Team 32 - P

In The

Supreme Court of the United States

Term 2013

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM BARNES,

Respondent.

On Write of Certiorari to
the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

STATEMENT OF QUESTIONS PRESENTED

I. DOES FEDERAL RULE OF EVIDENCE 501 RECOGNIZE AN EVIDENTIARY PRIVILEGE FOR INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION AND, IF SO, SHOULD SUCH PRIVILEGE BE ABSOLUTE OR QUALIFIED?

II. SHOULD LAY WITNESS' TESTIMONY BE ADMISSIBLE WHEN DECIPHERING CODED WORDS AND MESSAGES AFTER REVIEWING TRANSCRIPTS OF CONVERSATIONS IN WHICH THEY WERE NOT DIRECT PARTICIPANTS?

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BRIEF FOR PETITIONER

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual History

Respondent, William Barnes, inherited Big Top Circus which was nationally known for its herd of twenty elephants and over one-hundred acres of elephant grazing grounds from his father in May 2000. See R. at 1. However, by July 2011, Big Top Circus informed Respondent that the circus need to raise $500,000 dollars by December 2011 or file for bankruptcy. Id. Concluding that the circus would not be able to repair its financial situation, on July 12, 2011, Respondent contacted Boerum City Circus and Flying Feats Circus to stage "the greatest elephant show on earth," beginning in December 2011. R. at 1-2. As proposed, the two additional circuses agreed to bring twenty total additional elephants to graze on the grasslands owned by Big Top Circus for the winter. See id. at 2.

On July 20, 2011, Respondent contacted Alfred Anderson, and proposed that they hunt the elephants, poach the expensive ivory, and divide the profits; Anderson agreed. See R. at 2. Both Anderson and Respondent agreed that they needed to find a third hunter. See id. Anderson informed Defendant that James Reardon "was interested in participating in the elephant-hunting scheme." Id. Respondent "agreed to involve Reardon." Id. In September 2011, Respondent proposed renting a helicopter and purchasing assault rifles to expedite the killing of the elephants on the day of the hunt. See id. On October 1, 2011, Anderson accepted Respondent's proposal "on behalf of himself and Reardon," so long as the Respondent provided the equipment needed for the hunt. Id. On October 2, 2011, Respondent contacted Weapons Unlimited, a Texas company, to purchase assault rifles. See id. Unbeknownst to Respondent, "his contact at Weapons Unlimited, was an undercover Bureau of Alcohol, Tobacco, and Firearms ("ATF") agent, Jason Lamberti." Id. Because of the cost and three-month waiting period, Agent

Lamberti proposed that Respondent purchase the weapons illegally. See R. at 2. Respondent agreed and paid $500 for each of the automatic rifles. See id.

Following Respondent's communication with Agent Lamberti, the FBI obtained a warrant permitting the interception of Respondent's telephone communications. See id. The government intercepted numerous telephone conversations between the Respondent, Anderson, and Reardon from October 4, 2011 until December 1, 2011. R. at 23. Agent Narvel Blackstock was assigned to the investigation. See id. He transcribed conversations between the Respondent, Anderson and Reardon, while listening to them contemporaneously. See id. Due to unrelated incidents, Agent Blackstock died and Agent Thomas Simandy took over the investigation, analyzed all of the transcripts and interviewed Agent Lamberti. See id.

During the conversations, the conspirators made repeated references to "blood diamonds," "Charlie Tango," and a "black cat." R. at 23. Agent Simandy analyzed the transcripts and concluded that the references were actually code words used to describe the elephants, the helicopter, and the rifles.

While his phone calls were being recorded, Respondent and Anderson had two telephone conversations on November 15 and 29, 2001 wherein Anderson suggested he "made a mistake with Reardon," R. at 18.; that Reardon "was having second thoughts," Id.; and that they "need[ed] him out of the picture." R. at 19.

Later on November 29th, an individual observed Anderson running from Reardon's apartment, and found Reardon dead in his apartment. Anderson later admitted to killing Reardon to prevent him from informing the police.

Before the planned elephant hunt was to occur, Respondent also contacted Kara Crawley, a reporter for the Boreum Times in an attempt to publicize the elephant show. R. at 22.

