
No. 12-23

**IN THE
SUPREME COURT OF THE UNITED STATES**

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES,

Respondent.

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

- I. Does Federal Rule of Evidence 804(b)(6) prohibit the admission of a hearsay declaration made by a decedent through forfeiture-by-wrongdoing when there is no evidence that the defendant intended to procure the unavailability of the declarant and the action by a co-conspirator was not reasonably foreseeable by the defendant?

- II. Does Federal Rule of Evidence 501 grant an absolute evidentiary privilege to a journalist to keep sources confidential despite compelled disclosure when the journalist assured anonymity and took precautions to keep the source confidential, and disclosure of the source is not necessary to the case?

- III. Does Federal Rule of Evidence 701 prohibit testimony of a lay witness's opinion regarding the meaning of alleged code words used in conversations with which the witness did not personally participate in or observe, the testimony is unhelpful to the jury, and the testimony requires the witness be qualified as an expert?

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STATEMENT OF THE CASE

Statement of Facts

Defendant William Barnes (“Barnes”) was the owner of Big Top Circus (“Big Top”) as well as the co-owner of an unregistered charity, Boerum 4 Animals. R. at 1. On approximately July 10, 2011, Barnes became aware that Big Top was on the brink of bankruptcy. R. at 1. In an effort to raise money and save Big Top, Barnes invited two other circuses, Boerum City Circus and Flying Feats Circus, to join Big Top in a month long special holiday elephant show. R. at 1-2. Barnes proposed that the other circuses bring their elephants to his property for quartering and grazing, to which the other circuses agreed. R. at 2, 21.

On August 30, 2011, in an effort to promote the holiday show, Barnes contacted journalist Kara Crawley (“Crawley”) to visit Big Top. R. at 22. Barnes gave Crawley unlimited access to the Big Top premises, which ordinarily required special security clearance, in exchange for an article promoting the upcoming holiday show. R. at 2.

During one of her visits to Big Top, Crawley spoke with an employee who informed her of an alleged conspiracy being orchestrated by Barnes. R. at 22. The employee told Crawley that the proposed holiday show was actually a plan by Barnes to hunt the elephants on his property and sell their ivory for money. R. at 1, 22. Although the employee allowed Crawley to videotape the conversation, the employee asked Crawley to remain anonymous and did not want his or her identity revealed until after leaving Big Top. R. at 22. Crawley assured the employee that he or she would remain anonymous. R. at 22. On December 1, 2011, Crawley published an exposé on the alleged elephant hunt using this information. R. at 22.

October 2, 2011, prior to the release of Crawley’s exposé, Barnes contacted a registered Texas firearms dealer seeking to purchase automatic weapons. R. at 22. Unbeknownst to Barnes,

the gun shop employee was an undercover Alcohol, Tobacco, and Firearms, and Explosives (“ATF”) agent named Jason Lamberti (“Agent Lamberti”). R. at 22. In response to Barnes’ request for unregistered automatic weapons, Agent Lamberti agreed to sell Barnes three AK-47s to be delivered on December 5, 2011. R. at 23. Barnes gave Agent Lamberti his credit card information for the transaction, which provided sufficient evidence to support a warrant to wiretap Barnes’ telephone. R. at 23. The warrant was granted and ultimately executed on October 4, 2011 and Barnes’ telephone conversations were recorded until his arrest on December 1, 2011. R. at 23.

Prior to this, in late July 2011, Barnes contacted the other owner of the Boerum 4 Animals charity, Alfred Anderson (“Anderson”), allegedly offering him a chance to hunt the elephants that would be on Barnes’ property. R. at 21. Anderson then invited his acquaintance, James Reardon (“Reardon”), to join in what he referred to as a big game hunt. R. at 21. Reardon was not fully aware of all the details surrounding the hunt until early November 2011. R. at 21.

Telephone conversations intercepted by the Government suggested that, in mid-November 2011, Reardon was growing concerned about the nature of the hunt. R. at 24. On November 15, 2011, the Government recorded a telephone call between Anderson and Barnes in which Anderson expressed concerns that Reardon was questioning the legality of the hunt. R. at 18. Anderson suggested to Barnes that they should not include Reardon in the hunt, to which Barnes responded with “don’t do anything.” R. at 18. On November 29, 2011, Anderson called Barnes, again expressing his concern about Reardon’s questioning of the hunt. R. at 19. When Anderson suggested to Barnes that they needed to get Reardon “out of the picture,” Barnes responded by saying “this is different,” “hold off,” and finally ending the conversation by stating “I don’t want anything to do with this.” R. at 19.

On November 28, 2011, Reardon contacted his friend, Daniel Best (“Best”), and revealed the alleged elephant hunt plan. R. at 24. Reardon also expressed to Best that he feared for his safety and was concerned that Anderson may try to harm him. R. at 24. On the evening of November 29, 2011, Best drove to Reardon’s house where he saw Anderson fleeing from the home. R. at 24. Upon entering the home he found Reardon dead. R. at 24. Anderson later confessed to killing Reardon to prevent him from revealing details surrounding a planned elephant hunt. R. at 24.

The Federal Bureau of Investigation (“FBI”) originally assigned Agent Narvel Blackstock (“Agent Blackstock”) to investigate Barnes’ case. R at 23. However, after Agent Blackstock’s unexpected death, on December 15, 2011 the FBI assigned Agent Thomas Simandy (“Agent Simandy”) to review the case. R. at 23. While investigating the case, Agent Simandy reviewed Agent Blackstock’s transcripts of the intercepted telephone conversations and interviewed two witnesses. R. at 23. First, Agent Simandy interviewed Agent Lamberti, who informed Agent Simandy about his contact with Barnes in the gun shop. R. at 23. Second, Agent Simandy interviewed Alan Klestadt (“Klestadt”) of Copters Corporation, who informed Agent Simandy that he had spoken with Barnes on October 6, 2011, and that Barnes had been seeking to rent a helicopter for December 15, 2011. R. at 23.

Prior to trial, the Government moved to introduce testimony from Agent Simandy regarding “alleged code words and phrases” used in Barnes’ recorded telephone conversations. R. at 23. Agent Simandy testified that after reviewing Agent Blackstock’s transcripts and interviewing Agent Lamberti and Klestadt he believed that: “blood diamonds” was a phrase used to refer to elephant tusks, “Charlie tango” referenced the helicopter to be used in the hunt, and “black cat” was a reference to the AK-47s Barnes’ attempted to purchase. R. at 23-24.

