

No. 12-23

---

**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 RESPONDENT**

## **QUESTIONS PRESENTED**

- I. Does the forfeiture-by-wrongdoing doctrine, codified in Federal Rule of Evidence 804(b)(6), admit into evidence an unavailable declarant's hearsay statement where there is no evidence that the defendant intended to prevent the declarant from testifying nor procured the declarant's unavailability?
  
- II. Does Federal Rule of Evidence 501 protect a journalist's privilege against compelled disclosure where the journalist conducts a videotaped interview and promises not to publish the interview nor reveal the source's identity, and is that privilege absolute or qualified?
  
- III. Does a witness's lay opinion testimony concerning the meaning of code words and phrases satisfy the requirements of Federal Rule of Evidence 701 where the witness neither participated in nor observed the conversations, but merely based his opinion on a review of transcribed telephone conversations and two witness interviews?

**TABLE OF CONTENTS**

**QUESTIONS PRESENTED** ..... i

**TABLE OF CONTENTS** ..... ii

**TABLE OF AUTHORITIES** ..... iv

**STATEMENT OF THE CASE**..... 1

Statement of Facts ..... 1

Procedural History ..... 3

**SUMMARY OF THE ARGUMENT** ..... 4

**ARGUMENT**..... 6

I. REARDON'S STATEMENTS ARE INADMISSIBLE HEARSAY BECAUSE BARNES WAS NOT INVOLVED IN A CONSPIRACY TO MURDER REARDON. REGARDLESS, CONSPIRATORIAL LIABILITY IS NOT SUFFICIENT TO TRIGGER THE FORFEITURE-BY-WRONGDOING DOCTRINE. .... 6

    A. There is no conspiratorial liability to trigger the forfeiture-by-wrongdoing doctrine because Barnes was not involved in a conspiracy to murder Reardon...... 7

    B. Regardless, Reardon's statements are inadmissible hearsay because conspiratorial liability is not sufficient to trigger the forfeiture-by-wrongdoing doctrine...... 9

II. THE COMMUNICATION BETWEEN CRAWLEY AND THE CONFIDENTIAL INFORMANT FROM BIG TOP CIRCUS IS PROTECTED BY AN ABSOLUTE JOURNALIST'S PRIVILEGE PURSUANT TO FEDERAL RULE OF EVIDENCE 501. .... 13

    A. Rule 501 extends to the common-law privilege between a journalist and her source...... 13

    B. The common law journalist's privilege should be absolute, rather than qualified. ..... 18

    C. Alternatively, if this Court determines that the journalist's privilege is qualified, Crawley should still be protected against compelled disclosure...... 20

**III. THE LAY OPINION TESTIMONY OF AGENT SIMANDY DOES NOT SATISFY THE REQUIREMENTS OF FEDERAL RULE OF EVIDENCE 701 BECAUSE THE TESTIMONY IS NEITHER BASED ON FIRST-HAND KNOWLEDGE NOR OBSERVATION, AND IT IS NOT HELPFUL TO THE JURY.....23**

**A. Agent Simandy’s limited review of pre-collected information does not satisfy the first-hand knowledge requirement that his testimony be rationally based on his perception......28**

**B. Agent Simandy’s lay opinion testimony is not admissible because it does not help the jury understand the facts about which he is testifying......28**

**CONCLUSION .....31**

**TABLE OF AUTHORITIES**

**I. UNITED STATES SUPREME COURT CASES**

*Branzburg v. Hayes*, 408 U.S. 665 (1972).....14, 16, 20

*Davis v. Washington*, 547 U.S. 813 (2006).....7, 10

*Giles v. California*, 554 U.S. 353 (2008).....6, 9, 10

*Hyde v. United States*, 225 U.S. 347 (1912) .....8

*Jaffee v. Redmond*, 518 U.S. 1 (1996) ..... 14-15

*Nye & Nissen v. United States*, 336 U.S. 613 (1949) .....7

*Pinkerton v. United States*, 382 U.S. 640 (1946).....7, 8

*Reynolds v. United States*, 98 U.S. 145 (1878).....6-7, 9-10

*Trammel v. United States*, 445 U.S. 40 (1980) .....14

*United States v. Feola*, 420 U.S. 671 (1975) .....10

*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).....7

*United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984) .....14

*Upjohn Co. v. United States*, 449 U.S. 383 (1981).....14

**II. UNITED STATES COURTS OF APPEALS CASES**

*Baker v. Goldman Sachs & Co.*, 669 F.3d 105 (2d. Cir. 2012) .....19

*Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972) .....15

*Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d. Cir. 2011) .....17, 18

*Cochran v. United States*, 41 F.2d 193 (8th Cir. 1930) .....8

*Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29 (2d Cir. 1998).....17, 20, 21

*In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005).....18, 21

<i>In re Special Proceedings</i> , 373 F.3d 37 (1st Cir. 2004) .....	21
<i>LaRouche v. Nat'l Broad. Co.</i> , 780 F.2d 1134 (4th Cir. 1986).....	20
<i>New York Times Co. v. Gonzales</i> , 459 F.3d 160 (2d Cir. 2006).....	21, 22
<i>Riley v. City of Chester</i> , 612 F.2d 708 (3d Cir. 1979) .....	17, 20
<i>United States v. Awan</i> , 966 F.2d 1415 (11th Cir. 1992) .....	24, 29
<i>United States v. Cano</i> , 289 F.3d 1354 (11th Cir. 2002).....	26, 29
<i>United States v. Carson</i> , 455 F.3d 336 (D.C. Cir. 2006) .....	11
<i>United States v. Cherry</i> , 217 F.3d 811 (10th Cir. 2000).....	8, 11
<i>United States v. Criden</i> , 633 F.2d 346 (3d Cir. 1980) .....	15, 20
<i>United States v. Curry</i> , 977 F.2d 1042 (7th Cir. 1992).....	7, 8
<i>United States v. Cuthbertson</i> , 630 F.2d 139 (3d Cir. 1980).....	15, 17, 20
<i>United States v. Delpit</i> , 94 F.3d 1134 (8th Cir. 1996) .....	28
<i>United States v. Durham</i> , 464 F.3d 976 (9th Cir. 2006).....	24
<i>United States v. Earls</i> , 42 F.3d 1321 (10th Cir. 1994).....	28
<i>United States v. Garcia-Barzaga</i> , 361 F. App'x 109 (11th Cir. 2010) .....	24
<i>United States v. Gold</i> , 743 F.2d 800 (11th Cir. 1984) .....	27
<i>United States v. Gonzalez</i> , 570 F.3d 16 (1st Cir. 2009).....	7-8
<i>United States v. Gray</i> , 405 F.3d 227 (4th Cir. 2005).....	9
<i>United States v. Hamaker</i> , 455 F.3d 1316 (11th Cir. 2006) .....	27
<i>United States v. Harrelson</i> , 713 F.2d 1114 (5th Cir. 1983).....	15
<i>United States v. Jayyousi</i> , 657 F.3d 1085 (11th Cir. 2011) .....	25, 26-27, 29
<i>United States v. Johnson</i> , 439 F.2d 885 (4th Cir. 1971).....	7
<i>United States v. Manbeck</i> , 744 F.2d 360 (4th Cir. 1984).....	8

