
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 PETITIONER

QUESTIONS PRESENTED

- I. Does Federal Rule of Evidence 804(b)(6) permit admission of non-testimonial hearsay statements made by a murdered declarant against a criminal defendant, when his unavailability was wrongfully procured by the defendant's co-conspirator in furtherance, within the scope of, and reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy?

- II. Does Federal Rule of Evidence 501 compel recognition of a journalist privilege in a criminal prosecution when the public and private interests to be served by such a privilege are outweighed by its burden on truth-seeking and when state privileges do not compel analogous privileges in federal courts; alternatively, if Rule 501 does compel recognition of a qualified privilege is it overcome when the disclosure of a journalist's source will result in the admission of evidence that rebuts a criminal defendant's theory of defense, the evidence is not obtainable by alternative means, and the public has a compelling interest in the fair and effective administration of criminal justice?

- III. Does Federal Rule of Evidence 701 permit a witness to give lay opinion testimony as to alleged code words and phrases in conversations when that witness bases his testimony solely on what he has learned during his investigation of the defendant, including his extensive review of conversation transcripts and interviews with key witnesses, and when such testimony will provide context as to those conversations?

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STANDARD OF REVIEW

Questions of law are reviewed de novo. *Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir. 1990).

STATEMENT OF THE CASE

On December 4, 2011, Respondent, William Barnes, was indicted by a grand jury and charged with conspiracy to deal unlawfully in firearms, conspiracy to commit a crime of violence against an animal enterprise, and conspiracy to commit unlawful takings under the Endangered Species Act. (R. at 3-4.) In May 2000, Respondent inherited Big Top Circus from his father, a profitable enterprise located in rural southern Boerum. (R. at 1.) Despite being nationally-known for its twenty Asian elephants and renowned elephant show, Big Top Circus became unprofitable after Respondent assumed control. (R. at 1, 21.) By July 2011, Big Top Circus faced imminent bankruptcy and the only way to avoid it was to raise \$500,000 by December 2011. (*Id.*) After realizing that the circus's finances were unsalvageable, Respondent conceived of a scheme to reap as much profit as he could from the circus. (*Id.*)

On July 12, 2011, Respondent contacted Boerum City Circus and Flying Feats Circus, two smaller circuses located in northern Boerum, and invited them to join Big Top Circus in staging the "greatest elephant show on earth," beginning that December. (R. at 1-2, 21.) As an incentive for participating in the planned show, Respondent offered them the opportunity to quarter their elephants for the winter free of charge. (*Id.*) Unaware of Respondent's ill intentions, Boerum City Circus and Flying Feats Circus agreed to deliver ten Asian elephants each to Big Top Circus on December 2, 2011. (R. at 2.) Respondent's real plan, however, was to hunt and kill the elephants, harvest their extremely valuable ivory, and sell it for profit. (R. at 1-2, 21.)

On July 30, 2011, Respondent contacted Alfred Anderson, his long-time business partner in a sham animal charity called “Boerum 4 Animals.” (*Id.*) Respondent solicited Anderson’s assistance and offered him a share of the money made from selling the ivory. (R. at 2, 21.) Anderson agreed to the elephant hunt and suggested they solicit a third hunter. (R. at 2.) Anderson then contacted James Reardon, his long-term acquaintance, who agreed to join Anderson and Respondent in a “domestic big game hunt.” (R. at 2, 21.)

On August 30, 2011, Respondent contacted Kara Crawley, a reporter for the Boerum Times. (R. at 2.) He offered her unrestricted access to the facilities at Big Top Circus in exchange for an article that would increase publicity for the planned show and make it appear legitimate. (R. at 2, 9, 22.) Crawley agreed, and toured Respondent’s circus for two weeks during September 2011. (R. at 9-10.) During Crawley’s tours at the circus, she developed a rapport with one particular employee. (R. at 10, 22.) This employee told Crawley about overhearing a certain conversation between Respondent and another party concerning a plan to kill the elephants for their ivory. (*Id.*) The employee agreed to let Crawley videotape an interview without disguising his or her appearance or voice, but did ask Crawley not to reveal the tip or the employee’s identity while still employed by the circus. (*Id.*) On December 1, 2011, Crawley published an exposé about Respondent’s plan to kill the elephants, revealing the information she received from the employee about the elephant-poaching scheme. (R. at 3, 11, 22.)