Procedural History

On December 1, 2011, Barnes was taken into federal custody. R. at 3. On December 4, 2011, Barnes was indicted and charged with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922(a)(1)(a), two counts of conspiracy to commit crimes of violence against an animal enterprise under 18 U.S.C. § 43, and one count of conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. R. at 3, 4, 21.

On May 1, 2012, the District Court for the Southern District of Boerum heard three pre-trial motions concerning the admissibility of certain evidence. R. at 5, 6. First, the court heard the Government's motion to introduce Reardon's hearsay statements under the forfeiture-by-wrongdoing exception pursuant to Rule 804(b)(6). R. at 6, 7. Second, the court heard a motion to quash the Government's subpoena for Crawley to reveal her source under a Rule 501 journalist privilege. R. at 8. Lastly, the court heard the Government's motion to introduce Agent Simandy's lay witness testimony under Rule 701. R. at 12.

On May 2, 2012, the District Court ruled against the Government on all three issues. R. at 25. On July 12, 2012, the United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's ruling on all three issues. R. at 20, 28, 29, 30. The Government subsequently filed a petition for writ of certiorari, and on October 1, 2012, this Honorable Court granted certiorari. R. at 36, 37.

SUMMARY OF THE ARGUMENT

The District Court and the Fourteenth Circuit Court of Appeals correctly ruled on all three issues presented before this Honorable Court. First, forfeiture-by-wrongdoing is designed to prevent people from benefiting from their own misconduct. In this case, Barnes did not intend to prevent Reardon from testifying in court. Under *Giles v. California*, this Court requires that,

under the common law forfeiture-by-wrongdoing exception, the defendant must intend to prevent the witness from testifying at a trial. 554 U.S. 353, 361 (2008). Rule 804(b)(6) is the codification of the common law forfeiture-by-wrongdoing exception, and thus requires Barnes' intent. Because Barnes did not intend for Reardon to be unavailable, and specifically disavowed in Anderson's conduct, Best's testimony regarding Reardon's statements is inadmissible under Rule 804(b)(6).

Further, Rule 501 grants courts the right to recognize common law privileges based on their reason and experience. Almost every circuit court, along with forty-nine states and the District of Columbia, have used reason and experience to recognize that journalists have a common law privilege to prevent disclosure of their confidential sources and investigatory information under subpoena. When weighing the evidentiary value of disclosure against the interests in promoting the free flow of information, the concern for a source's safety, and the almost unanimous state recognition of a journalist privilege, this Court should recognize a federal common law journalist privilege. Furthermore, because a journalist's privilege is impractical if it can be defeated by a mere showing of need, this privilege should be absolute.

Finally, Rule 701 requires that testimony be first-hand, helpful to the jury, and not based on Rule 702 knowledge. Agent Simandy's lay opinion fails to meet all three requirements. First, Agent Simandy did not listen to or participate in the conversations, but merely read transcripts prepared by another agent. Therefore he lacks first-hand personal knowledge. Secondly, his opinion regarding the meaning of three coded phrases is unhelpful to the jury and is simply the Government's closing argument in disguise. Lastly, because he lacks personal knowledge, this is the exact type of testimony Congress intended to prevent from being admissible under Rule 701

and must meet the expert qualification requirements of Rule 702. Accordingly, this Honorable Court should affirm the District Court and Fourteenth Circuit on all three issues.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT FEDERAL RULE OF EVIDENCE 804(b)(6) REQUIRES INTENTIONAL CONDUCT DESIGNED TO RENDER A WITNESS UNAVAILABLE TO TESTIFY AT A TRIAL AND CONSPIRATORIAL LIABILITY FAILS TO SATISFY THIS REQUIREMENT

Federal Rule of Evidence 804(b)(6) provides that “[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result” can be admitted as a hearsay exception. Fed. R. Evid. 804(b)(6). To admit hearsay under Rule 804(b)(6), the Government must show 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.” *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005).

Rule 804(b)(6) is derived from the common law wrongful-procurement exception, which was created to prevent defendants from unfairly benefiting from the Sixth Amendment Confrontation Clause by preventing a witness from testifying against them at trial. *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878). Rule 804(b)(6) thus “recognizes the need for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’” Fed. R. Evid. 804(b)(6) advisory committee’s note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)).

In 2004, this Court ruled that the Sixth Amendment Confrontation Clause gives defendants the right to confront a witness who testifies against them, “admitting only those exceptions established at the time of the founding.” *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The *Crawford* court also found that “the rule of forfeiture by wrongdoing . . .

extinguishes confrontation claims on essentially equitable grounds.” *Id.* at 62. In 2006, this Court stated in *Davis v. Washington* that Rule 804(b)(6) is the codification of the forfeiture doctrine accepted in *Crawford*. 547 U.S. 813, 833 (2006).

In 2008, this Court readdressed the forfeiture-by-wrongdoing exception in *Giles v. California*, 554 U.S. 353, 358 (2008). In *Giles*, this Court reaffirmed the framing-era approach of *Crawford* and held that the forfeiture “exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying.” 554 U.S. at 359. This Court further held that this approach is “supported by modern authorities, such as Federal Rule of Evidence 804(b)(6), which ‘codifies the forfeiture doctrine.’” *Id.* at 367 (citing *Davis*, 547 U.S. at 833).

Under *Giles*, Rule 804(b)(6) can only be applied to a defendant who engages in conduct “designed” to render a witness unavailable at trial. *Id.* at 359. Therefore, for hearsay to be admitted under Rule 804(b)(6), the *Giles* decision requires that the defendant not only cause or acquiesce in the declarant’s unavailability, but that they do so intentionally. *Id.* Because Barnes did not intend to render Reardon unavailable to testify at a trial Rule 804(b)(6) is inapplicable to Barnes and the statements were properly excluded.

A. Best’s Testimony Regarding Reardon’s Statements Is Inadmissible Under Rule 804(b)(6) Because Barnes Did Not Engage In Conduct Intended Or Designed To Prevent Reardon From Testifying

In 2008, this Court ruled in *Giles* that forfeiture-by-wrongdoing would apply “only when the defendant engaged in conduct *designed* to prevent the witness from testifying.” 554 U.S. at 359. The Government failed to demonstrate that Barnes “designed to prevent” Reardon from testifying. Thus, Best’s testimony cannot be admitted under Rule 804(b)(6).

