assault rifles. (R. 2.) The FBI obtained a warrant and listened to Barnes's phone calls. The FBI heard Barnes cryptically relay progress reports to Anderson, using code words like "blood diamonds" in reference to the ivory. (R. 13.) Outside the FBI's hearing, Barnes contacted Alan Klestadt of Copters Unlimited to rent a helicopter for the slaughter. (R. 3.)

During her visits to Big Top Circus, Kara Crawley discovered an employee who had overheard Barnes discussing plans for the elephant slaughter. (R. 10.) The employee feared Barnes would retaliate. (R. 10.) Crawley agreed to use a pseudonym for the employee and not publish the tips while the employee was still working at the circus. (R. 10.) The employee allowed Crawley to videotape an interview without the employee's identity concealed. (R. 10.)

There were also problems within the conspiracy. Anderson told Barnes that Reardon was having second thoughts after he learned the details of the plan. (R. 18.) Anderson proposed killing Reardon to silence him. (R. 19.) Barnes initially convinced Reardon not to do anything, but two weeks later, Anderson told Barnes he was going to

kill Reardon. (R. 19.) With almost a full day notice, Barnes did nothing to stop Anderson from killing Reardon. (R. 19.) On November 28th, Reardon told his friend, Daniel Best, about the planned slaughter. (R. 8.) Worried about his friend, Best went to Reardon's house on November 29th, only to find Anderson running away after killing Reardon. (R. 7.) Anderson was arrested and confessed to killing Reardon so that he would not expose the slaughter. (R. 7.)

Kara Crawley published her exposé December 1st, and Barnes was arrested later that same day. (R. 11.) About two weeks after the grand jury returned an indictment against Barnes, the FBI agent who transcribed all Barnes's phone calls died. (R. 12.) Agent Thomas Simandy took over the investigation the next day, and poured over the phone call transcripts. (R. 13.) Engulfing himself in the investigation, Agent Simandy learned the meaning of the code words from Barnes's calls. (R. 13.) The FBI contacted Kara Crawley, but she refused to reveal her confidential source. (R. 12.)

Procedural History

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

Beginning March 1st, 2012, the United States District Court for the Southern District of Boerum held oral arguments on pre-trial motions, and on May 2nd, 2012, the court announced decisions on the motions. First, the court denied the government's motion seeking to introduce Daniel Best's testimony under the Rule 804(b)(6) hearsay

exception. (R. 16.) Next, the court recognized a journalist's privilege under Rule 501. (R. 17.) Finally, the court denied the government's motion seeking to introduce Agent Thomas Simandy's testimony as a lay witness under Rule 701. (R. 17.)

On interlocutory appeal the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's rulings on July 12th, 2012. (R. 32.) The government then filed a petition for Writ of Certiorari to the United States Supreme Court, which was granted on October 1st, 2012. (R. 36, 37.)

SUMMARY OF THE ARGUMENT

At trial, the district court made three erroneous evidentiary rulings. First, the court improperly excluded, under Federal Rule of Evidence 804(b)(6), James Reardon's hearsay statement. Reardon was murdered by one of William Barnes's co-conspirators. Next, the district court erred when it permitted a reporter, Kara Crawley, to assert a testimonial privilege under Federal Rule of Evidence 501 and to refuse to identify an informant who disclosed information that directly incriminates Barnes. Finally, the district court incorrectly excluded, under Federal Rule of Evidence 701, testimony by FBI agent Thomas Simandy. Simandy uncovered a suspected code used by Barnes and his co-conspirator to communicate about the conspiracy.

The district court's exclusion of Reardon's statement was improper because Barnes forfeited his right to object to Reardon's statement when he participated in a conspiracy that resulted in Reardon's murder. Under Rule 804(b)(6), Barnes surrendered his right to object to the hearsay because he was complicit in securing Reardon's absence from trial. The trial court incorrectly held that for a party to forfeit objection to hearsay testimony, the party must have personally participated in the wrongdoing. Instead,

Federal Rule of Evidence 804(b)(6) states that a party forfeits the right to contest hearsay statements when the party merely acquiesces in the wrongdoing. Thus, Reardon's death at the hands of Barnes's co-conspirator is properly imputed to Barnes, and Barnes forfeited his right to confront the murdered witness.

The district court's refusal to compel Kara Crawley to identify her informant was error because, contrary to the court's holding, federal law does not recognize a testimonial privilege for news reporters under Federal Rule of Evidence 501. No testimonial privilege for news reporters existed at common law and no such privilege has ever been created by the Constitution, by federal statute, or by the Supreme Court. The district court further erred in holding that the privilege claimed by Crawley is an absolute privilege. Even if federal law recognized a reporter's privilege, such a privilege would be qualified, like other more well-established privileges .If a qualified reporter's privilege were applied here, the facts of this case would warrant an exception to the privilege because the evidence Crawley concealed is relevant and cannot be obtained from any other source. In addition, the fact that this is a criminal matter creates a compelling public interest in the admission of the evidence. Therefore, the district court should have required Crawley to identify her informant.