<i>United States v. Martinez</i> , 476 F.3d 961 (D.C. Cir. 2007) .....	11-12
<i>United States v. McKinney</i> , 954 F.2d 471 (7th Cir. 1992) .....	11
<i>United States v. Miranda</i> , 248 F.3d 434 (5th Cir. 2001) .....	25-26
<i>United States v. Muñoz–Franco</i> , 487 F.3d 25 (1st Cir. 2007) .....	7
<i>United States v. Newell</i> , 658 F.3d 1 (1st Cir. 2011).....	7
<i>United States v. Parker</i> , 839 F.2d 1473 (11th Cir. 1988) .....	8
<i>United States v. Parsee</i> , 178 F.3d 374 (5th Cir. 1999) .....	24
<i>United States v. Peoples</i> , 250 F.3d 630 (8th Cir. 2001).....	24, 25, 29, 30
<i>United States v. Plunk</i> , 153 F.3d 1011 (9th Cir. 1998).....	28
<i>United States v. Rea</i> , 958 F.2d 1206 (2d Cir. 1992) .....	28
<i>United States v. Romero</i> , 897 F.2d 47 (2d Cir. 1990).....	11
<i>United States v. Saulter</i> , 60 F.3d 270 (7th Cir. 1995).....	24
<i>United States v. Stewart</i> , 485 F.3d 666 (2d Cir. 2007) .....	12
<i>United States v. Treacy</i> , 639 F.3d 32 (2d Cir. 2011) .....	17
<i>United States v. Vazquez-Botet</i> , 41 F.2d 193 (8th Cir. 1930) .....	8
<i>United States v. Wantuch</i> , 525 F.3d 505 (7th Cir. 2008) .....	28
<i>von Bulow by Auersperg v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987) .....	16, 17

### **III. UNITED STATES COURT OF MILITARY APPEALS CASE**

<i>United States v. Marchesano</i> , 67 M.J. 535 (C.M.A. 2008) .....	11
--	----

### **IV. UNITED STATES DISTRICT COURT CASES**

<i>United States v. Lopez</i> , No. 86CR513, 1987 WL 26051 (N.D. Ill. Nov. 30, 1987) .....	17
<i>United States v. Rivera</i> , 292 F.Supp. 2d 827 (E.D. Va. 2003).....	12

**V. CONSTITUTIONAL AND STATUTORY PROVISIONS**

18 U.S.C. § 3731.....4  
28 C.F.R. § 50.10 (1980) .....21  
ARIZ. REV. STAT. § 12-2237 (1960) .....19  
PA. CONS. STAT. § 5942 (1978).....19  
U.S. CONST. amend. VI.....6

**VI. FEDERAL RULES**

FED. R. EVID. 501 .....14  
FED. R. EVID. 602 .....23  
FED. R. EVID. 701 .....23, 29  
FED. R. EVID. 801 .....6  
FED. R. EVID. 802 .....6  
FED. R. EVID. 804(b)(6).....6, 7

**VII. SECONDARY SOURCES**

Black's Law Dictionary (9th ed. 2009) .....11  
Joel G. Weinberg, *Supporting the First Amendment: A Reporter's Shield Law*, 31 Seton Hall  
Legis. J. 149 (2006) .....18  
Reporters Committee for Freedom of the Press, *The Reporter's Privilege*,  
<http://www.rcfp.org/reporters-privilege> (last visited Feb. 10, 2013) .....20  
Sandra Davidson & David Herrera, *Needed: More Than A Paper Shield*, 20 Wm. & Mary Bill  
Rts. J. 1277 (2012).....16, 18

## STATEMENT OF THE CASE

### **Statement of Facts**

On or about July 10, 2011, William Barnes (“Barnes”), operator of Big Top Circus (“Big Top”) in Boerum City, Boerum, faced an ultimatum from his accountant: raise \$500,000 or declare bankruptcy. (R. 1.) Confronted with this insurmountable financial obstacle, Barnes conferred with two local circuses, Boerum City Circus and Flying Feats Circus, in an attempt to produce a holiday show highlighting the antics of the Circuses’ elephants. (R. 1-2.) Slated to arrive in early December 2011, the ten Asian elephants would be quartered with Big Top’s elephants. (R. 2.) On or about July 30, 2011, Barnes discussed the proposition of harvesting ivory from the elephants, for profit, with an associate, Alfred Anderson (“Anderson”). (R. 2.) Anderson agreed to assist in this venture for a share of the financial return. (R. 2.)

On August 30, 2011, Mr. Barnes invited Kara Crawley (“Crawley”), a reporter for the Boerum Times, to tour Big Top and report about the upcoming elephant show. (R. 2.) Crawley agreed and, with Barnes’ permission, had complete access to Big Top and its employees. (R. 2.) During her time at the circus, Crawley spoke with an employee (“the employee”) who revealed Barnes’ plan to hunt the Asian elephants. (R. 22.) The employee agreed to a videotaped interview with Crawley, contingent upon the confidentiality of the video and the employee’s identity while the employee remained at Big Top. (R. 22.)

In early September, upon Anderson’s suggestion, James Reardon (“Reardon”) became involved in the venture. (R. 2.) Barnes agreed to this arrangement and throughout that month they continued to settle on details, including the use of a helicopter and assault rifles for the planned “hunt.” (R. 2.)

On or about October 1, 2011, Anderson officially accepted the offer to join the venture, provided Barnes supply any requisite equipment. (R. 2.) The next day, Barnes spoke with an associate at Weapons Unlimited about acquiring firearms. (R. 2.) Unaware that he was communicating with Agent Jason Lamberti (“Agent Lamberti”) from the Bureau of Alcohol, Tobacco, and Firearms (“ATF”), Barnes provided his credit card number and paid for three AK-47s, but never acquired possession of the guns. (R. 2.) Barnes also spoke with Alan Klestadt (“Klestadt”), a sales representative at Copters Corporation, and negotiated a one-day helicopter rental for December 15, 2011. (R. 3.) Barnes informed Anderson of these arrangements on or about October 15, 2011. (R. 3.) To assist with the cost of the weapons, Anderson wired Barnes \$1,000 on behalf of himself and Reardon. (R. 3.)

On November 15, 2011, Anderson told Barnes that he had reservations about including Reardon in their venture. (R. 18.) Reardon was primarily concerned about legal ramifications of the strategy. (R. 18.) Anderson claimed that he wanted to “get rid of” Reardon, but Barnes suggested that they simply wait. (R. 18.) On November 29, 2011, Anderson told Barnes that they needed Reardon “out of the picture” to prevent him from divulging their plan. (R. 19.) Barnes vehemently declared that he didn’t “want anything to do with” Anderson’s scheme to “take care of” Reardon. (R. 19.) On that same day, Reardon’s best friend, Daniel Best (“Best”), arrived at his home to find Anderson running out the front door. (R. 24.) Reardon was found dead, and Anderson confessed to police that he killed Reardon to avoid disclosure of the elephant-hunting venture. (R. 24.)

On December 1, 2011, Crawley published her exposé on Big Top and the business arrangement between Barnes, Anderson, and Reardon. (R. 3.) Barnes was taken into custody that same day. (R. 3.)

Agent Narvel Blackstock (“Agent Blackstock”) was originally assigned to investigate this case. (R. 23.) Agent Blackstock listened to and transcribed numerous telephone conversations between Barnes and his conspirators, Anderson and Reardon (collectively “co-conspirators”), which were intercepted by the United States Government (“the Government”) between October 4, 2011 and December 1, 2011. (R. 23.) However, in unrelated events, Agent Blackstock died on December 14, 2011. (R. 23.)

On December 15, 2011, Agent Thomas Simandy (“Agent Simandy”) took over this case. (R. 12.) He reviewed the conversation transcripts and interviewed Agent Lamberti, who told him about his October 2, 2011 conversation with Barnes. (R. 13.) Agent Simandy also interviewed Klestadt, who told him about his October 6, 2011 conversation with Barnes. (R. 13.) Based on his investigation, Agent Simandy made the following conclusions regarding code words and phrases used by Barnes and his co-conspirators: (1) “blood diamonds” referred to elephant ivory tusks; (2) “Charlie tango” referred to the helicopter from Copters Corporation; and (3) “black cat” referred to the three AK-47s from Weapons Unlimited. (R. 13.)