In *Giles*, Dwayne Giles was on trial for murdering his girlfriend, Brenda Avie. *Id.* at 356. At trial, the Government introduced statements Avie made to a police officer three weeks prior to

her death contradicting Giles' self-defense claim. *Id.* This Court vacated the conviction because the trial court did not consider Giles' intent in rendering Avie unavailable. *Id.* at 377. This Court reasoned that the forfeiture exception requires that the defendant's wrongdoing be *designed* to render the witness unavailable to testify at trial. *Id.* at 359. Avie's statements were therefore inadmissible because, despite the fact that Giles prevented Avie from being available, the forfeiture exception requires that the defendant's wrongdoing be intended to render a witness unable to testify. *Id.*

The *Giles* Court, in addition to upholding the forfeiture-by-wrongdoing exception to testimonial statements under the Confrontation Clause, also reaffirmed the holding in *Davis* that Rule 804(b)(6) is the codification of the common law rule. *Id.* at 367 (citing *Davis*, 547 U.S. at 833). This affirmation "acknowledge[d] the fact that the 'intent' element in 804(b)(6) is consistent with the original formulation of the forfeiture doctrine." Joshua B. Christensen, *Beguiled by Giles: The Overlooked Duality of Forfeiture by Wrongdoing*, 62 Ala. L. Rev. 645, 655 (2011). Consequently, under *Giles*, the forfeiture exception as codified in Rule 804(b)(6) requires that the defendant's wrongdoing intend to render the witness unavailable at trial.

Nontestimonial statements, such as Reardon's statements to Best, have been traditionally excluded as unreliable hearsay. Despite no longer having Confrontation Clause protection under *Crawford*, "framing-era doctrine uniformly *prohibited* admission of the sort of casual, informal hearsay that *Crawford* now completely exempts from the Confrontation right under its 'nontestimonial hearsay' label." Thomas Y. Davies, *Selective Originalism: Sorting out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 Lewis & Clark L. Rev. 605, 611 (2009). Thus, nontestimonial statements must still fall within a firmly rooted hearsay exception, as was true under the prior

standard of *Ohio v. Roberts*, 448 U.S. 56, 57 (1980) (holding that reliability can be inferred when the statement falls within a firmly rooted hearsay exception). *Crawford*, 541 U.S. at 60.

In the wake of *Giles*, Rule 804(b)(6) necessitates that the defendant's conduct, or acquiescence in another's conduct, is designed and intended to render the witness unavailable at trial. This is further emphasized by the plain language of the statute, which requires that the conduct or acquiescence of the defendant was done "*intending* that result." Fed. R. Evid. 804(b)(6) (emphasis added). Anything less than a defendant's intentional conduct or manifested acquiescence is insufficient for hearsay to be admitted under Rule 804(b)(6).

The facts of the present case contain no evidence that Barnes intended to render Reardon unavailable to testify. Barnes did not kill Reardon, intend to kill Reardon, or acquiesce in Anderson killing Reardon. In fact, when Anderson suggested to Barnes that they address Reardon's growing concerns, Barnes specifically told Anderson to "hold off" and said "don't do anything." R. at 18-19. Without any evidence regarding Barnes' intent, the Government has failed to satisfy the forfeiture-by-wrongdoing exception requirements.

The overarching rule *Giles* has set forth is that "testimony [will] *not* be admitted without a showing that the defendant intended to prevent a witness from testifying." 554 U.S. at 361. Because Barnes did not intend to prevent Reardon from testifying, Reardon's out of court statements to Best cannot be admitted under Rule 804(b)(6).

B. Applying Pinkerton Liability To Rule 804(b)(6) Is Inappropriate Under Giles Because Forfeiture-By-Wrongdoing Requires The Defendant Himself Intend Or Acquiesce In Preventing A Witness From Testifying

Conspiratorial liability, which attaches the reasonably foreseeable consequences of a conspirator to other co-conspirators, is improper under Rule 804(b)(6). *Giles* requires the defendant intend to render a witness unavailable. 554 U.S. at 361. Without the express intent of

the defendant, Rule 804(b)(6) prohibits admission of an uncrossed, unavailable decedent's hearsay statements.

The Government contends that Barnes' intent is unnecessary under Rule 804(b)(6) because his intent can attach through conspiratorial liability as prescribed in *Pinkerton v. United States*, 328 U.S. 640 (1946). R. at 27. In order to be admissible under Rule 804(b)(6), the Government suggests that it is only necessary to show that Anderson's actions were reasonably foreseeable under the *Pinkerton* doctrine. R. at 27. However, due to the express requirement in *Giles* that the defendant's conduct be intended to render a witness unavailable, mere reasonable foreseeability is insufficient.

In *Pinkerton*, the Court established that a conspirator can be held liable for the substantive offenses of a co-conspirator. 328 U.S. at 646-48. For *Pinkerton* conspiratorial liability to attach to a co-conspirator, the substantive offense must be "within the scope" and "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-48. The Government asserts that Barnes should be liable for Anderson rendering Reardon unavailable, and therefore Reardon's statements are admissible under Rule 804(b)(6). R. at 27.

Prior to *Giles*, the only courts that addressed the issue of applying conspiratorial liability to Rule 804(b)(6), incorporated the *Pinkerton* doctrine and held hearsay statements admissible so long as the declarant's unavailability was reasonably foreseeable under the conspiracy. *See United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002); *United States v. Rivera*, 412 F.3d 562 (4th Cir. 2005); *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006); *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007). These courts looked specifically to the language of Rule 804(b)(6) and found that the phrase "acquiesced in wrongdoing" supported applying the *Pinkerton* doctrine to Rule 804(b)(6).

Cherry, 217 F.3d at 816. In *Cherry*, the Tenth Circuit imputed the defendant's right to make a hearsay objection because the defendant's co-conspirator engaged in misconduct that rendered the witness unavailable. *Id.* at 821. The Tenth Circuit found in *Cherry* that to trigger the forfeiture doctrine the Government must demonstrate that either "(1) [the defendant] participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy." *Id.* at 820.

These cases, however, have failed to consider the historically critical element of the defendant's intent under the common law forfeiture exception as codified in Rule 804(b)(6). As the *Giles* Court noted, "[e]very commentator we are aware of has concluded the requirement of intent 'means that the exception applies *only if the defendant* has in mind the particular purpose of making the witness unavailable.'" 554 U.S. at 367 (emphasis added) (quoting 5 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 8:134, p. 235 (3d ed. 2007)). While Rule 804(b)(6) does allow for statements against a party who "acquiesced in" wrongful conduct, reasonable foreseeability is insufficient to supplant the requirement that the defendant has the particular intent to procure the witness's unavailability.