Respondent granted her unrestricted access to the circus grounds. See id. Crawley's first visit occurred on September 15, 2011, and she returned every day for the following two weeks to watch the animals train. See id. While there, she developed a rapport with an employee of Big Top Circus. See id. The employee informed her that he or she had overheard the Respondent speaking to another individual about a plan to kill the elephants for their ivory. See id. The employee asked to remain anonymous out of safety concerns. See id. However, the employee allowed Crawley to videotape a conversation for her notes with his or her face visible in the recording. See id. Crawley published an article exposing the planned elephant hunt on December 1, 2011. See id. The article used information from Crawley's anonymous source. See id. Respondent was taken into federal custody later that day. R. at 22-23.

B. Procedural History

On December 4, 2011, Respondent William Barnes was indicted and charged with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922, two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and one count of conspiracy to commit unlawful takings under 16 U.S.C. §1538 (the "Endangered Species Act"). R. at 21.

On May 2, 2012, the United States District Court for the Southern District of Boerum ruled on three pre-trial motions brought by the Government. R. at 16. The court denied the Government's motion in limine seeking to introduce the testimony of Mr. Daniel Best under Federal Rule of Evidence 804(b)(6). Id. The court recognized a journalist's privilege under Federal Rule of Evidence 501, and found that privilege absolute. Id at 17. Finally, the court denied the Government's motion to introduce the testimony of Agent Thomas Simandy as lay witness opinion under Federal Rule of Evidence 701. Id.

The United States Court of Appeals for the Fifth Circuit granted an interlocutory appeal brought by the Government pursuant to 18 U.S.C. § 3731, and upheld the District Court's rulings on all three issues. R at 20.

SUMMARY OF THE ARGUMENT

We argue that the Federal Rule of Evidence 502 does not recognize an evidentary privilege for information gathered in a journalistic investigation. The Supreme Court rejected a claim of a reporter's privilege under the First Amendment. Though the case was decided three years before Federal Rule of Evidence 501 was promulgated, courts have continued to deny the privilege to journalists. After surveying the jurisprudence of journalist's privilege, the Seventh Circuit has concluded that journalists should have the same protections as other individuals. Additionally, if a journalist's privilege were to exist, it is qualified and should not be granted in this case. The government has demonstrated that the information subpoenaed is relevant, that the government has a compelling interest, and that the information can be obtained through alternative means.

Finally, we argue that lay witnesses should have their testimony admissible when deciphering coded words and messages after reviewing transcripts of conversations in which they were not direct participants. Specifically, we argue with the majority of U.S. Circuit Courts that lay witnesses can satisfy the perception requirement of Federal Rules of Evidence 701 by directly examining or have knowledge of appropriate documents necessary. This court should follow the precedent of the Eleventh Circuit Case United States v. Jayyoui where a government agent was able to testify on code words used between terrorist subjects in a transcribed recording made by another government official. Further, we argue that the lower court's ruling was wrongly decided and that the precedent they based their ruling on was factually different to the

case at hand. Finally, we argue that the lower court' ruling would set bad precedent that would impede the government's ability to bring necessary witnesses and evidence in trial. In addition, the requirements to satisfy the perception requirement would become confusing and contradictory for courts, judges and lawyers.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 501 DOES NOT RECOGNIZE AN EVIDENTARY PRIVILEGE FOR INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION AND, IF IT DID, THE PRIVILEGE WOULD BE QUALIFIED AND NOT AVAILABLE IN THIS CASE.

A. A Journalist's Privilege Does Not Exist Under the Constitution or the Common Law

Federal Rule of Evidence 501 does not grant an evidentiary privilege for information gathered in a journalistic investigation. Rather, the rule authorizes the courts to develop evidentiary privileges. As the Supreme Court has explained, "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." United States v. Weber Aircraft Corp., 465 U.S. 792, 803 n. 25 (1984). Though they may be subject to congressional overruling, courts must assess the arguments for and against the claimed privilege, just as the Supreme Court has done in cases recognizing common law privileges since 1975. See, e.g., Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (finding a psychotherapist-patient privilege); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (finding an attorney-client privilege); Trammel v. United States, 445 U.S. 40, 51 (1980) (finding marital communications to be confidential).