### **Procedural History**

On December 4, 2011, a grand jury indicted Respondent Barnes for two counts of conspiracy to deal unlawfully in firearms, two counts of conspiracy to commit a crime of violence against an animal enterprise, and one count of conspiracy to commit unlawful takings under the Endangered Species Act. (R. 24.) Before trial, the United States District Court for the Southern District of Boerum considered three motions: the Government’s motion to admit into evidence the out-of-court statements made by the late Reardon to Best, as an exception to the hearsay rules under Federal Rule of Evidence 804(b)(6); journalist Crawley’s motion to quash the Government’s subpoena seeking her sources, citing the journalist’s privilege; and the

Government's motion to introduce the testimony of Agent Simandy as a lay witness under Federal Rule of Evidence 701. (R. 6.)

On May 1 and May 2, 2012, the District Court heard oral arguments on the motions; on May 2, the District Court ruled against the Government on all three motions. (R. 25.) Pursuant to 18 U.S.C. § 3731, the Government filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 20.) On July 12, 2012, the Circuit Court affirmed the decision of the District Court on all issues, holding that: (1) conspiratorial liability is not applicable to the forfeiture-by-wrongdoing analysis; (2) a journalist's privilege exists pursuant to Federal Rule of Evidence 501 and is absolute; and (3) under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where, as here, the agent neither participated in the conversations nor observed them. (R. 20.) The Government subsequently filed a petition for writ of certiorari to the United States Supreme Court, requesting reversal on all three motions. (R. 36.) The Supreme Court granted certiorari on October 1, 2012. (R. 36.)

### **SUMMARY OF THE ARGUMENT**

In the present case, the lower courts both correctly ruled that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis; (2) that a journalist's privilege exists pursuant to Rule 501 and is absolute; and (3) that under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where, as here, the agent neither participated in the conversations nor observed them.

First, the Court of Appeals properly denied the Government's motion to present evidence of Reardon's hearsay statements under Rule 804(b)(6). This exception to hearsay, also known as the "forfeiture-by-wrongdoing" doctrine, is applicable only in situations where the defendant purposefully prevented the declarant from testifying. This rule is not applicable to Barnes

because, although Barnes and Anderson entered a conspiracy to hunt elephants, Barnes did not conspire to murder Reardon. Rather, he affirmatively disassociated himself from Anderson's plan to get rid of Reardon, and thus, he cannot be held liable for Reardon's murder. Furthermore, Rule 804(b)(6) explicitly requires a specific intent to prevent the declarant from testifying. Thus, even if Barnes is found guilty of conspiring to murder Reardon, Rule 804(b)(6) is still inapplicable because the only intent required for a conspiracy is the specific intent to commit the substantive crime. Conspiracy to murder does not equate with conspiracy to prevent a witness from testifying; if Barnes is found guilty of conspiring to murder Reardon that does not mean he entered the conspiracy with the intent to prevent Reardon from testifying. Therefore, conspiratorial liability is not sufficient to find that Barnes forfeited his sixth amendment confrontation rights under Rule 804(b)(6).

Second, the subpoena seeking to compel disclosure of journalist Crawley's source was properly quashed. While not explicitly established by Rule 501, a common law privilege governing conversations between a journalist and her source has emerged through recent legislation and jurisprudence. Courts at the state and federal levels have recognized the need to protect journalists from compelled disclosure of confidential sources in order to promote an effective and well-informed press. Such a privilege should be absolute to provide ultimate protection. However, as courts have identified, a qualified privilege based on a balancing test between the materiality, necessity, and otherwise unavailability of the sought information would also apply to protect Crawley in this case. The name of her source is not crucial to the Government's claim, but would be merely cumulative based on the plethora of evidence available to the Government. Therefore, the District Court and Circuit Court properly quashed the subpoena seeking to compel disclosure of Crawley's source.

Lastly, the lay opinion testimony of Agent Simandy concerning the meaning of code words and phrases was properly excluded under Rule 701. First, the testimony is not rationally based on his perception. Agent Simandy neither participated in nor observed the conversations between Barnes and his co-conspirators. His participation in the investigation was limited to a review of about a dozen transcribed telephone conversations, and two witness interviews. This limited review of pre-collected information does not satisfy the first-hand knowledge requirement that Agent Simandy's testimony be rationally based on his perception. Furthermore, the testimony is not helpful to the jury because it does not further the jury's understanding of the facts about which Agent Simandy is testifying. All of the inferences Agent Simandy drew were based on facts already in evidence, and therefore, the jury could draw the same inferences given the transcribed conversations and the testimony of the two witnesses without Agent Simandy's additional testimony. Accordingly, this Court should affirm the ruling of the Circuit Court on all three motions.

### **ARGUMENT**

#### **I. REARDON'S STATEMENTS ARE INADMISSIBLE HEARSAY BECAUSE BARNES WAS NOT INVOLVED IN A CONSPIRACY TO MURDER REARDON. REGARDLESS, CONSPIRATORIAL LIABILITY IS NOT SUFFICIENT TO TRIGGER THE FORFEITURE-BY-WRONGDOING DOCTRINE.**

The Sixth Amendment to the United States Constitution protects an accused's right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. Thus, if a witness is not available for cross-examination, the evidence is inadmissible as hearsay. *See* FED R. EVID. 801; FED. R. EVID. 802. However, if an accused procures the absence of a witness, the accused forfeits his right to confront the witness. *See* FED. R. EVID. 804(b)(6); *Giles v. California*, 554 U.S. 353, 359-60 (2008). In other words, "if a witness is absent by [the accused's] own wrongful

procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” *Reynolds v. United States*, 98 U.S. 145, 158 (1878). Rule 804(b)(6) codified this “forfeiture-by-wrongdoing” doctrine. *Davis v. Washington*, 547 U.S. 813, 833 (2006); *see also* FED. R. EVID. 804(b)(6). The Government wrongfully argues that Reardon’s statements are admissible under Rule 804(b)(6) through conspiratorial liability. (R. 25-26.)

The substantive crime in a conspiracy imputes to all members of the conspiracy, even those who did not actually commit the crime. *See Pinkerton v. United States*, 382 U.S. 640, 646-47 (1946). “A conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, [p]rovided that the substantive offense was committed in furtherance of the conspiracy and as a part of it.” *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949). Proof of a conspiracy requires a showing that “(1) a conspiracy existed; (2) the defendant knew of and voluntarily participated in the conspiracy; and (3) there was an overt act in furtherance of the conspiracy.” *United States v. Newell*, 658 F.3d 1, 13 (1st Cir. 2011) (*citing United States v. Muñoz–Franco*, 487 F.3d 25, 45 (1st Cir. 2007)).

**A. There is no conspiratorial liability to trigger the forfeiture-by-wrongdoing doctrine because Barnes was not involved in a conspiracy to murder Reardon.**

A conspiracy is a partnership in crime, which requires an overt act toward the unlawful end. *Pinkerton*, 382 U.S. at 644 (*citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 153 (1940)). “[T]he overt act of one partner in crime is attributable to all.” *Id.* at 647. An agreement is the essence of a conspiracy; without one, there is no conspiracy. *See United States v. Curry*, 977 F.2d 1042, 1053 (7th Cir. 1992); *see also United States v. Johnson*, 439 F.2d 885, 888 (4th Cir. 1971) (“Proof of an agreement to enter into a conspiracy is not to be lightly inferred.”). Proof of an agreement requires more than just a mere showing of association. *United*

*States v. Gonzalez*, 570 F.3d 16, 23 (1st Cir. 2009). The government must show “an understanding of the objectives of the conspiracy,” to prove an agreement. *Curry*, 977 F.2d at 1042; *see also*, *United States v. Manbeck*, 744 F.2d 360, 390 (4th Cir. 1984) (Defendant crew members with knowledge of marihuana on board could not be held liable for conspiracy to distribute marihuana); *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1988) (“Without evidence showing . . . a meeting of the minds . . . the [conspiracy] conviction cannot stand.”).