The district court's exclusion of FBI agent Simandy's testimony was erroneous because Simandy's opinion was rationally based on his personal observations and would have helped the jury understand the facts of this case. Simandy formed his opinion about the suspected code used by Barnes through rational inferences based on conversations uncovered during the FBI's investigation of the conspiracy. Therefore, the district court incorrectly held that Agent Simandy's opinion is expert testimony because the opinion is

not based on any scientific, technical, or other specialized knowledge. The district court further erred in requiring that Simandy have participated in the conversations with the conspirators. Such a rule would pervert justice where conspirators use non-verbal means of communication such as text messages. Finally, Simandy's testimony would assist the jury in understanding the cryptic communications between Barnes and his co-conspirator. Therefore, the district court should have admitted Simandy's testimony.

In issuing the three evidentiary ruling at issue in this appeal, the district court improperly interpreted and applied certain provisions of federal law. Although the Fourteenth Circuit upheld the district court's rulings, the Fourteenth Circuit's decision was based upon the same inaccurate interpretations and improper applications of federal law. Therefore, this Court should reverse the district court's rulings and remand this case to the lower court.

ARGUMENT

I. REARDON'S HEARSAY DECLARATION SHOULD BE ADMISSIBLE AGAINST BARNES BECAUSE BARNES WAS COMPLICIT IN REARDON'S MURDER AND FORFEITS THE RIGHT TO CONFRONT A WITNESS SILENCED BY HIS OWN WRONGDOING.

William Barnes should not be rewarded for participating in a criminal conspiracy that resulted in James Reardon's murder and unavailability to testify about the conspiracy. Hearsay statements are admissible against a party that acted with knowledge, complicity, planning, or in any other way resulting in the declarant's unavailability.[1] Any other result would "mock the very system of justice the confrontation clause was designed to protect." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

Forfeiture by wrongdoing, codified in Rule 804(b)(6), requires the defendant (1) engage or acquiesce in wrongdoing, (2) with the intent to render the declarant unavailable as a witness, and (3) the wrongdoing must in fact render the witness unavailable. United States v. Dinkins, 691 F.3d 358, 367 (4th Cir. 2012); United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005). Justice Rodriguez, writing for the Fourteenth Circuit, overreads this Court's opinion in Giles v. California by requiring a defendant personally commit the wrongdoing. In fact, Giles endorses the possibility that a defendant forfeits confrontation rights "when he uses an intermediary for the purpose of making a witness absent." Giles v. California, 554 U.S. 353, 360 (2008). Further, the only other circuit court considering this question, since Giles, held that conspiracy liability indeed applies to forfeiture-by-wrongdoing. Dinkins, 691 F.3d at 384.

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[1] United States v. Stewart, 485 F.3d 666, 670–71 (2d Cir. 2007); United States v. Dhinsa, 243 F.2d 635, 653–54 (2d Cir. 2001); United States v. Carneglia, 256 F.R.D. 366 (E.D.N.Y. 2009).

A. The plain language of Rule 804(b)(6) does not require direct, personal participation in the wrongdoing, but only acquiescence like Barnes demonstrated when Anderson killed Reardon.

Barnes acted with complicity and knowledge of his co-conspirator's plan to silence Reardon by "get[ting] rid of him." (R. 18.) Rule 804(b)(6) applies broadly to situations where a party agrees by consent or silence, and may be triggered by "bare knowledge" of plans to kill a witness. Mastrangelo, 693 F.2d at 273–74. Additionally, a party's actions on behalf of a criminal ringleader, like Barnes, may be imputed to him, operating to waive his hearsay objection as if he had murdered the witness himself.[2]

Barnes's acquiescence to his co-conspirator's plans to murder Reardon satisfies the plain the language of Rule 804(b)(6). Forfeiture by wrongdoing is established when the government proves the defendant's actions were designed to prevent the witness from testifying.[3] Yet Giles does not alter the forfeiture-by-wrongdoing exception to require a defendant personally commit the wrongdoing. Dinkins, 691 F.3d at 383.

Justice Rodriguez rejects the idea that Giles could be reconciled with vicarious liability through a criminal conspiracy even though Giles does not suggest that vicarious liability is improper under Rule 804(b)(6). The defendant in Giles murdered his ex-girlfriend. Giles, 554 U.S. at 356. Giles objected to a statement made by his ex-girlfriend to police three weeks prior to the shooting that he threatened to kill her if he found her cheating on him again. Id. at 357. The trial court admitted these statements under a California evidence code provision allowing out-of-court statements describing threats or

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[2] Dinkins, 691 F.3d 358, 383-84 (4th Cir. 2012); United States v. Rivera, 412 F.3d 562, 567 (4th Cir. 2005); Grayton v. Ercole, No. 07-CV-0485 (SLT), 2009 WL 2876239 at *19 (E.D.N.Y. Sept. 8, 2009).

[3] Giles, 554 U.S. at 367-68; Gray, 405 F.3d at 241.

actual physical injury when the declarant is unavailable to testify at trial. Giles, 554 U.S. at 357. The jury convicted Giles of murder, and a California appeals court upheld the conviction as not violating our holding in Crawford v. Washington. Id. at 368. In fact, Crawford determined defendants could forfeit their confrontation rights through their own wrongdoing. Id. at 365 (citing Crawford v. Washington, 541 U.S. 36, 62 (2004)).