During September 2011, Respondent and Anderson discussed the details of the scheme. (R. at 2.) Respondent recommended that he, Anderson and Reardon use a helicopter and purchase assault rifles to kill the elephants. (R. at 2.) Anderson accepted the proposal on behalf of himself and Reardon, while Respondent agreed to provide the helicopter and weapons. (R. at

2.) On October 2, 2011, Respondent contacted Weapons Unlimited, a licensed firearm dealer, to inquire about assault rifles. (R. at 2.) Unbeknownst to Respondent, the “employee” he dealt with was undercover Agent Jason Lamberti with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. (R. at 2, 22.) Lamberti told Respondent that he could provide three unregistered, fully automatic AK-47s “under the table” by December 5, 2011 for \$500 each. (*Id.*) Respondent accepted Lamberti’s offer and based on Respondent’s illegal transaction, the FBI obtained a warrant to tap Respondent’s telephone line. (*Id.*) The FBI recorded Respondent’s telephone conversations from October 4, 2011, until he was arrested on December 1, 2011. (*Id.*)

On October 6, 2011, Respondent contacted salesman Alan Klestadt at Copters Corporation and arranged for a one-day helicopter rental on December 15, 2011. (R. at 3.) Respondent then informed Anderson that the necessary arrangements were complete. (R. at 3.) They agreed that the hunt would take place on December 15, 2011. (R. at 3.) Anderson wired Respondent \$1,000 on behalf of himself and Reardon for the cost of the weapons. (R. at 3.) In a telephone conversation recorded by the FBI on November 15, 2011, Anderson voiced his concerns to Respondent. (R. at 18.) He stated that he “made a mistake with Reardon,” and that they “shouldn’t have used him” because Reardon was “having second thoughts,” asking legal questions, and needed to “stay out of trouble.” (*Id.*) Respondent acknowledged that Anderson was worried about Reardon betraying the conspiracy and wanted to “think about it.” (*Id.*)

On the evening of November 28, 2011, Reardon called his friend, Daniel Best, relating to him a narrative of the conspiracy and his concern that Anderson might harm him. (R. at 8, 24.) Reardon further described conversations he had earlier that day with Respondent, which the FBI was unable to intercept. (R. at 8.) Reardon specifically stated that Respondent described to him how they would kill the elephants and split the ivory. (R. at 8.)

In a telephone conversation recorded by the FBI at 2:00 a.m. on November 29, 2011, Anderson told Respondent that he was right about Reardon and that they were “out of time,” and needed Reardon “out of the picture.” (R. at 19.) Agreeing with Anderson, Respondent suggested that they tell him they had “called it off.” (*Id.*) Anderson replied, suggestively, that Respondent’s idea was inadequate to protect the conspiracy because of the risk that Reardon would “see the news.” (*Id.*) After Respondent agreed, Anderson declared that he was “gonna take care of” Reardon because things would “be messy” if “people show up” as he and Respondent are in the process of carrying out their plan at Respondent’s “place next month.” (*Id.*) Anderson reiterated his intention to take care of Reardon, stating, “I’m doing it,” and stating again that they were “out of time.” (*Id.*) Respondent replied ambiguously with, “hold off,” “just shut him up for a while,” and lastly, “I don’t want anything to do with this.” (*Id.*)

On the evening of November 29, 2011, Best drove to Reardon’s home and observed Anderson running out of Reardon’s apartment. (R. at 7, 24.) Best entered to find Reardon dead on the floor. (*Id.*) Anderson was apprehended by police later that evening, Mirandized, and then voluntarily confessed to killing Reardon to prevent him from exposing the conspiracy to the authorities. (*Id.*) Respondent, however, alleges that Anderson was a “very mentally ill man” who concocted a fantastical story that they would be hunting his elephants, and that the entire outlandish “elephant hunt was a delusion.” (R. at 7.)