Even with an agreement, a person can be found guilty of a co-conspirator’s actions only if those actions were in furtherance of the conspiracy. *See United States v. Vazquez-Botet*, 532 F.3d 37, 62 (1st Cir. 2008) (*citing Pinkerton*, 328 U.S. at 647-48). For example, in a conspiracy for mail-fraud, the act of mailing is an overt act in furtherance of the conspiracy. *See Cochran v. United States*, 41 F.2d 193, 199-200 (8th Cir. 1930). A conspiracy cannot be found:

if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

*Pinkerton*, 328 U.S. at 647-48.

However, a person cannot be found guilty of a conspiracy if that person withdraws from the conspiracy. In order to establish withdrawal from a conspiracy, a co-conspirator must act affirmatively to remove himself from the conspiracy. *Hyde v. United States*, 225 U.S. 347, 369 (1912). This “requires that the defendant show that he or she has done ‘some act to disavow or defeat the purpose of the conspiracy.’” *United States v. Cherry*, 217 F.3d 811, 818 (10th Cir. 2000) (*quoting Hyde*, 225 U.S. at 369). “[U]nder *Pinkerton*, a defendant is not responsible for the acts of co-conspirators if that defendant meets the burden of proving he or she took affirmative steps to withdraw from the conspiracy before those acts were committed.” *Id.* at 821.

In the present case, Barnes did not agree to conspire to murder Reardon. First, the agreement between Anderson and Barnes was to hunt elephants. (R. 2.) The intentional killing of another person is not an element or a foreseeable consequence of a plan to hunt elephants. There was no indication at any point in time that any person would be killed in the process. Second, Barnes affirmatively removed himself from any relation to Anderson's plan to murder Reardon when he said, "I don't want anything to do with this." (R. 19.) He made explicit statements indicating that he wanted no part of Anderson's plan or involvement with Reardon. (R. 19-20.) Barnes was not involved in a conspiracy to murder Reardon, and thus, there is no conspiratorial liability to trigger the forfeiture-by-wrongdoing doctrine.

**B. Regardless, Reardon's statements are inadmissible hearsay because conspiratorial liability is not sufficient to trigger the forfeiture-by-wrongdoing doctrine.**

The Circuit Court used the test adopted by the Fourth Circuit in *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). "In order to apply the forfeiture-by-wrongdoing exception, the district court must find, by a preponderance of the evidence, that (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness." *Id.* Barnes does not meet prongs (1) and (2) of the forfeiture-by-wrongdoing analysis because he removed himself from any wrongdoing associated with Reardon and he did not possess the requisite intent to render Reardon unavailable.

Rule 804(b)(6) requires a specific intent to prevent the declarant from testifying in order for the defendant's confrontation right to be waived. *See Giles*, 554 U.S. at 367-68. In *Reynolds*, this Court admitted testimony of the defendant's second wife, in part, because the defendant took part in procuring her absence. 98 U.S. at 158. The defendant argued that admitting said

testimony violated his constitutional rights. *Id.* This Court explained that “if [the defendant] voluntarily keeps the witness away, he cannot insist on his privilege.” *Id.* “[N]o one shall be permitted to take advantage of his own wrong.” *Id.* at 159.

This Court has established that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Davis*, 547 U.S. at 833. This hearsay exception is not a blanket exception for every absent witness. This Court declared that Rule 804(b)(6) applies only to the witness whom the defendant procured the absence of, for the purpose of keeping said witness from testifying. *Giles*, 555 U.S. at 361. “[U]nconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.” *Id.*

In *Giles*, the prosecution sought to introduce Giles’ girlfriend’s statements into evidence under Rule 804(b)(6) because Giles murdered his girlfriend. *Id.* at 356. This Court held that the declarant’s statements were not admissible under the forfeiture-by-wrongdoing doctrine because the defendant did not procure the declarant’s absence with the intent of preventing the declarant from testifying. *Id.* at 367. By definition, murdering a person prevents that person from testifying. *Id.* at 357. However, Giles did not commit the murder with the intention of preventing the declarant from testifying, and thus her statements were inadmissible hearsay. *Id.* at 377.

Conspiracy, alone, is not sufficient to meet the requisite intent to invoke Rule 804(b)(6). *See Id.* at 361-62. “In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying . . . the testimony was excluded.” *Id.* A conspirator can be guilty of a crime to which the conspirator did not specifically agree. *United States v. Feola*, 420 U.S. 671, 692 (1975) (“[O]ne may be guilty as a conspirator for acts the precise details of which one does not know at the time of the agreement.”); *see also*

*United States v. McKinney*, 954 F.2d 471, 476-77 (7th Cir. 1992) (To prove conspiracy, government only need show an overt act in furtherance of a conspiracy regardless of intent.). On the other hand, Rule 804(b)(6) requires a specific intent, which, by definition, requires knowledge of the crime. *See* INTENT, Black's Law Dictionary (9th ed. 2009) (the intent to accomplish the precise criminal act that one is later charged with). Finding a defendant guilty of a conspiracy is not sufficient to find the defendant had the specific intent required for application of Rule 804(b)(6). *See United States v. Romero*, 897 F.2d 47, 51 (2d Cir. 1990); *Feola*, 420 U.S. at 692.

Even if a defendant is found to be guilty of a conspiracy, in order to invoke Rule 804(b)(6), the trial court must still find that the defendant intended to procure the absence of the declarant through a co-conspirator. *See United States v. Marchesano*, 67 M.J. 535, 543-44 (C.M.A. 2008). A co-conspirator's actions can result in a defendant's loss of confrontation rights, only if "their misconduct was within the scope of the conspiracy and reasonably foreseeable to the defendant." *United States v. Carson*, 455 F.3d 336, 364 (D.C. Cir. 2006). *See also Cherry*, 217 F.3d at 821 ("[P]articipation in an ongoing . . . conspiracy may constitute a waiver of constitutional confrontation rights if . . . the wrongdoing leading to the unavailability of the witness was in furtherance of and within the scope of the drug conspiracy, and such wrongdoing was reasonably foreseeable as a 'necessary or natural' consequence of conspiracy."). For example, if "several individuals enter into a conspiracy, and as a part of the conspiracy, they agree to kill all potential witnesses against them," then a defendant's confrontation rights may be forfeited through conspiracy liability. *Carson*, 455 F.3d at 364.

In *United States v. Martinez*, the defendant forfeited his confrontation rights when his co-conspirators killed a government informant after threatening murder to protect the privacy of the

conspiracy. 476 F.3d 961, 966 (D.C. Cir. 2007). The defendant overtly showed that he approved of murdering anyone who violated the privacy of the conspiracy in order to prevent that person from testifying, by threatening the informant after learning of the informant's communication with police. *Id.* The court found that the forfeiture-by-wrongdoing doctrine applied to co-conspirators where there was evidence of the defendant's specific intent to prevent the victim from testifying. *Id.*

Similarly, in *United States v. Stewart*, the Second Circuit found the defendant guilty of conspiracy to murder the victim "with the intent to prevent [the victim] from testifying against Stewart." 485 F.3d 666, 672 (2d Cir. 2007). Stewart was part of a "crew" whose "code" was "informer must dead," meaning that anyone who was a government informant must be killed. *Id.* After the victim made it very clear that he had every intention to testify against Stewart, Stewart sent messages to the victim "that if [he] insisted on testifying against Stewart, [he] would be shot." *Id.* at 669-72. The court found that the foregoing evidence was sufficient to infer a conspiracy to murder the victim with the intent to prevent the victim from testifying, and thus, Stewart forfeited his right to confrontation. *Id.* at 672.