One difference between Giles and the facts at bar is that Giles himself killed his girlfriend, unlike Barnes who merely acquiesced to Reardon's murder. Still, Justice Scalia addressed this possibility in Giles by recognizing the forfeiture rule includes conduct *designed* to produce unavailability. Giles, 554 U.S. at 360. Justice Scalia goes on to say that a witness made unavailable by the defendant's "means or procurement" includes a defendant who "uses an intermediary for the purpose of making a witness absent." Id. Therefore, a court must examine whether a defendant's purpose was to keep the witness out of court by his "means" or "contrivance." Id. This Court vacated and remanded Giles, but only because the lower courts did not consider Giles's purpose in killing his girlfriend. Id. at 377. This Court never stated Giles requires personal involvement in the wrongdoing. Rather, Giles informs us that a defendant's *purpose* is the central inquiry. If his purpose is to prevent testimony through an intermediary—for example, a co-conspirator—he forfeits his confrontation rights.

Such was the case in Dinkins. Dinkins, 691 F.3d at 358. The defendants ran a drug distribution ring and murdered the "snitches" who provided local law enforcement with details of their drug operation. Id. at 365. Dinkins, one of the drug dealers, was jailed after attempting to kill Dowery, a government cooperating witness. Id. While Dinkins was jailed, the other defendants threatened and ultimately murdered Dowery.

Dinkins, 691 F.3d at 375. Dinkins argued that because he was in jail and therefore unable to directly participate in the murder, Rule 804(b)(6) did not apply to Dowery's statements. Id. at 376. The court comprehensively rejected Dinkins's argument, holding that the term "acquiesce" includes wrongdoing attributable to the defendant even when not directly caused by him. Id. at 384.[4]

Barnes acquiesced to Anderson's idea to "get rid of [Reardon]," just as Dinkins knew a fellow drug dealer had plans to "finish [Dowery] off." (R. 7.); Dinkins, 691 F.3d at 385. Barnes knew Reardon was getting cold feet about the elephant hunt and he did not want Reardon to testify about the criminal conspiracy at trial. Much like Dinkins knew his co-defendants would silence Dowery from testifying about the drug syndicate, Barnes knew that his co-conspirator Anderson intended to silence Reardon. Although Dinkins did not directly participate in Dowery's murder, just as Barnes did not directly participate in Reardon's murder, the Dinkins court determined that Rule 804(b)(6) applied even when the defendant was in jail and had no power to personally act. Id. at 384. If the court could find Dinkins complicit while sitting in a jail cell, this Court can certainly find Barnes acquiesced in Reardon's murder because he knew of Anderson's plan to kill Reardon and did nothing to stop it.

Because Barnes tacitly accepted Anderson's plan to prevent Reardon from testifying by killing him, he was complicit in the murder and satisfies the "acquiescence" prong of Rule 804(b)(6). That Barnes allowed a co-conspirator to accomplish his intent by murdering a witness does not prevent application of Rule 804(b)(6) under Giles. In

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[4] See also Rivera, 412 F.3d at 567 (holding that personal commission of the crime is not required); United States v. Thompson, 286 F.3d 950, 964 (7th Cir. 2002) (defining "acquiesce" as "to accept or comply tacitly or passively").

fact, Giles reinforces the plain language of Rule 804 because a defendant's intent to silence a witness may be established by his acquiescence to a co-conspirator's murderous act.

B. Barnes forfeits his hearsay objection because conspiratorial liability applies to forfeiture-by-wrongdoing when a co-conspirator murders a witness to prevent his testimony.

Barnes waives his hearsay objection under the doctrine of conspiratorial liability, because he is responsible for his co-conspirator's murder that was designed to prevent Reardon's testimony. A defendant forfeits his hearsay objection when a preponderance of evidence establishes (1) he participated directly in procuring the declarant's unavailability or (2) the wrongful procurement was in furtherance, within the scope, and a reasonably foreseeable consequence of an ongoing conspiracy.[5] This Court is asked to balance confrontation clause rights with the interest in preventing witness tampering. Applying Pinkerton conspiratorial liability strikes the best balance between these interests while preventing "abhorrent behavior," like murdering a witness to a crime. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982). This protects the fundamental principle that a party should not profit from his own misdeeds.

In Cherry, five defendants were charged as part of a drug conspiracy. Cherry, 217 F.3d at 814. Most of the government's evidence came from a cooperating witness. Id. That witness was killed after one of the conspirators discovered his cooperation. Id. Because only one conspirator killed the witness, the district court refused to find the other defendants waived their confrontation clause rights. Id. The court held there was "absolutely no evidence [the other defendants] had knowledge of, agreed to, or

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[5] Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v. Cherry, 217 F.3d 811, 820 (2000).

participated in the [witness's] murder." Cherry, 217 F.3d at 814. On interlocutory appeal to consider the hearsay evidence, the Tenth Circuit determined that conspiratorial liability *could* apply, and remanded the matter for application of the Pinkerton tests. Id. at 822; see also United States v. Alvarez, 755 F.2d 830, 849 (11th Cir. 1985) (holding that murder was a reasonably foreseeable consequence of a drug conspiracy under Pinkerton because the amount of drugs and money involved was substantial, thereby allowing a reasonable jury to infer murder was a foreseeable consequence for anyone who threatened the operation.)