The Supreme Court addressed the issue of a reporter's privilege in Branzburg v. Hayes, 408 U.S. 665 (1972). In this seminal case, the Court rejected a broad claim of a reporter's privilege based on the First Amendment. In finding that reporters are obligated to respond to

grand jury subpoenas as other citizens do, the Court opined that "it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Id. at 682. However, the Court did not eviscerate the protections of the First Amendment, rather it noted that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." Id. at 707. Furthermore, "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." Id. at 707-708.

Though the Supreme Court decided Branzburg three years before Congress enacted Federal Rule of Evidence 501, Federal Circuits have continued to apply Branzburg's narrow holding. The Fourth Circuit refused to grant a privilege to journalists who refused to testify about the prosecution and investigation of certain members of the South Carolina Legislature for accepting bribes. In re Shain, 978 F.2d 850, 851 (4th Cir. 1992). There, reporters moved to quash a subpoena, asserting that the First Amendment grants news reporters a qualified privilege against being compelled to testify concerning newsgathering. See id. at 852. In upholding the district court, the Fourth Circuit held that the Branzburg was binding, and that "the incidental burden on the freedom of the press in the circumstances of this case does not require the invalidation of the subpoenas issued to the reporters, absent evidence of governmental harassment or bad faith." Id. Furthermore, "reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution." Id.

Nearly 30 years after Branzburg, the Seventh Circuit in McKevitt v. Pallasch discussed the different approaches Federal Circuits have taken:

> Some of the cases that recognize the privilege . . . essentially ignore Branzburg . . . some treat the "majority" opinion in

> Branzburg as actually just a plurality opinion . . . some audaciously declare that Branzburg actually created a reporter's privilege . . . The approaches that these decisions take to the issue of privilege can certainly be questioned.
> . . .
> The cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of government, and so forth . . . Since these considerations were rejected by Branzburg even in the context of a confidential source, these courts may be skating on thin ice.

McKevitt v. Pallasch, 339 F.3d 530, 532-33 (7th Cir. 2003). The court in McKevitt makes a crucial point. Federal Appellate Courts that ignore Branzburg are ignoring binding precedent, dictated by the highest court in the land.

After surveying the Federal Circuits, the McKevitt court concluded that it "did not see why there need to be a special criteria merely because the possessor of documents or other evidence sought is a journalist." McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003). Instead of "speaking of privilege, courts should simply make sure that a *subpoena duces tecum* directed to the media, like any other *subpoena duces tecum*, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." Id., see also Fed. R. Civ. P. 45(c)(3)(A). An issuing court "must quash or modify a subpoena" if it (1) fails to allow a reasonable time for compliance, (2) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides," (3) "requires disclosure of privileged or other protected matter," and (4) "subjects the deponent to an undue burden." Fed. R. Civ. P. 45(c)(3)(A).

It is good policy to analyze journalist's duty to turn over crucial evidence using the guidelines of the Federal Rule of Civil Procedure for issuing subpoenas, rather than through the jurisprudence of privilege. Journalists and their sources are protected from harassment and

undue burden, while parties seeking crucial information are reasonably able to obtain it. Furthermore, this protection will maintain trust between anonymous sources and journalists.

In this case, the Ms. Crawley should not be exempt from the duty to give evidence. Long-settled precedent has established that, when issued a subpoena, members of the press should be granted the same restrictions and protections as any other individual. Also, there is absolutely no evidence of bad faith on the part of the Government, as Branzburg requires. The Government does not seek to interfere with Ms. Crawley's source simply to weaken her relationship with that person, nor has Respondent shown any bad faith on the part of the Government. Rather, the Government's subpoena for conversations between Ms. Crawley and her source are for the vital purpose of validating the criminal allegations against the Defendant.

Additionally, the merit of the Government's subpoena of Ms. Crawley should be evaluated according to the Federal Rules of Evidence. Here, Respondent failed offer evidence that the Government failed to allow reasonable time to comply, or that Ms. Crawley or her source lived more than 100 miles away from court. As discussed, the information the Government seeks is not privileged or protected under Branzburg. Finally, the Respondent offers no evidence that an "undue burden" would be placed upon Ms. Crawley through the subpoena. Though, as Ms. Crawley testified, her source was "concerned for his or her safety," the source allowed Ms. Crawley to videotaped. Thus, such concern did not manifest into protective or preventative action.