Applying an unqualified version of *Pinkerton* liability to the intent requirement under Rule 804(b)(6) would misapply the forfeiture doctrine post-*Giles* and runs contrary to the historical approach the Court applied. Such an application would put defendants in court against the hearsay statements of an uncrossed, unavailable witness they did not intend to render unavailable. As the dissent in *Cherry* noted, finding forfeiture simply on the basis of participation in a conspiracy "is too expansive and goes against the rule of fundamental fairness." *Cherry*, 217 F.3d at 823 (Holloway, J., dissenting). Allowing for that intent to

vicariously attach to a defendant who expressly disavows conduct designed to render a witness unavailable “goes against the rule of fundamental fairness.” *Id.*

Under the reasoning in *Giles*, the language “acquiesce in” should not be applied beyond ensuring that a defendant is held responsible for a third party’s *conduct*. This requires a more restrictive version of conspiratorial liability than what is prescribed under *Pinkerton* and *Cherry*, which would allow for a defendant to be responsible for a co-conspirator’s wrongdoing without proving that the defendant had the particular intent to render the witness unavailable.

This narrowed application of conspiratorial liability is supported by the careful examination of the Fourth Circuit opinion in *United States v. Dinkins*, which is the only circuit to address conspiratorial liability under Rule 804(b)(6) since *Giles*. 691 F.3d 358, 385 (4th Cir. 2012); *see also United States v. Jackson*, No. 11-4858, 2013 WL 204690 (4th Cir. Jan. 18, 2013). In *Dinkins*, the defendants were involved in a drug organization and were on trial for the murder of a cooperating government witness. 691 F.3d at 362. Dinkins argued that because he was in prison at the time of the victim’s murder, the victim’s hearsay statements against him were inadmissible under Rule 804(b)(6) because he could not have been present for the victim’s murder. *Id.* at 384. Critical to the court’s reasoning, Dinkins attempted to murder the victim the year before and expressed intent to “finish the job.” *Id.* at 386.

The court found that the statements were admissible because, in addition to satisfying the reasonable foreseeability element under *Pinkerton*, “the record is clear that Dinkins' acts of wrongdoing, as well as those of his co-conspirators, were intended to prevent, and in fact did prevent, [the victim] from testifying.” *Id.* at 386. Despite the *Dinkins* court holding that the *Pinkerton* doctrine is applicable to forfeiture-by-wrongdoing, the court qualified the reasonable foreseeability element in light of *Giles*. *Id.* The court held that “the second prong in *Cherry* must

be supported by evidence that the defendant ‘engaged in conduct *designed* to prevent the witness from testifying.’” *Dinkins*, 691 F.3d at 385 (quoting *Giles*, 554 U.S. at 359). Accordingly, a careful reading of *Dinkins* supports the reasoning that when applying conspiratorial liability under Rule 804(b)(6), reasonable foreseeability under *Pinkerton* is insufficient absent “evidence that the defendant” designed to render the witness unavailable. *Id.* at 385.

In the case at bar, not only did Barnes not express any intent himself, he explicitly disavowed any wrongdoing Anderson suggested towards Reardon. R. at 18-19. Even if Anderson’s actions were reasonably foreseeable, *Giles* requires that the defendant’s conduct was “*designed* to prevent the witness from testifying.” 554 U.S. at 359. Barnes made clear that he did not intend for Anderson to harm Reardon by telling Anderson to “hold off” and “don’t do anything.” R. at 18-19. It would be improper to hold Barnes liable for Anderson’s actions without the express intent requirement under *Giles*.

The last words Barnes said to Anderson prior to Anderson killing Reardon were: “I don’t want anything to do with this.” R. at 19. This is a clear statement that not only did Barnes not intend to prevent Reardon from testifying, but that he also disavowed any action taken by Anderson towards Reardon. Barnes cannot be held responsible for Reardon’s unavailability because he did not acquiesce in any action taken that would result in Reardon being harmed. Accordingly, because reasonable foreseeability is insufficient without the defendant’s intent, Reardon’s statements cannot be admitted through Best’s testimony under Rule 804(b)(6).

C. Even If *Pinkerton* Liability Is Applied To Rule 804(b)(6), Best’s Testimony Is Inadmissible Because Anderson’s Actions Were Not Reasonably Foreseeable As A Necessary Consequence Of The Conspiracy

Even if this court holds that conspiratorial liability applies to Rule 804(b)(6), the District Court still properly held Best’s testimony inadmissible because Anderson’s actions were not

reasonably foreseeable. Under the *Pinkerton* doctrine, forfeiture-by-wrongdoing is only applicable when “(1) the defendant participated directly in planning or procuring the declarant’s unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance of, within the scope of, and reasonably foreseeable as a necessary or natural consequence of, an ongoing conspiracy.” *Dinkins*, 691 F.3d at 385 (citing *Cherry*, 217 F.3d at 820).

While mere participation in a conspiracy will not trigger the admission of hearsay statements itself, “participation may suffice when combined with findings that the wrongful act at issue was in furtherance and within the scope of an ongoing conspiracy and reasonably foreseeable as a natural or necessary consequence thereof.” *Cherry*, 217 F.3d at 820. Under *Cherry*, Anderson’s actions were not reasonably foreseeable as the natural and necessary consequences of the alleged conspiracy.

The circuit courts that have applied *Pinkerton* liability to Rule 804(b)(6) have all done so in cases involving major illegal drug or gang operations. See *Cherry*, 217 F.3d 811; *Rivera*, 412 F.3d 562; *Carson*, 455 F.3d 336; *Johnson*, 495 F.3d 951; *Dinkins*, 691 F.3d 358. By their very nature, joining these types of conspiracies presupposes violence towards other drug organizations, gang members, and informants. See *United States v. Martinez*, 476 F.3d 961, 964–67 (D.C. Cir. 2007) (testimonial statements by a murdered cooperating witness were admissible based on the court’s finding that the defendant, who was a member of the MS-13 gang, “was aware that his co-conspirators were willing to engage in murder to protect the conspiracy.”). The wrongful actions of co-conspirators rendering a witness, most often an informant, unavailable is reasonably foreseeable as the necessary and natural consequence of these types of conspiracies.

In *Thompson*, however, the Seventh Circuit found that the murder of the witness was not reasonably foreseeable because “there [was] no evidence these defendants [knew] or had reason

to know that an informant would be murdered” and “there [was] no evidence that this conspiracy had previously engaged in murder or attempted murder.” 286 F.3d at 966. Unlike drug conspiracy cases, where violence is an anticipated and accepted aspect of the conspiracy, rendering a potential witness unavailable through murder is not a natural and necessary consequence in a proposed elephant hunt. Holding so is tenuous at best. Furthermore, instead of manifesting intent to render Reardon unavailable, Barnes expressly told Anderson “don’t do anything,” “hold off,” and “I don’t want anything to do with this.” R. at 18-19. Barnes therefore manifested his non-acquiescence and disagreement towards rendering Reardon unavailable. The facts of this case fail to meet the requirement of reasonable foreseeability.