Pinkerton held that co-conspirator participation may be inferred when (1) the act was in furtherance of the conspiracy, (2) fell within the scope of an unlawful project, and (3) was reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. Pinkerton, 328 U.S. at 647–48. First, the act of killing Reardon was in furtherance of the effort to conceal and carry out the illegal elephant hunt, just like the co-conspirator in Cherry killed the witness to silence his testimony about an ongoing drug operation. Second, Reardon's murder facilitated the conspiracy's goal of keeping the elephant hunt quiet, much like the murder in Cherry allowed the illegal drug distribution and sales to continue undeterred. Because the basis of any criminal conspiracy is illegal activity, courts recognize a conspiracy's implied goal of secrecy to preserve its criminal operation. Id.; see also Cherry, 217 F.3d at 814.

Finally, Anderson's statements to Barnes show that Reardon's murder was a reasonably foreseeable consequence of the conspiracy. Similar to Cherry's informant who communicated the conspiracy's drug activities to police, Reardon's fate was sealed the moment he presented a risk of exposing the criminal operation. Further, just like the

conspiracy in Alvarez involved a large-scale drug operation, Barnes's conspiracy to illegally hunt elephants involved a sufficiently large amount of money and violation of federal laws to make it reasonably foreseeable that anyone jeopardizing the conspiracy would be silenced. Although the court in Alvarez conceded this was a novel application of Pinkerton's foreseeability requirement, it was not improper because the stakes were high enough that murder was the likely outcome for any defectors. Alvarez, 755 F.2d at 849.

The dissent in Cherry expressed concern that the majority's application of Pinkerton to forfeiture-by-wrongdoing is over-expansive—a concern that may be shared by this Court. Cherry, 217 F.3d at 822 (Holloway, J., dissenting). The dissent was unconvinced that a defendant with no actual knowledge or agreement to participate in the murder could have a fundamental, constitutional right waived by a co-conspirator. Id. The dissent's concern is understandable because that defendant did not know of nor did she participate in murdering the witness. But unlike the defendants in Cherry who were not aware of plans to kill the police informant, the record here shows Barnes unquestionably knew of his co-conspirator's plan to kill Reardon. (R. 18–19.) Even if Cherry is over-expansive, the facts in this record should alleviate any concern that Barnes was an unknowing, innocent bystander in Reardon's murder.

II. KARA CRAWLEY SHOULD REVEAL HER CONFIDENTIAL SOURCE BECAUSE FEDERAL LAW DOES NOT MANDATE A REPORTER'S PRIVILEGE.

There is no federal privilege that protects a journalist from disclosing the identity of a source. Federal Rule of Evidence 501 provides that common law shall govern a claim of privilege unless the United States Constitution, a federal statute, or a rule of the

Supreme Court suggests otherwise. Fed. R. Evid. 501. This Court has expressly held that no reporter's privilege exists under common law or the United States Constitution. Branzburg v. Hayes, 408 U.S. 665, 685 (1972). Furthermore, Congress has not enacted any statute nor has this Court devised any rule that creates a testimonial privilege for news reporters. Thus, journalists and reporters, like all citizens, have a duty to appear and give testimony relevant to federal criminal proceedings.

A. Neither the First Amendment nor the common law mandates a reporter's privilege according to the Supreme Court.

In the seminal case of Branzburg v. Hayes, this Court considered several appeals by news reporters who claimed that a testimonial privilege permitted them to withhold information from federal grand jury proceedings. Branzburg, 408 U.S. at 669–70. The reporters argued that requiring testimony about confidential sources unconstitutionally restrained the freedom of the press. Id. The Court, however, was not persuaded by the reporters' argument, noting that no reporter's privilege existed at common law. Id. at 685. In support of its holding, the Court drew attention to the fact that numerous courts had considered and rejected the notion of a reporter's privilege. Id.

Branzburg further held that neither the First Amendment nor any other constitutional provision grants a testimonial privilege to members of the press. Id. at 692. Mindful of the important role that the free press plays in our society, the Court found that the public interest in law enforcement is a sufficiently important interest "to override the consequential, but uncertain, burden on news gathering that result[s] from insisting that reporters . . . respond to relevant questions . . . in the course of a valid grand jury investigation or criminal trial." Id. at 690–91. Although the Court declined to recognize a constitutional reporter's privilege, it stressed that reporters are not without constitutional

protection. Branzburg, 408 U.S. at 692. The Court held that First Amendment freedom of the press shields reporters from government inquiries asserted in bad faith or with the intent to harass the reporter. Id. at 708. Thus, the First Amendment provides sufficient protection for reporters without creating a testimonial privilege that impairs the public's interest in law enforcement.

1. Congress has never enacted a statutory reporter's privilege nor has the Supreme Court established any rule that recognizes a testimonial privilege for news reporters.

The Supreme Court in Branzburg expressly observed that Congress was capable of enacting a reporter's privilege by statute. Branzburg, 408 U.S. at 706. In spite of much discussion, Congress has never passed a statute recognizing a reporter's privilege. Although most states have enacted a reporter's privilege, "state law privileges do not apply in federal question cases such as this."[6] Because Congress never created a federal reporter's privilege, and because state law privileges do not apply in federal question cases, no statutory reporter's privilege exists in federal law.