Conspiratorial liability was, again, found to trigger to the forfeiture-by-wrongdoing doctrine in *United States v. Rivera*. 292 F.Supp. 2d 827, 837 (E.D. Va. 2003). In that case, the court found that evidence: (1) of the defendant's leadership position in a gang, (2) of knowledge that the declarant was cooperating with authorities, (3) that the defendant "desired to murder [the declarant] to prevent her from testifying against him," (4) that the defendant was aware of his gang's intentions to murder the declarant, and (5) that the defendant "gloated about the murder," was enough to infer the defendant had the requisite intent required under Rule 804(b)(6). *Id.* at 833-35, 837.

There is no reason to believe that Barnes had the requisite intent for Rule 804(b)(6) to apply based on the fact that (1) he stated he had no reason to believe Reardon was a threat, and (2) he affirmatively stated that he wanted nothing to do with Reardon. (R. 18-19.) Thus, there is no reason to believe Barnes had the intent to prevent Reardon from testifying.

Barnes did not have the requisite intent under Rule 804(b)(6) because he specifically stated he did not want anything to do with the murder of Reardon. (R. 19.) The conspiracy between Barnes and Anderson was for the purpose of hunting elephants. (R. 21.) The record does not contain evidence of an agreement to kill a potential witness. Barnes had no reason to believe that killing a person would be necessary in furtherance of the conspiracy. When Anderson hinted at the idea of killing Reardon, Barnes made it clear that he had no intention of being a part of such a plan. (R. 19.) He specifically said to Anderson, “don’t do anything,” and, “I don’t want anything to do with this.” (R. 18-19.) Thus, Barnes did not possess the requisite intent under Rule 804(b)(6).

The District Court properly denied the Government’s motion to admit Reardon’s statements into evidence because Barnes was not part of a conspiracy to murder Reardon, and even if he was, he did not possess the requisite intent required under Rule 804(b)(6).

## **II. THE COMMUNICATION BETWEEN CRAWLEY AND THE CONFIDENTIAL INFORMANT FROM BIG TOP CIRCUS IS PROTECTED BY AN ABSOLUTE JOURNALIST’S PRIVILEGE PURSUANT TO FEDERAL RULE OF EVIDENCE 501.**

### **A. Rule 501 extends to the common-law privilege between a journalist and her source.**

While the American adversarial system encourages truth-seeking and accessibility of evidence, this practice is not without limits. The discovery process has been restricted by Constitutional provision, statute, and the common law through “privileges” which protect

communications that transpire in the course of certain personal and professional relationships. Respondent contends that such a relationship exists between a journalist and her source, and thus, any conversations are sacrosanct.

This Court has ruled that the First Amendment does not confer a journalist's privilege. *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). However, this Court anticipated that Congress could "determine whether a statutory newsman's privilege is necessary and desirable" and could "fashion standards and rules" as necessary. *Id.* at 706.

In fulfillment of this Court's foresight, Congress enacted Federal Rule of Evidence 501, which provides that "the common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court." FED. R. EVID. 501. Rather than prescribing a limited set of recognized privileges, Rule 501 broadly protects those claims of privilege determined at common law. Congress enacted Rule 501 for the purpose of "leav[ing] privilege questions to the courts rather than attempt[ing] to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n. 25 (1984). The Court has since determined that certain relationships require protection under Rule 501. *See Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (protecting communication between a psychotherapist and his patients); *Upjohn Co. v. United States*, 449 U.S. 383, 401-2 (1981) (protecting communication between an attorney and his client); *Trammel v. United States*, 445 U.S. 40, 53 (1980) (protecting spousal communication).

In *Jaffee*, where this Court first recognized Rule 501 as conferring a privilege upon the psychotherapist-patient relationship, this Court emphasized three factors that are relevant to the privilege analysis: (1) significant public and private interests that are served by the privilege; (2)

the relative weights of the interests to be served by the privilege and the burden on truth-seeking that might be imposed by it; and (3) the extent to which the privilege is recognized by the states. 518 U.S. at 9-14. Because the journalist privilege satisfies these factors, this Court should recognize such a privilege and affirm the lower courts' decision not to compel disclosure of Crawley's source.

As to the first and second *Jaffee* factors, compelling interests exist in the instant case to warrant protection of Crawley's source, and those interests do not impose an undue burden on truth-seeking. A journalist is a representative of the public who is entitled to serve the public by uncovering and sharing news without fear or compulsion from the government. *United States v. Criden*, 633 F.2d 346, 355 (3d Cir. 1980). Courts have recognized the importance of encouraging a "vigorous, aggressive, and independent press capable of participating in robust, unfettered debate . . . ." *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972). Such interests in protecting sources and the editorial process are present in both civil and criminal trials. *See United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). Any restrictions upon the press should be permissible only "to prevent a substantial threat to the administration of justice." *United States v. Harrelson*, 713 F.2d 1114, 1116 (5th Cir. 1983).

In the instant case, the District Court acknowledged that the purpose of the journalist's privilege is to "encourage people to speak to the press," which can only be realized if there is an absolute guarantee that journalists and informants will face no reprisal, either from the government or from a defendant against whom they are compelled to testify. (R. 17.) Likewise, the Circuit Court recognized that uncertainty as to whether communication will remain confidential could result in reluctance to assist journalists. (R. 30.) Crawley gained an insider's view into the alleged Big Top scandal only by guaranteeing to her source, who had safety

concerns, that the interview would remain completely confidential. (R. 10.) Her exposé hinged upon confidentiality, and any attempt by the Government to breach that confidentiality would result in potential sources being less likely to cooperate with the press in the future. Furthermore, Crawley's refusal to divulge her source does not place an overwhelming burden on the Government to gather evidence and prosecute Barnes. The Government has access to Barnes' phone conversations (R. 18-19), the content of his discussions with Agent Lamberti (R. 13), and Anderson's confession (R. 24.) Consequently, the identity of Crawley's source is far from being the cornerstone of the Government's case against Barnes.

Regarding the third factor of the *Jaffee* analysis, the states have overwhelmingly recognized the journalist's privilege. Though this Court noted in its dicta in *Branzburg* that a majority of the states had neglected to acknowledge the journalist's privilege, the passage of time has resulted in a significant change. *See Branzburg*, 408 U.S. at 689. Today, forty states and the District of Columbia have enacted journalist shield laws. Sandra Davidson & David Herrera, *Needed: More Than A Paper Shield*, 20 Wm. & Mary Bill Rts. J. 1277, 1289 (2012). Affirming the lower courts' holdings would simply reinforce the position that a majority of the states have taken with regard to the journalist's privilege.

Additionally, case law has established that the privilege does not automatically extend to anyone who engages in researching and reporting a current event. Rather, an individual claiming protection under this privilege must demonstrate the intent to disseminate information to the public, and that this intent existed at the inception of the newsgathering process. *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

In the instant case, Crawley is a staff writer for the Boerum Times, whom Barnes contacted in anticipation of a newspaper story about Big Top. (R. 9.) Her initial purpose in

touring the facility and interviewing employees was for the purpose of publishing that story. (R. 9.) When she videotaped the interview with her confidential informant, she intended to publicize the contents of that interview to the City of Boerum, rather than create a record for potential use at trial. Therefore, Crawley satisfied the requirement pursuant to *von Bulow* that her goal be dissemination of information to the public. *See von Bulow*, 811 F.2d at 144.