B. If a Journalists' Privilege Does Exist, it is Qualified and Should not Apply in this Case

Even if a qualified journalist's privilege does exist, under the analysis of cases recognizing journalist's privilege, Ms. Crawley's motion to quash the subpoena should be denied. Courts recognizing a qualified privilege often look to a three-step balancing test to determine

whether a privilege should be granted: (1) whether the information subpoenaed is relevant, (2) whether the party requesting the information has a compelling interest, and (3) whether the information can be obtained through an alternative means. Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 opinion supplemented on denial of reh'g, 628 F.2d 932 (5th Cir. 1980). Utilizing these factors, an examination of the facts at bar shows that a privilege should not be granted to Ms. Crawley, as it is in the interest of justice that she reveal her source.

The D.C. Circuit has held that the First Amendment did not afford journalists a right to conceal their confidential sources from grand jury subpoenas. In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1149-50 (D.C. Cir. 2006). If there was a federal common law privilege protecting reporters from disclosing confidential sources to a grand jury, it was overcome by government's interest in an investigation into an illegal disclosure of the identity of an agent within the Central Intelligence Agency. Id.

The Sixth Circuit also held that a television reporter must comply with a subpoena issued by a grand jury when he failed to turn over film footage taken while reporting on the activities of Detroit youth gangs. In re Grand Jury Proceedings, 810 F.2d 580, 586 (6th Cir. 1987). The reporter had asked gang members to conduct on-camera interviews about their activities. Id. at 582. He promised them that he would not disclose their activities. Id. While investigating a police shooting, several gang members revealed to the detectives that the individuals who had murdered the officer were present during one of the filmed interviews. Id. at 583. Despite the promise of confidentiality made by the reporter to the gang members, the Court of Appeals upheld the District Court's denial of the motion to quash the subpoena because the government made a clear and convincing showing that the state has a "compelling and overriding interest in obtaining the information." Id. at 586.

Here, the government has also shown an interest in evidence from Ms. Crawley's unidentified source that should override any claims of journalist's privilege. The Respondent has been charged with serious crimes violating federal statutes. The Government's interest in protecting animals, and especially endangered animals is now codified in our federal statutes. Additionally, the Government could not have a stronger interest in protecting the public from the unlawful sale and trade of illegal firearms. Ms. Crawley testified that her source spoke of conversations he or she overheard between the Respondent and another individual about a plan to kill the elephants. If this information were released, it would be the crux upon which the Government could further these vital interests. Finally, the facts of In re Grand Jury Proceedings are in line with those in this case. Even though Ms. Crawley promised her source that she would not reveal his or her identity, her source allowed her to videotape the interview. Such promise of confidentiality should not obstruct these compelling Government interests.

Second, if a qualified privilege were recognized, the information from Ms. Crawley's source is so central to the investigation in question that she should be compelled share such evidence. In a separate concurrence in Branzburg, Justice Powell said that news gatherers may be entitled to First Amendment protection where the information sought bears "only a remote or tenuous relationship to the subject of the investigation," or where there is other reason to believe that testimony "implicates confidential source relationships without a legitimate need of law enforcement." Branzburg, 408 U.S. at 710.

Though this treatment of journalist's privilege is found only in Branzburg's concurrence, some Federal Circuits have taken up the analysis. In Lee v. Dep't of Justice, 413 F.3d 53, 59-60 (D.C. Cir. 2005), court found that a plaintiff's interests in compelling disclosure of sources outweighed journalist's First Amendment interest in protecting their confidential news sources

because of the centrality of the information in question. See also U.S. v. Cuthbertson, 651 F.2d 189, 195-196 (3rd Cir. 1981) (party seeking disclosure must show that the information is "crucial to the claim."); U.S. v. Treacy, 639 F.3d 32, 43 (2nd Cit 2011); and see generally The New York Times Co. v. Gonzales, 459 F3d 160 (2nd Cir. 2006).