When Congress enacted Federal Rule of Evidence 501, which governs testimonial privileges, Congress neither explicitly nor implicitly created a federal reporter's privilege. The Advisory Committee that created Rule 501 considered and rejected a reporter's privilege. 23 Wright et al., Federal Practice and Procedure Evidence § 5426 (1st. ed. 2012). Federal circuit courts that have found a federal reporter's privilege under the authority of Rule 501 have relied on Jaffee v. Redmond, 518 U.S. 1 (1996); (R. 28–29.) In Jaffee, the Supreme Court created a psychotherapist-patient testimonial privilege. Jaffee, 518 U.S. at 1. Jaffee set forth three considerations for determining if a testimonial

[6] Patterson v. Caterpillar, Inc., 70 F.3d 503, 506 (7th Cir. 1995); McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003).

privilege exists at common law: (1) significant public and private are interests are served, (2) those interests outweigh the loss of evidence, and (3) the new privilege is justified by "reason and experience." Jaffee, 518 U.S. at 8–10.

In this case, the Fourteenth Circuit found a public interest in a watchdog press without any new evidence that warranted a departure from this Court's holding in Branzburg. (R. 28–29.) The Fourteenth Circuit determined that the press would be inconvenienced in reporting on the government if reporters must testify before juries, as other citizens must. (R. 29.) The Supreme Court in Branzburg, however, called this burden on the press "consequential [] but uncertain." Branzburg, 408 U.S. at 690. Even without a reporter's privilege, the uncertain burden on the press is lessened because, as Branzburg noted, the First Amendment protects reporters from bad faith questioning and harassment by judges or prosecutors. Id. at 709–10.

The Fourteenth Circuit further concluded that the evidence gained by denying a reporter's privilege would be modest. (R. 29.) The court again reconsidered the Supreme Court's holding in Branzburg and decided that without the protection of a testimonial privilege, journalist's sources would disappear. Id. Contrary to the Fourteenth Circuit's holding, the absence of a federal reporter's privilege has not deterred informants from coming forward before today. Branzburg, 408 U.S. at 691. The press in the United States has thrived for over two hundred years without a federal reporter's privilege. Creating a reporter's privilege today will tilt the established balance away from the public's interest in law enforcement and toward the interests of private reporters whose primary objective is to sell the news.

Finally, the Fourteenth Circuit found that "reason and experience" supports a reporter's privilege simply because a majority of states have enacted such a privilege. (R. 29.) The court, however, ignores the consequences of its holding on states that have chosen not to enact the privilege. The Supreme Court in Jaffee effectively enacted a psychotherapist-patient privilege without consequence on states that did not have the privilege because all fifty states and the District of Columbia had already created the privilege. Jaffee, 518 U.S. at 12. Some states already had statutory reporter's privilege when the Supreme Court decided Branzburg, but the Supreme Court still held there was no reporter's privilege under federal common law. Branzburg, 408 U.S. at 688–89.

2. The scope of a common law reporter's privilege is uncertain compared to well-established testimonial privileges.

A reporter's privilege is fundamentally different from virtually all of the more well-established privileges. Reporters are unlicensed and difficult to identify compared to regulated professionals such as lawyers and doctors. The growth of blogs and self-publishing on the Internet means that the role formerly occupied by professional reporters is now occupied by amateurs and hobbyists. The public interests protected by the reporter's privilege could easily apply to an amateur who posts a single blog entry. Applying a reporter's privilege to amateurs could expand the scope of the privilege beyond anything the Court can imagine. The problem of amateurs and hobbyists does not impact the attorney-client, doctor-patient or psychotherapist-patient privileges. These privileges protect a person who discloses information to obtain help within a fiduciary relationship. The reporter's privilege protects a professional who solicits information outside a fiduciary relationship and uses that information to sell news.

Not only does the reporter's privilege reverse the usual party that is protected, but it also reverses the party that holds the power to waive the privilege. Thus the protection of informants provided by a reporter's privilege is illusory because the reporters, not the informants, hold the power to waive the privilege. Legal consequences prevent attorneys and doctors from disclosing privileged client and patient information. Only the clients and patients can choose to waive the privilege. The reporter's privilege, however, does not protect confidential sources by imposing any legal consequences on a reporter who discloses a source's identity. The protection of confidential sources by the reporter's privilege can disappear at the whim of the reporter. Therefore, the protection that is only controlled by the interest of the reporter is meaningless.

Here, the confidential source within Big Top Circus did not want the tip published until the source no longer worked for the circus. (R. 22.) The source only wanted to remain anonymous while employed. Id. The fact that the story was published means that either the source is no longer employed at Big Top or Crawley published the story against the informant's wishes. In the first instance, the informant no longer wished to keep her identity hidden, so there is no justification for allowing Crawley to conceal the employee's identity. In the second instance, Crawley violated the confidence of the employee, thereby demonstrating the vulnerability of informants under a supposed reporter's privilege.

Law enforcement officers sometimes assert a privilege against identifying informers. Branzburg, 408 U.S. at 697. This privilege protects the public interest in law enforcement by encouraging citizens to share their knowledge with law enforcement officers. Id.; Roviaro v. United States, 353 U.S. 53, 59 (1957). The decision to expose a

police informer is made by public officials, as opposed to private figures who control the reporter's privilege. The benefits and costs of the reporter's privilege vary broadly by the source that is protected. Yet because the cost to the public of concealed evidence is sometimes extreme, any recognized reporter's privilege should be qualified.