On December 15, 2011, FBI Agent Simandy took over Respondent’s case from Agent Narvel Blackstock. (R. at 12.) Agent Blackstock had listened to the intercepted telephone conversations contemporaneously and transcribed them. (R. at 23.) As part of his investigation, Agent Simandy thoroughly reviewed the telephone transcripts and personally interviewed

Lamberti and Klestadt. (*Id.*) Lamberti and Klestadt gave Agent Simandy the dates Respondent contacted them, what Respondent inquired about, and what arrangements had been made. (*Id.*)

At the hearing on motions in limine, Agent Simandy testified that his extensive investigation on this case enabled him to put Respondent's telephone conversations into context based on the dates of those conversations, and the dates that Respondent contacted Lamberti and Klestadt regarding the AK-47s and the helicopter. (R. at 13-14.) He further testified that such context enabled him to decipher the meaning of the code words and phrases used in those conversations. (R. at 13.) For example, Respondent and his co-conspirators made repeated references to "blood diamonds," which Agent Simandy interpreted as referring to elephant ivory tusks. (*Id.*) Additionally, on October 8, 2011, two days after Respondent arranged for the one-day helicopter rental, he stated that "Charlie tango is ready," which Agent Simandy said was a reference to the helicopter. (*Id.*) Lastly, on October 3, 2011, one day after Respondent had paid Lamberti for the three AK-47s, he stated "black cat was arranged," which Agent Simandy said was a reference to the AK-47s. (*Id.*) Agent Simandy testified that he came to these conclusions based on everything he learned by extensively investigating this case. (R. at 14.)

On May 1, 2012, the United States District Court for the Southern District of Boerum heard evidence and argument concerning three pre-trial motions: the Government's motion to admit Reardon's hearsay statements to Best under Federal Rule of Evidence 804(b)(6); Crawley's motion to quash the Government's subpoena seeking disclosure of her source; and the Government's motion to admit the lay witness opinion testimony of Agent Simandy under Federal Rule of Evidence 701. (R. at 5-6.) On May 2, 2012, the district court ruled against the Government on all three issues. (R. at 16.) On July 12, 2012, in a 2-1 decision, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's decision on each

of the three pre-trial motions. (R. at 20.) The Government sought a writ of certiorari, which this Court granted on October 1, 2012. (R. at 36.)

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision and find that: (1) Reardon's hearsay statements are admissible under Federal Rule of Evidence 804(b)(6); (2) Federal Rule of Evidence 501 does not compel recognition of a journalist privilege, or alternatively, this Court should only recognize a qualified privilege that is overcome by the Government's significant need for relevant evidence; and (3) Agent Simandy's lay witness opinion testimony as to alleged code words and phrases is admissible under Federal Rule of Evidence 701.

First, the non-testimonial hearsay statements made by Reardon, to his friend Best, are admissible under the doctrine of forfeiture by wrongdoing, codified in Rule 804(b)(6). The *Pinkerton* doctrine of conspiratorial liability is applicable to this case under the acquiescence prong of Rule 804(b)(6) because non-testimonial statements are at issue and Respondent's Confrontation Clause rights are not implicated. Furthermore, the Government is able to show by a preponderance of the evidence that Respondent's co-conspirator's wrongful procurement of Reardon's unavailability as a witness was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy.