In Lee, the Federal Bureau of Investigation ("FBI") investigated Dr. Wen Ho Lee, a scientist employed by the Department of Energy ("DOE"), on suspicion of espionage. Lee v. Dep't of Justice, 413 F.3d at 53. After his indictment, Lee brought an action under the Privacy Act against the DOE, the Department of Justice, and the FBI, alleging that each agency had improperly disclosed personal information about Lee and the investigation to the media. Id. Lee issued subpoenas to certain members of the press seeking information and documents relating to leaks. Id. at 56. The journalists moved to quash the subpoenas, but the District Court denied their motions. Id. In upholding the District Court, the Court of Appeals determined that the "information Lee is seeking goes to the heart of the case." Id. at 60. If Lee could not show the identities of those who revealed private information to the press, his ability to show the other elements of the privacy claim would also be compromised. Id.

In the case at bar, the information provided by Ms. Crawley's source is also central and crucial to the Government's claim. Each of the indictments involve the element of conspiracy. A conspiracy is "an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement." Black's Law Dictionary (9th ed. 2009). The testimony of this employee that he or she saw the Respondent speaking to another person concerning the plan to kill the elephants is crucial to the element of conspiracy present in each allegation against the Respondent. Without

this evidence, the government would not be able to show the other elements of each claim against the Respondent.

Under the final element of the analysis, the court must determine whether the government has made a proper showing that the same information cannot be obtained from other sources. In U.S. v. Treacy, a journalist's privilege was denied where the reporter's testimony about an interview with a defendant was not reasonably obtainable from other sources, and the reporter was only potential witness who could confirm that defendant made certain statements since the defendant invoked his Fifth Amendment privilege. 639 F.3d 32, 43 (2d Cir. 2011); See also Clyburn v. News World Communications, Inc., 903 F.2d 29, 35 (D.C. Cir. 1990) (upholding a privilege claim because the plaintiff failed to seek information from obvious alternative sources); and In re Special Proceedings, 373 F.3d 37, 44-45 (1st Cir. 2004) (refusing to compel disclosure unless "directly relevant to a nonfrivolous claim or inquiry undertaken in good faith," and where "same information is readily available" from less sensitive source).

Here, the Government has demonstrated that evidence from Ms. Crawley's source is more than merely cumulative, and cannot be reasonably obtained from other sources. During the telephone conversations the government recorded, Respondent and his co-conspirators allegedly used a code system when they referred to the plan to kill the elephants. Though the Government is prepared to offer testimony as to the true meaning of this code system, no single, clear evidentiary source exists to support the Government's contention that the Respondent and his co-conspirators had devised a plan to kill the elephants. If Ms. Crowley's description of her source's information is accurate, then her source would be the only individual privy to clear, unobstructed communication regarding the conspiracy.

As discussed in other areas of this brief, the Respondent attacks the validity of evidence of telephone conversations between himself and his co-conspirators. The Government contends these challenges have no validity. However, if the Respondent were to succeed, the only evidence of conspiracy would be the video interviews of Ms. Crawley's source.

For the foregoing reasons, we respectfully ask that the court deny a journalist's privilege to Ms. Crawley. The Fourteenth Circuit was incorrect when it held that a journalist's privilege existed under Federal Rule of Evidence 501, and the privilege was absolute.

II. LAY WITNESSES SHOULD HAVE THEIR TESTIMONY ADMISSIBLE WHEN DECIPHERING CODED WORDS AND MESSAGES AFTER REVIEWING TRANSCRIPTS OF CONVERSATIONS IN WHICH THEY WERE NOT DIRECT PARTICIPANTS.

A. A lay witness will satisfy the perception requirement of Rule 701 if they have direct knowledge or have directly examined the appropriate documents necessary for their testimony.

Rule 701 allows a lay witness to testify if their opinions are "rationally based on the perception of the witness." Fed. R. Evid. 701. In order for the perception to be rational, the witness' testimony must be based on the "personal observation and recollection of concrete facts." United States v. Beck, 418 F.3d 1008, 1015 (9th Cir. 2005). Such observations or recollections can be acquired through "any of the five percipient senses." 4 Weinstein's Evidence, 602.02 (1997). In addition, a lay witness may testify based on "particularized knowledge gained through their own personal experiences." United States v. Hill, 643 F.3d 807, 840 (11th Cir. 2011). This knowledge requirement is "derived" from Rule 602, which allows witnesses to testify to what they've read or heard unless it is "excluded under hearsay rules." United States v. Garcia, 994 F.2d 1499, 1506-7 (10th Cir. 1993) (citing Weinstein & Berger, Weinstein's Evidence, 602, 602-4 (1992)). Therefore, courts have ruled that a lay witness can use reports from others to help create their opinion. See Lightning Lube Inc., v. Witco Corp., 4 F.3d 1153, 1175 (3rd Cir. 1993).