B. Any reporter's privilege recognized by this Court should be qualified and not absolute.

The vast majority of jurisdictions that recognize a reporter's privilege hold that the privilege is qualified rather than absolute.[7] These courts recognize that "compelling public interests" overcome the reporter's privilege. New York Times Co. v. Gonzales, 459 F.3d 160, 173 (2d Cir. 2006); see also United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) (holding the reporter's privilege yields where information is sought that is "highly relevant, necessary to the proper presentation of the case, and unavailable from other sources) (*citing* Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir.1980)). The qualified reporter's privilege weighs the public interest in a free press against the public interest in justice.

Although proponents of an absolute privilege claim that qualification would frustrate the purpose of the privilege, evidence suggests this is not true. Compare Branzburg, 408 U.S. at 720–21 (Douglas, J. dissenting) (claiming that a qualified privilege will provide no protection) with Branzburg, 408 U.S. at 691 (noting that the free press thrived in the United States without a reporter's privilege). In all cases since

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[7] See, e.g., United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1998); New York Times Co. v. Gonzales, 459 F.3d 160, 173 (2d Cir. 2006); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980); Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993).

Branzburg, sources came forward in spite of the Court's express holding that there is no reporter's privilege under federal law.

Additionally, a reporter's privilege should be qualified, not absolute, because more well-established testimonial privileges are qualified. The Attorney-Client privilege is qualified by the "crime-fraud" exception, which does not protect plans for future illegal activity. In re Grand Jury Investigation, 631 F.2d 17, 19 (3d Cir. 1980). The marital communications privilege is qualified by an exception for crimes against children. United States v. Banks, 556 F.3d 967, 991 (9th Cir. 2009). Both of these scenarios are similar to the situation at bar. All three situations limit testimonial privileges to prevent or prosecute criminal activity.

An absolute privilege for reporters would impair any beneficial effect the free press has on the justice system. By allowing the concealment of a source of published incriminating information, an absolute reporter's privilege would allow the public to be informed about criminal conduct, but would deprive the public of evidence needed to bring a criminal to justice. Most troubling is that reporters would control the privilege and could choose when to waive the privilege and when to protect a source of evidence. Putting the balancing test in the hands of the reporter is placing too much power in the hands of a private actor. An absolute privilege would allow the reporter to interfere with federal criminal investigations and personally choose when to waive the privilege and violate the informant's desire to remain confidential.

1. Kara Crawley should be compelled to reveal the identity of her confidential source under a qualified reporter's privilege because the information is clearly relevant, cannot be obtained alternatively and is justified by a compelling interest.

The facts of this case warrant an exception to a reporter's privilege based on the criteria used by several circuit courts to qualify a reporter's privilege. Most courts that have adopted a qualified reporter's privilege use the test set forth by Justice Stewart's dissent in Branzburg. See, e.g., Gonzales, 459 F.3d at 173 (*citing* Branzburg, 408 U.S. at 743 (Stewart, J., dissenting)). Justice Stewart's test requires: (1) probable cause to believe the reporter has information that is clearly relevant to a specific violation of law; (2) demonstration that the information cannot be obtained by alternative means less destructive of First Amendment rights; and (3) a compelling and overriding interest in the information. Gonzales, 459 F.3d at 173.

In Gonzales, reporters learned that federal law enforcement planned to seize assets and execute searches of two organizations suspected of funding terrorists. Id. at 162. The reporters were the only witnesses that could reveal how the planned searches and seizures were disclosed. Id. The Second Circuit declined to decide if a common law reporter's privilege existed, but held that if a privilege did exist, it should be qualified and would be overcome on the facts. Id. at 169.

The information possessed by Kara Crawley would also overcome a qualified reporter's privilege based on Justice Stewart's test from Branzburg. Kara Crawley's information is clearly relevant because it "makes a fact of consequence more . . . probable." Fed. R. Evid. 401. Direct evidence that Barnes planned to hunt circus elephants for their ivory makes Barnes's participation in the conspiracy more probable. Crawley's source, the Big Top circus employee, is the only person who heard Barnes's conversation about the conspiracy. There is no other source of this information. This contrasts with the situation in Caporale, where information sought from two reporters

was obtainable through other means. Caporale, 806 F.2d at 1504. In Caporale, two reporters wrote about an investigation into jury tampering. Id. The reporters refused to testify. Id. The court did not compel the reports to testify because one reporter revealed his informant, thus creating another source for the information. Caporale, 806 F.2d at 1504.

The final prong of Justice Stewart's framework is satisfied because of the compelling and overriding interest in preventing and prosecuting this gruesome conspiracy. The public has a far greater interest in the outcome of criminal cases than it does it civil cases. United States v. Smith, 135 F.3d 963, 972 (5th Cir. 1998). In fact, the prevention and prosecution of planned future crimes is the very same interest that overrides the more widely recognized attorney-client privilege. Here, the employee's testimony about Barnes's conversation amounts to a confession by Barnes on the ultimate issue in this case—a plan to commit a criminal act. Fed. R. Evid. 801(d)(2)(A). In addition, the government has a compelling interest in admitting this evidence because it is necessary to the presentation of the prosecution's case. Furthermore, the employee does not have a reasonable expectation of confidentiality because Crawley videotaped the employee without obscuring the employee's identity. Smith, 135 F.3d at 972 (holding that information was not confidential where a reporter made a videotape of statements made by a witness). Using the reporter's privilege to protect the identity of an employee who had no reasonable expectation of confidentiality does not outweigh the public's interest in prosecuting this conspiracy.