Even if the Court holds that *Pinkerton* applies, Reardon’s death was not a reasonably foreseeable consequence of a planned elephant hunt. Barnes did not intend to prevent Reardon from testifying and expressly disapproved of any action that would render Reardon unavailable. Therefore, Anderson’s actions were not reasonably foreseeable and Best’s testimony is inadmissible under Rule 804(b)(6).

II. THE DISTRICT COURT PROPERLY QUASHED THE GOVERNMENT’S SUBPOENA BECAUSE JOURNALISTS HAVE AN ABSOLUTE PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501 TO KEEP SOURCES AND INFORMATION CONFIDENTIAL

Federal Rule of Evidence 501 provides that “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless . . . the United States Constitution; a federal statute; or rules prescribed by the Supreme Court” provide otherwise. Fed. R. Evid. 501. Rule 501 was originally presented to Congress with enumerated privileges. Fed. R. Evid. 501 advisory committee’s note. The Committee on the Judiciary eliminated the enumerated privileges, deferring to the courts to establish privileges as

needed through reason and experience. H.R. Rep. No. 93-650, at 72 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082-83.

In 1972, this Court, in *Branzburg v. Hayes*, held that the First Amendment does not grant newsmen a testimonial privilege in grand jury proceedings. 408 U.S. 665, 682 (1972). However, this Court further stated that:

At the federal level, Congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate.

Id. at 706. Three years after *Branzburg*, Congress enacted Federal Rule of Evidence 501. *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 136 (D.D.C. 2005). Rule 501 follows the Supreme Court's guidance in *Branzburg* and gives courts the discretion to establish privileges "as narrow or broad as deemed necessary." *Branzburg*, 408 U.S. at 706. This rule allows the courts to determine how privileges should be determined and defers to those court's judgment. Fed. R. Evid. 501 advisory committee's note.

Since *Branzburg*, the vast majority of federal circuit courts have found a common law journalist privilege to exist. *See Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134 (4th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). The only circuits to hold that journalists do not have privilege are the Sixth and Seventh Circuits. *See In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) (hereinafter "*Storer*"); *McKevitt v.*

Pallasch, 339 F.3d 530 (7th Cir. 2003). These decisions, however, are factually distinguishable from Crawley's interests in keeping her source confidential.

The Sixth Circuit decision in *Storer* stems from a grand jury proceeding, which *Branzburg* specifically declined to provide privilege for. 810 F.2d at 581. Unlike in *Storer*, where the grand jury was specifically seeking the identity of the individuals responsible for a murder, *id.* at 581-82, here, the identity of the defendant and other alleged conspirators is known. Attempting to identify potential murderers through a grand jury proceeding raises significant public interest concerns favoring disclosure that are not present in situations that involve disclosing the identity of a third party source not personally involved in a crime.

Additionally, the Seventh Circuit decision, which the dissent below relies on, is distinguishable from the facts at bar. In *McKevitt*, the court held a federal common law privilege should not be provided because “[t]here is no conceivable interest in confidentiality in the present case. Not only is the source . . . known, but he has indicated that he does not object to the disclosure of the tapes of his interviews.” 339 F.3d at 532. Conversely, the identity of the employee here remains confidential and the employee specifically requested the videotapes be used exclusively by Crawley. These facts support recognizing journalists and sources’ interests in maintaining confidentiality.

The decisions of the majority of the circuit courts are consistent with the vast majority of state statutory shield laws and judicially created journalist privilege. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1170 (D.C. Cir. 2006) (Tatel, J., concurring). Due to the broad recognition of a journalist privilege, Rule 501 provides the framework for this court to find that a journalist privilege to keep sources confidential exists.

A. The District Court Properly Held Crawley Was Permitted To Maintain The Confidentiality Of Her Source And Information Because Rule 501 Recognizes A Journalist Privilege

With the enactment of Federal Rule of Evidence 501, Congress opted to defer to the court's reason and experience. Fed. R. Evid. 501. In *Jaffee v. Redmond*, this Court recognized the psychotherapist-patient privilege was protected under Rule 501. 518 U.S. 1, 9-10 (1996). Under *Jaffee*, courts look to three aspects to determine if a privilege should be recognized. *Id.* at 9-13. First, the significant public and private interests that would be served by the privilege are determined. *Id.* at 9. Second, the interests served by the privilege are weighed against the evidentiary benefits that denying the privilege would provide. *Id.* at 11-12. Lastly, courts look to the recognition the privilege receives from the states. *Id.* at 12-13. Under this framework, due to the significant public and private interests served, the limited evidentiary value gained, and the states' widespread recognition, this Court should recognize a federal common law journalist privilege under Rule 501.

1. The Public and Private Interests Served By Recognizing a Journalist Privilege Are Vast

Under *Jaffee*, this Court first looks to the public and private interests served by recognizing a federal common law privilege. *Id.* at 9. In *Jaffee*, this Court found that the public and private interests were best served by recognizing a psychotherapist privilege because this relationship requires trust and confidence, which would be diminished without protection from compelled disclosure. *Id.* at 10. The relationship a journalist has with his or her sources requires the same trust and confidence.

As in *Jaffee*, where patients would be discouraged from seeking treatment absent a psychotherapist privilege, sources would be discouraged from revealing information in fear of retaliation or embarrassment absent a journalist privilege. Furthermore, the federal circuit courts

have almost uniformly recognized the important public interests served by recognizing a journalist privilege and have found that “confidentiality is often essential to establishing a relationship with an informant.” *Zerilli*, 656 F.2d at 711. Federal courts have recognized the overwhelming public interest protected in recognizing a journalist privilege stating that:

Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest “of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.”

Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) (quoting *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (Brennen, J., dissenting)). Furthermore, the federal circuits finding a federal common law privilege have done so recognizing the “strong public policy supporting the unfettered communication to the public of information and opinion, a policy . . . grounded in the first amendment.” *Cuthbertson*, 630 F.2d at 146. The public and private interests are both best served by requiring confidentiality for at least some information a journalist discovers, including the identity of sources. This protection is required in order for the journalist to discover facts that a source might otherwise be reluctant to reveal. Allowing courts to protect a limited amount of journalist information and a sources identity from disclosure promotes the public and private interests in revealing major government and corporate corruption as well as criminal activity.