As a result, the 11th Circuit Court correctly opined that in the context of deciphering coded language in a telephone conversation, a lay witness is not required to be "a participant or observer of a conversation to provide testimony about the meaning of coded language." United States v. Jayyousi, 657 F.3d 1085, 1103 (11th Cir. 2011). The lay witness' testimony is admissible if it is "rationally based on the perception of the witness" and not necessarily a reflection on their involvement in the activity. Id. at 1102. Thus, Rule 701 does not prohibit lay witnesses from testifying based on materials they observed and examined firsthand.

In Jayyousi, the 11th Circuit ruled that a Federal Bureau of Investigation ("FBI") agent was allowed to testify on coded language he read from transcripts of recorded phone calls between suspected terrorists. The court ruled that under Rule 701, lay witnesses are allowed, and have been allowed in the past, to "base his opinion testimony on his examination of documents even when the witness has not [been] involved in the activity about which he testified." Jayyousi, 657 F.3d at 1102. The court emphasized the fact that the agent examined thousands of documents and had been investigating terrorists for many years. In fact, the court pointed out that it had previously admitted the testimony of an FBI financial analyst who had "simply reviewed and summarized over seven thousand financial documents." *Id.* (citing United States v. Hamaker, 455 F.3d 1316, 1331-32 (11th Cir. 2006).

Other circuit courts have also ruled that lay witnesses need not be present during phone conversations or a direct participant in the activity they testify under Rule 701. In United States v. Rollins, the Seventh Circuit allowed a lay witness who listened to recorded telephone conversations to testify to the meaning of drug code words he listened to, based on his personal experiences and background. 544 F.3d 820, 832 (7th Cir. 2008). The court made note that the testifying agent's conversations with other agents about their involvement in the case and their

surveillance work helped admit his testimony under Rule 701. In United States v. Miranda, the Fifth Circuit allowed an agent to testify about code words used in a telephone conversation between two drug dealers. 248 F.3d 434 (5th Cir. 2001). The court opined that the agent was a lay witness and his testimony would be admitted under Rule 701 because of his "extensive participation in the investigation of *this* conspiracy… allowed him to form opinions concerning the meaning of certain code words." Id. at 441 (Italics added). In United States v. Garcia, the 10th Circuit allowed an FBI agent to testify that while listening to a recorded private conversation between two drug dealers, he identified the phrase "your old man" as a reference to the Defendant. See Garcia, 994 F.2d at 1506-7. The court opined that Rule 701 is satisfied if the testimony is based on "the lay witness' perception of otherwise admissible out of court statements." *Id*. at 1507. Finally, in United States v. Freeman, the 9th Circuit ruled that an agent who was not a participant in phone calls between two drug dealers, but listened to the recorded conversations in addition to other investigatory work, and was allowed to translate and explain coded language used in the recorded conversation for the court. 498 F.3d 893 (9th Cir. 2007). The court noted that the perception of the witness requirement in Rule 701 was simply "a restatement of the personal knowledge requirement for all lay testimony." Id. at 905. The agent in Freeman was able to discern ambiguous phrases and conversations based on his direct investigation in this specific case. These cases show that the majority of Circuit Courts have ruled that direct participation in telephone conversations is not necessary to satisfy the perception requirement of Rule 701. Instead, lay witnesses may review transcripts, documents and other pieces of evidence in order to testify.

In this case, the testimony of Agent Simandy should be admitted because it fulfills the perception requirement in Rule 701. Like in Rollins, Agent Simandy had a tremendous amount

of background knowledge on the case and had interviewed other agents, such as Agent Lamberti from the Bureau of Alcohol, Tobacco, and Firearms, for contextual information. Transcript at 13. Further, agent Blackstock listened the actual conversations were listened to and transcribed by FBI , who was the preceding officer in charge of the case before his death. *Id*. Like Jayyousi, Miranda and Garcia, Agent Simandy's testimony was strictly confined to identifying the word or phrase in the transcript and providing an explanation or interpretation of what that word or phrase was code for. Since Agent Simandy's testimony was strictly based on interpreting the phrases in the telephone conversations, which his investigative work made him knowledgeable of, his testimony met the perception requirements of Rule 701 and should be ruled admissible.