This Court should overturn the Fourteenth Circuit's finding of an absolute reporter's privilege. The Supreme Court already expressly held in Branzburg that no

federal reporter's privilege exists under the First Amendment or under federal common law. Even if the Court determines that a common law reporter's privilege has developed since Branzburg, the reporter's privilege should be qualified rather than absolute because the public interest in having all evidence available to juries outweighs the speculative benefit of more confidential press informants. The testimony of Crawley's confidential source's testimony is relevant, not obtainable through other means, and supports the compelling and overriding interest in convicting the leader of a criminal conspiracy to slaughter circus elephants with automatic rifles.

III. AGENT SIMANDY'S LAY OPINION TESTIMONY IS ADMISSIBLE BECAUSE IT IS RATIONALLY BASED ON HIS PERCEPTIONS, HELPFUL TO THE JURY, AND IS NOT EXPERT TESTIMONY.

Agent Simandy's lay opinion testimony is admissible under Federal Rule of Evidence 701. Lay witnesses may offer opinions that are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Agent Simandy read transcripts of Barnes's telephone conversations and personally interviewed two witnesses who talked with Barnes. Agent Simandy then considered the meaning of Barnes's conversations in context and rationally inferred the meaning of certain code words. Agent Simandy's testimony about his rational inferences would help the jury understand all the evidence in context and determine whether Barnes participated in a conspiracy to slaughter elephants for their ivory. Making rational inferences from evidence in a single criminal investigation is not "based on scientific, technical or other

specialized knowledge" and therefore not expert testimony under Rule 702. Fed. R. Evid. 702.

A. An investigating agent's opinion about the meaning of code words based only on the investigation is not based on "scientific, technical or other specialized knowledge within the scope of Rule 702."

Agent Simandy's testimony is not based on "scientific, technical or other specialized knowledge". Fed. R. Evid. 701. His opinion about the meaning of three code words is based entirely on the evidence that he uncovered during his investigation. The entire basis for Agent Simandy's opinion is admissible at trial, which is not always true with expert testimony. Expert testimony may be based on inadmissible evidence. United States v. Thorton, 642 F.3d 599, 606–07 (7th Cir. 2011). Sometimes, otherwise inadmissible evidence that is the basis of an expert opinion is admitted. Id. This case does not present the risk that inadmissible evidence will be admitted to support an opinion.

The dissent at the circuit level correctly noted that this case is substantively indistinguishable from United States v. Jayyousi. (R. 34.); United States v. Jayyousi, 657 F.3d 1085, 1103 (11th Cir. 2011). In Jayyousi, the Eleventh Circuit upheld the admission of an FBI agent's lay opinion testimony about the meaning of certain code words. The FBI agent based his opinion on wiretap summaries, verbatim transcripts, faxes, publications and speeches. Despite a spirited disagreement about the admissibility of the FBI agent's testimony, the majority and dissent in Jayyousi agreed on one legal point: the FBI Agent's testimony in Jayyousi was not expert testimony within the scope of Rule 702. Jayyousi, 657 F.3d at 1103; Id. at 1120. (Barkett, J. dissenting) ("I agree with the majority that subpart (c) does not apply").

Forcing the prosecution to find an expert in the codes used by elephant poachers, or other unusual criminal conspiracies would create a large obstacle for prosecutors with minimal, if any, protection for the defendant. Agent Simandy's testimony is based only on his investigation and calling his testimony "'expert opinion' would lend undue credibility to it and increase the risk of reliance on information not properly before the jury." United States v. Albertelli, 687 F.3d 439, 446 (1st Cir. 2012). In Albertelli, the First Circuit upheld the admittance of an ATF agent's lay opinion about cryptic conversations in an arson scheme. Id. The court noted that one risk of requiring expert opinion about the meaning of cryptic language is "reliance on information not properly before the jury as data on which 'experts in the particular field would reasonably rely', even though the 'field' is merely the facts of the case." Id. at 446 (quoting Fed. R. Evid. 703). Allowing Agent Simandy to testify as a lay witness protects against inadmissible evidence coming in during his opinion testimony and focuses the jury on the rational basis of his opinions rather than his credibility as an expert.

The classification of testimony as lay or expert opinion depends on the basis of the opinion rather than the experience of the witness. United States v. Rollins, 544 F.3d 820, 833 (7th Cir. 2008). In Rollins, an experienced DEA agent gave lay opinion testimony about the meaning of coded language in a drug conspiracy. Id. at 827–28. The defendants frequently changed code language in the middle of conversations and sometimes confused their co-conspirators. Id. at 831. Although the DEA agent had vast law enforcement experience with narcotics traffickers using code language, his ability to understand the coded language was not based on his specialized knowledge from prior work. Id. The defendants in Rollins were making up the codes as they went along. Id. at

831. The agent understood the code words based on the content of the calls and the other evidence that put those calls into context. Rollins, 544 F.3d 820, 831. The court observed that although the agent had years of experience, his opinion testimony was based on his perceptions from that particular case. Id. at 832–33. Although Agent Simandy has investigated fifty cases for the FBI, his opinion about the meaning of "black cat," "blood diamonds," and "charlie tango" is based only on his perception of facts in this investigation, not specialized knowledge covered by Rule 702.