The Government argues that Crawley's source forfeited any claim of the common law privilege by appearing on camera during the source's interview. (R. 11.) Some courts have established confidentiality as the linchpin which dictates whether the privilege applies. *See United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011); *Cuthbertson*, 630 F.2d at 147; *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). Nonetheless, courts have held that whether the source chooses to remain confidential or non-confidential does not alter the privilege. In other words, the willingness of an individual to reveal his/her identity does not equate with acquiescence to testify and serve as a witness in a trial. *See von Bulow*, 811 F.2d at 145; *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 32 (2d Cir. 1998); *United States v. Lopez*, No. 86CR513, 1987 WL 26051, at \*1 (N.D. Ill. Nov. 30, 1987).

Even where courts do determine that confidentiality is required for the journalist's privilege to apply, such "confidentiality" can be demonstrated by showing that the journalist made a "promise" not to divulge a source's identity. *See, e.g., Chevron Corp. v. Berlinger*, 629 F.3d 297, 307 (2d Cir. 2011). Consequently, cases indicating different standards for confidential and non-confidential communication are clearly inapposite to the instant case, as the source clearly manifested an expectation of confidentiality. (R. 10.) Out of fear for safety, Crawley's informant explicitly requested that Crawley use a pseudonym when publishing the tip and that she refrain from broadcasting the taped interview, to which she assented. (R. 10.) Confidentiality

of the informant's identity did not hinge upon publication of the Big Top article, and thus, the informant's expectation of confidentiality remained intact. Therefore, even if this Court decides to distinguish between confidential and non-confidential sources, the journalist's privilege should nonetheless apply in this case and shield Crawley from compelled disclosure.

**B. The common law journalist's privilege should be absolute, rather than qualified.**

This Court should find that the journalist's privilege is absolute, rather than qualified. "A shield that can be punctured is not a shield that can be relied upon." Davidson & Herrera, *supra*, at 1296. Without an absolute privilege and protection of confidential sources, journalists would often face pressure to breach confidentiality. While a qualified privilege would provide significant protection, only an absolute privilege affords the certainty that is vital in a relationship between a journalist and her source. This possibility of compelled disclosure would certainly "threaten . . . [the press's] ability in the future to perform its public function by impairing its ability to acquire information for publication." *Berlinger*, 629 F.3d at 307. As Justice Tatel said in his concurrence in *In re Grand Jury Subpoena, Judith Miller*:

If litigants and investigators could easily discover journalists' sources, the press's truth-seeking function would be severely impaired. Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld.

438 F.3d 1141, 1168 (D.C. Cir. 2005) (Tatel, J., concurring).

Over half the states with shield statutes have recognized the need for confidentiality between journalists and their sources as imperative, and have provided for an absolute privilege against compelled disclosure. Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 Seton Hall Legis. J. 149, 174 (2006). For example, the Pennsylvania

shield law states that no reporter “shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.” PA. CONS. STAT. § 5942 (1978). Similarly, the Arizona shield law protects journalists against compelled disclosure of sources “in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere . . . .” ARIZ. REV. STAT. § 12-2237 (1960). Such legislation affords an ultimate safeguard and recognizes that only an unqualified privilege will afford authentic protection to the press.

Alternatively, some states have enacted laws that provide for a dual nature of the privilege, depending upon the context in which it is invoked. *See Baker v. Goldman Sachs & Co.*, 669 F.3d 105, 107 (2d. Cir. 2012) (referencing New York shield law, which provides an absolute privilege where news is “obtained under a promise of confidentiality,” but only a qualified privilege where news is “unpublished and not obtained under a promise of confidentiality”). According to such legislation, confidential information and informants are completely immune from compelled disclosure, but non-confidential information is not.

Both the District Court and the Circuit Court recognized that for the journalist’s privilege to be meaningful and effective, it must be absolute. (R. 17, 30.) State legislation indicates a trend toward defending the rights of journalists, and public policy mandates complete protection of journalists who are subpoenaed to testify against their sources. Only an absolute privilege promotes the certainty that is vital in relationships between journalists and their sources. The interests in encouraging meaningful contribution to the media and promoting thoroughness in the news-gathering process warrant the utmost protection of those who have committed to developing a press that presents the most relevant and accurate news to its fellow citizens.

**C. Alternatively, if this Court determines that the journalist's privilege is qualified, Crawley should still be protected from compelled disclosure.**

Even if this Court finds that the journalist's privilege, pursuant to Rule 501, is qualified, Crawley should still be protected against compulsion to disclose her source. In *Branzburg*, Justice Powell clearly anticipated a situation where the journalist's privilege would operate, suggesting that a balancing test be struck between "the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Justice Stewart further set forth a three-prong analysis for compelled disclosure, requiring the government to:

(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law, (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights, and (3) demonstrate a compelling and overriding interest in the information.

*Id.* at 743 (Stewart, J., dissenting).

All twelve federal circuits have recognized a qualified privilege in certain contexts. Reporters Committee for Freedom of the Press, *The Reporter's Privilege*, <http://www.rcfp.org/reporters-privilege> (last visited Feb. 10, 2013). Some have employed variations on this balancing test, allowing compelled disclosure of confidential material where the information is highly material, necessary or critical to the maintenance of a claim, and not obtainable from other available sources. *See Criden*, 633 F.2d at 359-60; *Cuthbertson*, 630 F.2d at 148; *Nat'l Broad. Co.*, 194 F.3d at 32-33; *Riley*, 612 F.2d at 716-718; *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986). Courts often apply the test indiscriminately to both criminal and civil trials.

In determining whether the qualified privilege applies, courts have held that the privilege may be superseded only where a party seeking disclosure cannot obtain the information through

any other channel. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 41 (1st Cir. 2004) (disclosure of television reporter's source compelled only after defense attorney had interviewed fourteen other individuals and "exhausted . . . all other means of obtaining the information necessary to conclude his investigation"); *Nat'l Broad. Co.*, 194 F.3d at 36 (disclosure outtakes from "Dateline" program compelled because information contained was not "reasonably obtainable from other sources"). Additionally, where courts refuse to acknowledge the journalist's privilege, they often do so when the reporter observes criminal activity firsthand to avoid concealment of a felony. *See Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1150 (disclosure compelled where a "source" committed a crime by divulging the secret identity of a CIA agent to a news reporter). A court may likewise find the journalist's privilege superseded where national security is at stake. *See New York Times Co. v. Gonzales*, 459 F.3d 160, 169-171 (2d Cir. 2006) (compelled disclosure of newspaper's phone records where newspaper personnel received confidential information about government plans to seize assets and search organizations suspected of funding terrorism, and where such information was not available from any other source).

The qualified journalist's privilege has also been recognized at the federal executive level. The United States Department of Justice ("DOJ") guidelines have established a policy of ensuring that the news-gathering process is not impaired. 28 C.F.R. § 50.10 (1980). The DOJ has therefore declared that a primary goal is to "provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." *Id.* To that end, "all reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media . . ." *Id.* Such language indicates recognition of the balancing test anticipated by *Branzburg* and applied in

recent case law, and demonstrates that the concept of upholding the integrity of the press through a qualified privilege has been established in the federal system.