2. Denying a Journalist Privilege Will Result in Only Minimal Evidentiary Benefit

The next factor examined under *Jaffee* is “the likely evidentiary benefit that would result from the denial of the privilege.” 518 U.S. at 11. As this Court noted in *Jaffee*, “[i]f the privilege were rejected, confidential conversations . . . would surely be chilled, particularly when it is obvious that the circumstances . . . will probably result in litigation.” *Id.* at 11-12. Without

protection the privilege would provide, sources that have important information they wish to reveal to the public will be chilled from releasing that information, particularly in the most important circumstances where criminal activity has been discovered. Denying this privilege would serve as a warning to all future potential sources that their identity may be discovered should they reveal information to a journalist despite the promise of confidentiality.

The dissent below argues that there is insufficient evidence that sources will be deterred from coming forward with information and to propose such an idea is “pure fear-mongering.” R. at 33. However, federal circuits have routinely found that unless a source is confident that they will remain anonymous, “they will be reluctant to disclose any confidential information to reporters.” *Zerilli*, 656 F.2d at 712.

A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public.

Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir.1979). Furthermore, as is demonstrated here, Crawley has revealed the alleged hunt to the public through her exposé and discovered information that in the absence of the promise of confidentiality may have gone undiscovered. To deny journalists and sources the federal common law protection from disclosure would in fact chill people in similar circumstances from coming forward.

Denying a journalist privilege in the interest of keeping evidence in court is outweighed by the interest the public has in ensuring that sources with information are not chilled from coming forward in fear that their identity may be revealed. The Government has failed to establish any interest served in forcing Crawley to reveal the identity of her source and other investigatory information. The interests at issue demonstrate that providing a journalist privilege allowing for some information and sources to remain confidential will actually result in the

“dissemination of more information and matters of public interest and public concern to the public.” *Riley*, 612 F.2d at 714.

3. State Recognition of a Journalist Privilege Is Almost Unanimous

Under *Jaffee*, “it is appropriate for the federal courts to recognize a . . . privilege under Rule 501” when “the existence of a consensus among the states indicates that ‘reason and experience’ support recognition of the privilege” 518 U.S. at 12-13. Currently, because there is “undisputed evidence that forty-nine states plus the District of Columbia offer at least qualified protection to reporters’ sources confirms that ‘‘reason and experience’ support recognition of the privilege.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1170 (Tatel, J., concurring) (citing *Jaffee*, 518 U.S. at 13). To continue to deny what the vast majority of states recognize on a federal level “directly undermines the policies of forty-nine states and the District of Columbia and wreaks havoc on the legitimate and good-faith understandings and expectations of sources and reporters throughout the nation. This is an unnecessary, intolerable and, indeed, irresponsible state of affairs.” Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 Hofstra L. Rev. 39, 42-43 (2005).

This Court should recognize what almost every state and the vast majority of federal circuits have: journalists must be provided with a privilege to keep sources and information confidential. *Id.* at 49-50. As this Court noted in *Jaffee*, the experience of the states is critical and “the policy decisions of the [s]tates bear on the question whether federal courts should recognize a new privilege.” 518 U.S. at 12-13. Failure to recognize a privilege found by almost every state would “frustrate the purposes of the state legislation that was enacted.” *Id.* at 13. In light of the nearly unanimous protection given by the states and federal circuits, this Court should recognize the federal common law journalist privilege.

B. A Journalist Privilege Under Rule 501 Should Be Absolute And Cannot Be Outweighed By A Compelling Government Interest

If this Court determines that the federal common law recognizes a journalist privilege, that privilege should be absolute, and not subject to court imposed balancing tests. As this Court held in *Upjohn Co. v. United States*, people “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” 449 U.S. 383, 393 (1981). Additionally, in *Jaffee*, this Court held that “[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the [person]'s interest in privacy and the evidentiary need for disclosure *would eviscerate the effectiveness of the privilege.*” 518 U.S. at 17 (emphasis added).

When looking at the nearly unanimous protection journalists are given among the states, allowing for varying tests and judicial decisions would create inconsistency among the circuits and jurisdictions, which would defeat the goal of providing the certainty of protection. “For quite persuasive reasons, other privileges, such as the attorney-client, doctor-patient, psychotherapist patient, and priest-penitent privileges, which are deeply rooted in our national experience, do *not* allow such ad hoc determinations of ‘need’ to override the privilege.” Stone, 34 Hofstra L. Rev. at 51 (citing *Jaffee*, 518 U.S. at 2, 17-18). If courts are able to overcome the privilege with a showing of need, the privilege fails to provide protection to the most important potential sources the privilege is designed to protect: sources with information relating to criminal conspiracies or government corruption.

Here, providing journalists with merely a qualified privilege is insufficient to safeguard journalists and sources alike. If the privilege is subject to a showing of need, the Government could go on fishing expeditions to discover unknown information. *See Cuthbertson*, 630 F.2d at

144. A case-by-case analysis applying a balancing-test undermines the overarching public interest served in upholding an absolute privilege. “[I]f the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.” *Zerilli*, 656 F.2d at 712. Allowing the Government to overcome the privilege in one case results in the very uncertainty and possible self-censorship the privilege is designed to prevent.

While qualified privilege may be proper for non-confidential sources or information sought under subpoena, when the subpoena is for the compelled disclosure of a source who has been guaranteed anonymity, absolute privilege is necessary. This will create the consistency and confidence the privilege is intended to provide. In accordance with these principles a federal common law privilege for journalists should be absolute.

C. Even If The Court Holds That The Journalist Privilege Is Qualified, The Government Has Not Demonstrated A Sufficient Need To Overcome The Qualified Privilege Balancing Test

Even if this Court determines that the journalist privilege is qualified, the Government has failed to demonstrate that this information is necessary to establish the Government’s case. Courts review qualified privileges on a case-by-case basis, applying a balancing test to determine if the privilege should be overcome. *Branzburg*, 408 U.S. at 710. “[I]nformation may only be compelled from a reporter claiming privilege if the party requesting information can show that it is highly relevant, necessary to proper presentation of the case, and unavailable from other sources.” *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). Because the Government has failed to present any evidence that this information is highly relevant, will support its presentation of the case, and that it has exhausted alternative sources, the Government has failed to establish that Crawley should be compelled to disclose her confidential information.