B. The 14th circuit's ruling was based on case law factually different and not applicable to our case.

In our case, the lower court erroneously based their ruling to exclude Agent Simandy's testimony on the Eighth Circuit's United States v. Peoples. 250 F.3d 630 (8th Cir. 2001). The Peoples case was about a conspiracy to murder a potential witness to a number of burglaries. In Peoples, the court would not admit the testimony of an FBI agent, whose testimony was based on listening to a recorded conversation, because the agent did not have first-hand knowledge of the conversation and was basing her opinions on "her investigation after the fact, not on her perceptions of the facts." Id. at 641. Whereas in our case, Agent Simandy's testimony was strictly about interpreting the phrases in the conversation, the FBI agent in Peoples stated opinions "phrased as contentions supporting her conclusion." Id. at 640. Further, her testimony consisted almost entirely of her "personal opinions of what the conversations meant," and were treated as "the contentions of the government," as well. Id. In the case at bar Agent Simandy testified that code words such as "Charlie tango" referred to the helicopter the defendants were using from Copters Corporations. The agent in Peoples went much further, however, and, when

asked about a conversation relating to a burglary, testified "I believe [the defendant] was there to actually murder Ross at the time." Peoples, 250 F.3d at 640. Finally, there was even inconsistency within Peoples regarding which agent's lay witness testimony was admissible or not. While the testimony of the agent who listened to the recordings and made conclusory statements was inadmissible, the court admitted another agent's objective assessment, "formed in the course of his investigation of one of the robberies, regarding the relationship among the four robberies." Id. at 639. This shows that the Peoples case is factually different and inapplicable to our case because the judge in Peoples was unable to rule on lay witness testimony that was solely based on an interpretation of coded language, without contentions and conclusions from the witness.

C. The lower court's ruling is bad precedent that will inhibit investigators' ability to collect evidence and testify at trials, and confuse Rule 701's perception requirement.

The lower court's ruling would result in bad public policy and create a burden on the government's ability to provide testimony in civil or criminal cases. If this court follows the lower court's ruling, agents investigating suspects who do not speak English would have to listen in or participate in phone conversations that they would not be able to understand solely for the purpose of being able to satisfy Rule 701's perception requirement at trial. Further, if an investigating agent is physically unable to participate in a conversation with the suspects, then they will be unable to use that evidence at trial. In our case, Agent Blackstock's unfortunate death would make all his important work and collected evidence inadmissible at trial. This creates a tremendous burden on government officials and agencies, and could severely hamper the ability to present important evidence at trial.

Further, if this court follows the lower court's ruling, it will lead to inconsistency as to what satisfies the perception requirement in Rule 701. In United States v. Hill, the court ruled

that a business owner could testify as a lay witness to transactions or the company's "manner of business" despite not having directly participated in the transaction. 643 F.3d 807, 842 (11th. Cir 2011) (citing Fed. R. Evid. 701 Advisory Comm. Note 2). The court's reasoning was that a business owner or officer would have "particularized knowledge" from their position to provide relevant information to the court. Id. The lower court's ruling, thus, creates an inconsistency in Rule 701's perception requirement, as business owners would be allowed to testify to transactions they were not present to, but FBI agents would not be allowed to testify to phone conversations they were not present to but had read the transcripts of during their investigation.

Finally, courts have previously allowed FBI agents to testify in financial fraud cases as lay witnesses after they had reviewed financial records of the defendants. E.g. United States v. Hamaker, 455 F.3d 1316 (11th Cir. 2006). In Hamaker, the FBI agent's testimony on fraud was admitted under the perception requirement of Rule 701 even though he was not a participant in the fraud but "simply reviewed and summarized over seven thousand financial documents." Id. at 1331-32. If this court follows the lower court's ruling in our case, Rule 701's perception requirement will become confusing, arbitrary and will result in bad public policy for government officials and judges.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Appeals for the Fourteenth Circuit should be reversed.

Respectfully submitted this 20th day of February, 2013

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