In the instant case, the Court should conduct the balancing test in favor of the journalist's privilege. In applying the three-part test, the Government's alleged "need" for the identity of Crawley's source does not merit subordination of the journalist's privilege. Crawley's source is not crucial to the Government's case, nor is it unobtainable from alternate sources. Unlike *Nat'l Broad.*, the instant case presents several additional forms of evidence at the Government's disposal. The Government has presented phone conversations between Barnes and his co-conspirators and discussions between Barnes and an ATF agent regarding the purchase of weapons for the elephant-hunting venture. (R. 13, 18-19.) Additionally, records of Barnes' contacts with Copters Corporation are available as evidence. (R. 13.) As recognized by the District Court, the informant's identity would be merely cumulative, since the Government has set forth alternative sources of evidence. (R. 17.)

Furthermore, unlike in *Grand Jury Subpoena, Judith Miller*, here the source did not seek confidentiality because the source had committed a crime. Rather, Crawley's source had legitimate concerns for job security and personal safety. Moreover, there existed no exigency necessitating compelled disclosure before the Grand Jury, such as danger to citizens or the potential disclosure of secret government plans. *Cf. New York Times*, 459 F.3d at 170. Forcing Crawley to divulge her source would serve no other purpose than to degrade her profession, and to jeopardize future journalist-source relationships and the breadth of news coverage.

The District Court properly granted Crawley's motion to quash the subpoena pursuant to an absolute journalist's privilege. Should this Court determine that the journalist's privilege is

indeed qualified, it should still affirm the Circuit Court’s holding, as the Government has failed to demonstrate a compelling reason for overcoming that privilege.

**III. THE LAY OPINION TESTIMONY OF AGENT SIMANDY DOES NOT SATISFY THE REQUIREMENTS OF FEDERAL RULE OF EVIDENCE 701 BECAUSE THE TESTIMONY IS NEITHER BASED ON FIRST-HAND KNOWLEDGE NOR OBSERVATION, AND IT IS NOT HELPFUL TO THE JURY.**

Federal Rule of Evidence 602 requires that a witness have personal knowledge of the matters about which the witness testifies, except in the case of expert opinions. FED. R. EVID. 602. Federal Rule of Evidence 701 adds that a lay witness may offer opinions or inferences if they are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' 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. Subsection “(a) is the familiar requirement of first-hand knowledge or observation.” *Id.* advisory committee notes on 1972 proposed rules. The limitation in (b) is phrased in terms of requiring that the lay witness's testimony be helpful in resolving issues. *Id.*

**A. Agent Simandy’s limited review of pre-collected information does not satisfy the first-hand knowledge requirement that his testimony be rationally based on his perception.**

Rule 701(a) requires lay opinion testimony to be rationally based on the witness's personal perceptions. *See* FED. R. EVID. 701(a). The rational-basis requirement is the “first-hand knowledge or observation” requirement. *Id.* advisory committee notes on 1972 proposed rules; *see also* FED. R. EVID. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). The “traditional objective” of the rule is to afford the trier of fact “an accurate reproduction of the event” at issue. FED. R. EVID. 701(a) advisory committee notes on 1972 proposed rules.

Furthermore, the Eleventh Circuit held that a lay witness may “clarify conversations that are ‘abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that were clear only to the defendant and the witness.’” *United States v. Garcia-Barzaga*, 361 F. App'x 109, 115 (11th Cir. 2010) (quoting *United States v. Awan*, 966 F.2d 1415, 1430 (11th Cir. 1992)). “[S]uch testimony is permissible where it assists the jury in understanding words and phrases it otherwise would not understand, and is provided by a witness who was a party to the conversation he interprets for the jury.” *Id.* (the court found that the district court did not abuse its discretion by permitting the agent to testify as to his impressions and interpretations concerning recorded conversations to which he was a party).

Courts have interpreted “first-hand knowledge or observation” as requiring the witness to have been a participant in the conversation, have personal knowledge of the facts communicated in the conversation, or have observed the conversation as it occurred. *See, e.g., United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001); *United States v. Parsee*, 178 F.3d 374, 379-80 (5th Cir. 1999) (witness was permitted to testify that a reference to “pants” was a coded reference to drugs because the witness was a participant in the telephone conversations); *United States v. Saulter*, 60 F.3d 270, 276 (7th Cir. 1995) (witness who had first-hand knowledge of subject discussed and persons involved was permitted to testify); *Awan*, 966 F.2d at 1430 (undercover agent who was a participant in the conversations and had personal knowledge of the facts being discussed was permitted to testify). *See also United States v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006) (“opinion testimony of lay witnesses must be predicated upon concrete facts within their own observation and recollection—that is facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts” (internal quotation marks omitted)).

Relying on the plain language of Rules 602 and 701, the Eighth Circuit in *Peoples* held that:

[w]hen a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.

250 F.3d at 641. The FBI agent in *Peoples* was not permitted to testify to her opinion of the “hidden meanings” of the words and phrases used because the agent had not heard or observed the conversations. *Id.* at 640 (agent testified that “buying a plane ticket” meant “killing”). Instead, the agent reviewed transcripts of conversations after-the-fact, and therefore, her opinions “lacked first-hand knowledge of the matters about which she testified.” *Id.* at 641.

Similarly, Agent Simandy lacked first-hand knowledge of the matters about which the government wanted him to testify. He was not a participant in any of the conversations between Barnes and his co-conspirators, Anderson and Reardon. (R. 14.) His opinions were based on his investigation after-the-fact, primarily his second-hand review of telephone transcripts transcribed by another agent, and were not based on personal experience of those conversations. (R. 14.) According to Chief Judge Wu from the District Court, what Agent Simandy did during his investigation is the equivalent of “reading a book and then asserting first-hand knowledge to the events the book describes.” (R. 15.) Thus, the District Court did not err in excluding Agent Simandy’s opinion about the “hidden meanings” in the intercepted telephone conversations.

Additionally, Courts have found the 701(a) “personal perception” requirement to be satisfied where a witness has extensive participation in the investigation. *See United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001); *United States v. Jayyousi*, 657 F.3d 1085, 1003 (11th Cir. 2011). In *Miranda*, the Fifth Circuit held that an investigator’s extensive participation in the investigation of a conspiracy, including surveillance, undercover drug purchases,

debriefings of witnesses familiar with the defendants' negotiations, and the monitoring and translating of intercepted telephone conversations, qualified him to form opinions as to the meaning of certain code words and testify those opinions under Rule 701. 248 F.3d at 441. In *Jayyousi*, the Eleventh Circuit held that an agent may testify as a lay witness to the meaning of code words and phrases after reviewing intercepted telephone conversations. 657 F.3d at 1102. The agent's lay opinion testimony regarding the meaning of code words was found to be rationally based on his perception. *Id.* Although the agent was not a participant to the conversations and reviewed transcripts of intercepted telephone conversations in English and in Arabic after-the-fact, the court allowed the agent to testify because he investigated the case for five years, and read thousands of wiretap summaries and hundreds of verbatim transcripts, faxes, publications, and speeches. *Id.*

The defendants in *Jayyousi* relied on *United States v. Cano*, 289 F.3d 1354 (11th Cir. 2002), a cocaine trafficking and money laundering case, to support their argument. *Jayyousi*, 657 F.3d at 1103. In *Cano*, the government proffered the agent as a lay witness to testify regarding the "hieroglyphics" in a defendant's phone book. *Id.* (citing *Cano*, 289 F.3d at 1360-61). "The agent 'decipher[ed] the hieroglyphics—by correlating the ten digit telephone number of members of the conspiracy (obtained from the wiretaps) with the ten hieroglyphic symbols opposite their names in the phone book.'" *Id.* (quoting *Cano*, 289 F.3d at 1360-61). The Eleventh Circuit in *Jayyousi* "agreed with the defendants that the agent [in *Cano*] was prohibited from testifying about the meaning of a simple code that the jury could have deciphered easily based on evidence admitted at the trial." *Id.* However, the court found the defendants' reliance on *Cano* misplaced because the agent's testimony in *Jayyousi* was based on what he learned during

his examination of thousands of documents, many of which were not admitted into evidence, during a five-year investigation. *Id.*

The court in *Jayyousi* also found that the testimony of the agent was more similar to the lay opinion testimony held admissible in *United States v. Hamaker*, 455 F.3d 1316, 1331–32 (11th Cir. 2006) (testimony of a financial analyst of the FBI who “reviewed and summarized over seven thousand financial documents”), and *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984) (testimony of a lay witness in a prosecution for Medicare fraud who conducted his own examination of store records). *Id.* at 1102-03. Therefore, the court in *Jayyousi* found that the agent’s extensive review of documents permitted his testimony to be rationally based on his perception. *Id.* at 1103.