Here, there is no evidence that disclosure of Crawley's source would further the Government's case. The Government has numerous alternative sources for this information, including Agent Lamberti, Alan Klenstat, and Crawley herself. The Government has failed to show that the revelation of Crawley's source will result in additional information. It would be cumulative at best. In light of this balancing test, the privilege strongly outweighs the Government's interest in adding an additional witness to testify to evidence the Government already has available to it. Therefore, without such a need, the District Court properly quashed the Government's motion to compel disclosure.

III. THE DISTRICT COURT PROPERLY EXCLUDED THE LAY WITNESS TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 701 BECAUSE AGENT SIMANDY LACKS FIRST-HAND PERSONAL KNOWLEDGE, HIS TESTIMONY IS UNHELPFUL TO THE JURY, AND THIS TESTIMONY FAILS TO MEET THE CONGRESSIONAL SAFEGUARDS BUILT INTO THE RULE

Under Federal Rule of Evidence 701, a lay witness can only offer their opinion if it is: “(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining 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. The Government has failed to meet all three requirements under Rule 701 and accordingly cannot introduce Agent Simandy's testimony regarding the alleged code words in Barnes' conversations with Anderson and Reardon.

First, Agent Simandy did not participate in or contemporaneously observe the conversations and thus lacks first-hand personal knowledge under subsection (a). Secondly, Agent Simandy's testimony regarding the alleged code words is not helpful to the jury under subsection (b), but rather is a premature summation of the Government's case. Lastly, the testimony is the result of months of investigatory work reviewing transcripts and conducting

interviews. This is the exact type of testimony subsection (c) requires to undergo the procedural safeguards of the Federal Rules of Criminal Procedure and Federal Rule of Evidence 702.

A. Agent Simandy Lacks First-Hand Personal Knowledge Because He Did Not Participate In Or Contemporaneously Observe The Conversations As They Occurred

Personal knowledge is deeply embedded in the common law evidentiary requirements to ensure reliability and helpfulness. *See generally* McCormick on Evidence, § 10 (2d ed. 1972). Federal Rule of Evidence 602 provides that: “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid. 602. Under Rule 701(a), a lay witness must have Rule 602 first-hand personal knowledge. Fed. R. Evid. 701 advisory committee’s note. Accordingly, “[w]hen a law enforcement officer is not qualified as an expert” his or her testimony is admissible “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.” *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001).

The District Court properly held that Agent Simandy’s testimony failed to meet the first-hand personal knowledge requirement of Rule 701(a). R. at 17. He did not participate in, observe, or listen to the conversations, but merely read transcripts written by another agent and inferred code words by conducting follow up interviews with witnesses. R. at 23. This is not enough to demonstrate that Agent Simandy has first-hand personal knowledge.

In *Peoples*, FBI Agent Joan Neal was in charge of a murder investigation where she reviewed recorded telephone conversations between the defendant and his co-defendant. 250 F.3d at 639-40. At trial, Agent Neal testified to the hidden meaning of plain language words and gave her “personal opinions of what the conversations meant.” *Id.* The Eighth Circuit ruled that

the trial court erred in allowing Agent Neal's testimony because she "lacked first-hand knowledge of the matters about which she testified." *Id.* at 641. Similar to Agent Simandy's investigation, Agent Neal's "opinions were based on her investigation after the fact, not on her perception of the facts." *Id.*

The Government and dissent below argue that Rule 701 does not require a law enforcement officer to be present at the time of the conversations, specifically citing *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). R. at 34. However, the Government's reliance on *Jayyousi* is misplaced. In *Jayyousi*, the agent reviewed "hundreds of verbatim transcripts" and "listened to the intercepted calls" over a five year investigation. 657 F.3d at 1102. Conversely, Agent Simandy reviewed the personal transcripts of another agent and never actually listened to the words spoken by Barnes, Anderson, or Reardon. R. at 23-24. While the dissent below argues that "[o]ur case cannot be meaningfully distinguished from *Jayyousi*," R. at 34, reading verbatim transcripts and listening to recorded telephone calls is fundamentally different from reading the personal transcripts of another agent and interviewing other Government witnesses as Agent Simandy did here.

In *United States v. Santiago*, a Government agent was involved in a drug conspiracy investigation. 560 F.3d 62, 66 (1st Cir. 2009). In addition to listening to over ninety percent of the recorded telephone intercepts, he also learned the voice patterns of the defendant and he personally heard and used the coded language while buying drugs as an undercover agent. *Id.* The agent was actively involved in the investigation, and accordingly, the First Circuit found that he had the requisite personal knowledge to testify to the meaning the code words used by the defendant. *Id.* at 67; see also *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (FBI agent's active involvement and "extensive participation in the investigation of this conspiracy"

warranted first-hand personal knowledge); *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982) (testimony must be based on personal observation and recollection of concrete facts).

In this case, unlike in *Santiago*, Agent Simandy was not actively involved in the ongoing investigation and did not begin his investigation of the case until after Barnes was arrested. R. at 23. This is considerably different from being actively involved in learning, understanding, and actually using the code words with the declarants during the course of the conspiracy. Agent Simandy's testimony is not based on first-hand personal knowledge, but is rather "based on h[is] investigation after the fact, not on h[is] perception of the facts." *Peoples*, 250 F.3d at 641.

Unlike *Santiago* and *Jayyousi*, where the agents actually listened to the conversations, either as they occurred, or through recordings, Agent Simandy merely read transcripts written by Agent Blackstock. R. at 23. As the Government stated itself, Agent Simandy's investigation was a "review over a period of several months, of *transcripts* of the intercepted phone calls and interviews." R. at 14-15 (emphasis added). Without any prior involvement in the investigation, or personally listening to the intercepted telephone calls, this is by definition second-hand knowledge.

Agent Simandy, and if admitted, the court, is trusting that the words Agent Blackstock wrote in his transcripts are exactly the words Barnes, Anderson, and Reardon actually used. To allow a lay witness to read a third person's transcripts of multiple conversations between three people months after they occurred, and then give opinion testimony to their meaning, is a gross misapplication of the requirement that the perception be rationally based on one's own personal knowledge. Thus, to admit Agent Simandy's testimony would be a blatant disregard of Rules 602 and 701(a).

B. Agent Simandy's Testimony Does Not Satisfy Rule 701's Requirement That It Help Determine A Fact In Issue

Federal Rule of Evidence 701(b) requires the testimony be "helpful in resolving issues" and is not permitted otherwise. Fed. R. Evid. 701 advisory committee's note. "Lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying . . ." *Peoples*, 250 F.3d at 641. "If . . . attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule." Fed. R. Evid. 701 advisory committee's note. In the case at bar, Agent Simandy's lay witness testimony is not helpful to the jury.