B. Agent Simandy's lay opinion about the meaning of code words is rationally based on his perceptions during his investigation.

Agent Simandy personally poured over the transcripts of Barnes's conversations. (R. 23.) He interviewed ATF Agent Lamberti and Alan Klestadt from Copters Corporation. Id. This research allowed Agent Simandy to understand "black cat," "blood diamonds," and "charlie tango" in the context of Barnes's conversations. (R. 13.)

The judge should make a threshold determination if Agent Simandy's testimony is rationally based on his perception. Once admitted, the jury should determine whether Agent Simandy's opinion about the code words is *rational* after a vigorous cross-examination. In United States v. Albertelli, the First Circuit emphasized the importance of a lay witness being able to articulate the basis for the opinion. Albertelli, 687 F.3d at 448. The court in Albertelli upheld the admission of an agent's lay opinion because the agent pointed to specific evidence as the basis for each opinion and did not claim his opinion was based on prior experience or "the totality of the circumstances." Albertelli, 687 F.3d at 448 (quoting United States v. Grinage, 390 F.3d 746, 749–51 (2d Cir. 2004)).

The plain language of Rule 701 only requires a lay opinion be rationally based on a witness's perception. Fed. R. Evid. 701. The circuit court majority narrowed the

requirement of Rule 701 when a lay witness testifies about code words. (R. 30.) Based on the dicta from United States v. Peoples, the circuit court held that a lay opinion witness must be a participant in the conversation or listen to the conversation contemporaneously. (R. 30.); United States v. Peoples, 250 F.3d 630, 641 (8th Cir. 2001). In Peoples, the Eighth Circuit ruled that an FBI agent's lay opinion was inadmissible when her opinion was not based on her perception of the facts. Peoples, 250 F.3d at 641.

In dicta, the Eighth Circuit opined that when an officer participates in the conversations, observes the conversations as they occur, or has personal knowledge of the facts conveyed, the officer may provide lay testimony. Id. Although the court based this determination on specific cases where Rule 701 previously applied, the problem with the FBI agent's testimony in Peoples went beyond the agent not being a participant in the conversations. Id. The agent's testimony was not simply the meaning of a few coded words but included her opinion of what the defendants were thinking. Id. at 640. The Eighth Circuit did not need to invent a new standard for lay opinion to exclude the agent's testimony. Therefore, the extremely limited circumstances for lay opinion testimony blessed by the Eighth Circuit are dicta.

Code words in text messaging are a good example of why the Eighth Circuit's standard does should not be adopted. If law enforcement is monitoring a suspect's text messages, there is no method for an officer to participate in the conversations or observe them as they occur. Preventing law enforcement officers from helping juries understand coded language in text messages would allow criminals to easily thwart detection by using code words. The jury's role would change from weighing the evidence into attempting to decipher code language.

C. Agent Simandy's testimony is admissible because it draws inferences not readily drawn by the jury and helps the jury understand Barnes's cryptic language.

Agent Simandy's opinions will help the jury understand the unintelligible code phrases used by Barnes to evade prosecution. Lay opinion testimony must be "helpful to . . . determining a fact in issue." Fed. R. Evid. 701(b). The jury will hear extensive conversations with Barnes using language deliberately intended to confuse outsiders. Requiring the jury to hear these cryptic conversations without any assistance in understanding their meaning until closing arguments perverts the role of trial as a truth seeking mechanism.

Agent Simandy's interpretation of the code words will be critically helpful to the jury because the inferences are not so simple that any juror could draw them. In United States v. Cano, a police detective called jurors' attention to simple hieroglyphics next to the names of two conspirators in a phone book. United States v. Cano, 289 F.3d 1354, 1363 (11th Cir. 2002). The detective then showed the jurors how the simple hieroglyphics represented the conspirators' phone numbers. Id. at 1360. The Eleventh Circuit ruled that the detective's testimony was inadmissible because his inferences were based on one piece of evidence, a phone book, rather than his own perceptions. Id. at 1362. Agent Simandy's inferences are based on his entire investigation, not a single piece of evidence. In Jayyousi, the Eleventh Circuit held that an investigator's lay opinion was helpful because his "knowledge of the investigation enabled him to draw inferences about the meanings of code words that the jury could not have readily drawn." Jayyousi, 657 F.3d at 1103. Agent Simandy's lay opinion should be admissible because it is based on

inferences drawn from his entire investigation. His opinion is helpful because it is based on inferences the jury could not easily draw.

CONCLUSION

The district court should have admitted the hearsay statement made by James Reardon because Reardon's absence from trial is attributable to Barnes. In addition, the district court should have required Kara Crawley to identify her informant because no testimonial privilege for news reporters exists under federal law and, even if such a privilege exists, the facts of this case warrant an exception. Finally, the district court should have admitted the testimony of FBI Agent Thomas Simandy because the agent's opinion was derived from his own personal observations and would have assisted the jury in understanding the fact of this case. For these and the foregoing reasons, this Court should reverse the rulings of the district court and the Fourteenth Circuit and remand this case for further proceedings.

Respectfully Submitted,

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Counsel for Petitioner

Date: February 20, 2013