According to Circuit Judge Zhu’s dissent, when a witness reviews transcripts of conversations and then testifies as to his conclusions concerning the use of terms in those conversations, that testimony is based on first-hand knowledge of the records. (R. 34.) Judge Zhu cites to *Jayyousi* to support the proposition that the aforementioned satisfies the personal perception requirement of Rule 701(a), and states that the instant case cannot be meaningfully distinguished from *Jayyousi*. (R. 34.) Respondent contends otherwise.

Unlike the agents in *Miranda* and *Jayyousi*, Agent Simandy’s participation in the investigation cannot be deemed extensive so as to satisfy the personal perception requirement. Agent Simandy’s opinion was only based on about a dozen conversations that took place over a period of less than two months: from October 4, 2011 until the defendant’s arrest on December 1, 2011. (R. 13.) Agent Simandy also interviewed two witnesses, Agent Lamberti and Klestadt, to learn when the defendant contacted them regarding the AK-47s and the helicopter, respectively. (R. 13.) That was the extent of Agent Simandy’s participation in the investigation.

Accordingly, because Agent Simandy lacked first-hand knowledge or observation of the conversations to satisfy the “personal perception” requirement of Rule 701(a), the District Court properly excluded Agent Simandy’s opinion concerning the alleged code words and phrases used in the intercepted telephone conversations. He was not a participant in the conversations, he did not observe the conversations as they occurred, and due to his limited participation in the investigation, he did not have personal knowledge of the facts being related.

**B. Agent Simandy’s lay opinion testimony is not admissible because it does not help the jury understand the facts about which he is testifying.**

The second prong of Rule 701 requires that the lay witness's opinion testimony be “helpful” to the jury in understanding the witness's testimony or determining a fact in issue. FED. R. EVID. 701(b). This includes helping the jury or the court to understand the facts about which the witness is testifying. *United States v. Wantuch*, 525 F.3d 505, 513 (7th Cir. 2008). “Lay opinion testimony will probably be more helpful when the inference of knowledge is to be drawn not from observed events or communications that can be adequately described to the jury, but from such factors as the defendant's history or job experience.” *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992).

In cases where such evidence is necessary to explain the meaning of criminal jargon, agents use their particular expertise to decipher that jargon for the jury. *See, e.g., United States v. Delpit*, 94 F.3d 1134, 1144 (8th Cir. 1996) (police officer gave expert testimony interpreting slang and drug codes in connection with recorded telephone calls); *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (police officer gave expert testimony based on his specialized knowledge of narcotics code terminology); *United States v. Earls*, 42 F.3d 1321, 1324–25 (10th Cir. 1994) (expert testimony was proper to show that defendants were speaking in code). Thus,

“to permit such testimony as lay opinion is to permit an end run around the more exacting requirements for expert testimony.” (R. 31) (*citing Peoples*, 250 F.3d at 640).

Additionally, the Eleventh Circuit has “held that a lay witness may provide interpretations of code words when the meaning of these words ‘[is] not ‘perfectly clear’ without [the witness’s] explanations.’” *Jayyousi*, 657 F.3d at 1103 (*quoting Awan*, 966 F.2d at 1430–31). In *Jayyousi*, the agent’s extensive investigation enabled him to link all the material support in the case and put the code words into context. *Id.* Also, the court held that the agent’s testimony helped the jury understand the conversations related to international terrorism because they “would likely be unfamiliar with the complexities” of terrorist activities. *Id.* (*quoting Awan*, 966 F.2d at 1430). Unlike the agent in *Cano*, who “‘merely delivered a jury argument from the witness stand’ when he drew ‘inferences . . . based on facts already in evidence,’” the agent’s familiarity with the investigation in *Jayyousi* allowed him to draw inferences about the meanings of these code words that the jury could not have drawn. *Id.* (*quoting Cano*, 289 F.3d at 1363).

Here, Agent Simandy’s testimony was not “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” FED. R. EVID. 701(b). The conversations between Barnes and his co-conspirators were relatively clear and logical. Agent Simandy is basing his interpretation of everyday words and phrases simply on reviewing pre-collected and transcribed information. (R. 14.) His testimony would not be helpful to the jury because, as Agent Simandy said himself, “[t]he context of the conversations made it apparent what the defendant and his co-conspirators were discussing.” (R. 14.)

The present case is readily distinguishable from *Jayyousi* and is most similar to *Cano*. None of the inferences Agent Simandy drew were based on his perception; rather, they were based on facts already in evidence. (R. 13-14.) Also, Agent Simandy’s investigation consisted of

interpreting about a dozen transcribed telephone conversations and interviewing two witnesses. (R. 13.) He did not have any specialized knowledge or experience investigating poaching or other crimes against animals (R. 14), and therefore the jury could draw the same inferences that he did about the meanings of these code words.

Agent Simandy would have done nothing more than deliver a jury argument from the witness stand and call the jurors' attention to the fact that some of the words used in the intercepted telephone conversations had "hidden meanings." See *Peoples*, 250 F.3d at 640 (instead of helping the jury understand the evidence, the agent's lay opinion constituted mere argument from the witness stand, as the trial court conceded). From the telephone conversations, Agent Simandy concluded that certain code words and phrases were used. (R. 13.) The context of the conversations allowed him to decipher the meaning of the words and phrases used. (R. 13.) After interviewing Agent Lamberti and Klestadt, Agent Simandy simply put the telephone conversations into context by matching up the dates of the conversations with the dates the defendant contacted the two witnesses regarding the AK-47s and the helicopter. (R. 13.) Given the transcribed conversations and the testimony of the two witnesses, the jury would also be able to decipher the meaning of the words and phrases used without Agent Simandy's additional testimony.

Even if this Court finds that the jury could not decipher the meaning of the code words and phrases used, lay opinion testimony is not admissible to provide "specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Peoples*, 250 F.3d at 641. Therefore, as Chief Judge Wu from the District Court articulated, it is "the jury's job to come to its own conclusions regarding the meaning of the words used." (R. 15.)

The District Court properly excluded Agent Simandy's opinion about the meaning of code words and phrases used in the intercepted and transcribed telephone conversations. Agent Simandy's testimony is not rationally based on his perception and it does not further the jury's understanding of the facts about which he is testifying.

### CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) Reardon's hearsay statements are not admissible as a hearsay exception under Rule 804(b)(6); (2) journalist Crawley's source is protected by the journalist's privilege under Rule 501; and (3) the lay opinion testimony of Agent Simandy concerning the meaning of code words and phrases is not admissible under Rule 701.

Respectfully Submitted,

\_\_\_\_\_  
34R  
Counsel for Respondent

Date: February 20, 2013.