In *United States v. Garcia*, an agent was asked to testify "based on [his] investigation" regarding the roles of participants involved in a drug conspiracy. 413 F.3d 201, 209 (2d Cir. 2005). The Second Circuit held that the agent's testimony was inadmissible because the opinion was not based on his personal perceptions, but rather drew on the total information developed by all officials who participated in the investigation. *Id.* at 212-13. Additionally, the court held the testimony was unhelpful under Rule 701 because it went beyond telling the jury what was in evidence to telling the jury what inferences should be drawn from it. *Id.* at 213-14.

Similar to *Garcia*, Agent Simandy's opinion as to the meaning of three code phrases is unhelpful to the jury to understand the evidence or to determine a fact at issue. The Government cannot put Agent Simandy on the stand to testify to the meaning of the three coded phrases, specifically because his opinion was based on the work of another law enforcement officer. The Government's case, as it relates to this testimony, can be established by having Agent Lamberti, Alan Klestadt, and a qualified expert testify to the meaning of the code words in Agent Blackstock's transcripts. The Government can then argue the alleged meaning of these words in closing argument and allow the jury to weigh the persuasiveness of the expert testimony and, as

the District Court stated, “come to its own conclusions regarding the meaning of the words used.” R. at 15.

In *Jayyousi*, the court found the testimony useful because the agent was testifying to the “meaning of coded language that the jury could not have readily discerned.” 657 F.3d at 1103. The agent’s testimony in *Jayyousi* included a matrix of various coded words, phrases, and pseudonyms used in a conspiracy based on Islamist violence overseas. *Id.* at 1095. This is significantly more complex than the opinion testimony of three alleged code phrases. The testimony here is more akin to an “interpretation that an untrained layman could” make, “perceiving the same acts or events” already in evidence. *See Peoples*, 250 F.3d at 641.

As the dissent noted in *Jayyousi*, an agent who is not directly involved in an ongoing investigation lacks first-hand personal knowledge and his opinion is not helpful to the jury. *Jayyousi*, 657 F.3d at 1121-22, 1125 (Barkett, J., dissenting). Similarly, Agent Simandy lacks first-hand personal knowledge of the case because he was not actively involved in the investigation. R. at 23. Accordingly, by allowing Agent Simandy to testify that “everything that I have learned by extensively investigating this case allowed me to come to these conclusions,” R. at 13-14, the Government is introducing conclusory statements that are “merely the government’s closing argument in disguise.” *Jayyousi*, 657 F.3d at 1126 (Barkett, J., dissenting). To allow a lay witness to state the meaning of three phrases used in telephone conversations he never actually heard undermines the role of the jury and is merely argument from the stand.

C. Allowing Agent Simandy’s Testimony Would Promote An Unintended Loophole Around Expert Testimony Reliability Requirements

In 2000, Congress amended Rule 701, adding subsection (c) in an effort to prevent parties from circumventing the reliability and expert witness qualification requirements. Fed. R. Evid. 701 advisory committee’s note. “What is essentially expert testimony . . . may not be admitted

under the guise of lay opinions.” *Peoples*, 250 F.3d at 641. The Advisory Committee Notes specifically reference the Ninth Circuit opinion *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) as an example to this point. Fed. R. Evid. 701 advisory committee’s note. In *Figueroa-Lopez*, the court found that while an agent could testify as a lay witness to what he perceived, such as how the defendant was acting at the time of the arrest, once the agent tried to testify to alleged code words, the agent needed to be qualified as an expert. 125 F.3d at 1246. As the Ninth Circuit found, and Congress noted in the 2000 amendment, Rule 701 is not intended to be a loophole for parties to avoid expert witness requirements by introducing expert testimony as lay opinion. *Id.*

The Fourth Circuit aptly noted the difference between Rule 701 from Rule 702 in *United States v. Perkins*, 470 F.3d 150 (4th Cir. 2006). In *Perkins*, an officer was charged with excessive use of force. 470 F.3d at 151. At trial, the Government offered testimony from officers on the scene as well as from officers who did not witness the incident. *Id.* at 153-54. Only officers that were on the scene, who actually witnessed the actions of the offending officer, and based their opinions on “contemporaneous perceptions” were permitted to testify under Rule 701. *Id.* at 156. Conversely, the testimony of officers who did not witness the incident, but merely testified based on hypotheticals and second-hand accounts, was found to have “crossed the line between Rules 701 and 702.” *Id.* The court ruled that this crossed the line into Rule 702 testimony because it would be “expert testimony based on second-hand information.” *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (citing *Perkins*, 470 F.3d at 156).

In *Johnson*, the Fourth Circuit took the *Perkins* analysis and applied it to an agent’s lay witness testimony regarding intercepted telephone calls with drug jargon. 617 F.3d at 293. After

investigating the telephone calls, the court in *Johnson* noted the testimony was crossing the line into 702 evidence, holding that:

Here, we have exactly what Rule 701 forbids. The government called Agent Smith to testify regarding his interpretation of the wiretapped phone calls between Pickens and Johnson . . . Agent Smith admitted that he did not participate in the surveillance during the investigation, but rather gleaned information from interviews with suspects and charged members of the conspiracy *after* listening to the phone calls. His post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.

Id. at 293. Similar to the testimony in *Perkins* and *Johnson*, because Agent Simandy's testimony is not based on personal knowledge, but rather a second-hand investigation, it is the type of testimony that an expert should provide. This is the precise type of testimony Congress intended to exclude from Rule 701 through the enactment of subsection (c).

The Government looks to cases such as *Jayyousi*, *Miranda* and *United States v. Rollins*, 544 F.3d 820, 832 (7th Cir. 2008), to establish that Agent Simandy is only testifying to his familiarity with the specific conspiracy at issue, and not based on the expert testimony of a trained law enforcement officer. In *Rollins*, the Seventh Circuit allowed a DEA agent to testify to alleged code words in a drug conspiracy. 544 F.3d at 832. The court ruled that because the agent was not basing his testimony on his training as a narcotics officer, but rather from the agent's intimate familiarity with the unique code used in the specific conspiracy involved, the testimony was admissible under Rule 701. *Id.* at 832-33.

While Agent Simandy did base his impressions and conclusions solely on his investigation of this case, Agent Simandy lacks the intimate familiarity with the voices, mannerisms, and speaking habits of the conspirators that allowed the agents in *Miranda*, *Rollins*, and *Jayyousi* to reach their conclusions. Agent Simandy reviewed another agent's transcripts of conversations after Barnes was arrested and never actually listened to the conversations. This is