Second, this Court should refuse to recognize a journalist privilege under Rule 501. The uncertain burden on news gathering that may result from the lack of a privilege is insufficient to override the public interest in law enforcement and the effective administration of criminal justice. Furthermore, common law principles, in light of reason and experience, do not compel federal courts to recognize a journalist privilege. In the alternative, this Court should only recognize a qualified privilege, which is overcome by: (1) the relevancy of the evidence to a

significant and highly disputed issue in this case; (2) the lack of an alternative means from which this evidence can be obtained; and (3) the Government's compelling interest in the effective administration of criminal justice.

Lastly, under Rule 701 Agent Simandy's lay opinion is rationally based on his perceptions because his extensive review of the telephone transcripts and his interviews with key witnesses constitutes first-hand knowledge. Furthermore, his lay opinion will be helpful to a jury, unfamiliar with the conspiracy, because it will put Respondent's conversations into context and give the code words and phrases their intended meaning. Additionally, Agent Simandy's testimony is based solely on what he has observed and learned from this particular investigation, and not on any specialized knowledge obtained through law enforcement training or previous investigations.

ARGUMENT

I. Federal Rule Of Evidence 804(b)(6) Permits The Admissibility Of Non-Testimonial Hearsay Statements Under The *Pinkerton* Doctrine When The Declarant's Unavailability Was Wrongfully Procured By The Respondent's Co-Conspirator.

An out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay. Fed. R. Evid. 801(c), 802. However, the forfeiture by wrongdoing doctrine, codified in Federal Rule of Evidence 804(b)(6), provides for an exception to the rule against hearsay for “[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.” Fed. R. Evid. 804(b)(6). In enacting this exception, Congress recognized the need for a prophylactic rule to deal with abhorrent behavior “which strikes at the heart of the system of justice” Fed. R. Evid. 804(b)(6) advisory committee’s note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (3d Cir. 1982)). The primary purpose behind this rule is to deter criminals from intimidating

or “taking care of” potential witnesses against them. *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002).

To apply the forfeiture by wrongdoing exception, the 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. *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). In applying the forfeiture by wrongdoing exception, federal courts broadly construe these elements to effectuate the rule’s purpose of preventing witness tampering. *Id.* at 241-42.

This Court should reverse the Fourteenth Circuit’s decision and hold that *Pinkerton* conspiratorial liability applies to Rule 804(b)(6) to admit non-testimonial hearsay statements because it is consistent with the “acquiescence” prong of the Rule when, like here, Confrontation Clause Rights are not implicated.

A. When A Party Seeks To Admit Non-Testimonial Statements Made By An Unavailable Declarant, Confrontation Clause Issues Are Not Raised, And Therefore, The *Giles* Intent Requirement Is Unnecessary In Determining Admissibility Under Rule 804(b)(6).

Federal courts have characterized the hearsay exception set forth in Rule 804(b)(6) as codifying the common law doctrine of forfeiture by wrongdoing. *Id.* The forfeiture by wrongdoing doctrine is an exception to a criminal defendant’s Sixth Amendment constitutional right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. It provides that a criminal defendant who procures the absence of witnesses against him has waived his constitutional right to confront such witnesses. *Reynolds v. United States*, 98 U.S. 145, 158 (1878). This exception “has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong” and is thus, necessary to prevent wrongdoers from profiting by their misconduct. *Gray*, 405 F.3d at 242 (quoting *Reynolds*, 98 U.S. at 158-59).

Furthermore, the Confrontation Clause only excludes testimonial statements made against criminal defendants. *Giles v. California*, 554 U.S. 353, 376 (2008); *Davis v. Washington*, 547 U.S. 813, 824 (2006). However, Rule 804(b)(6) allows for the admission of non-testimonial statements offered against a criminal defendant who has wrongfully caused, or acquiesced in causing, the declarant's unavailability. Fed. R. Evid. 804(b)(6). Thus, when non-testimonial statements are at issue, the criminal defendant's Confrontation Clause rights are not implicated and statements cannot be objected to on that basis. *Davis*, 547 U.S. at 821; *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

1. The Statements At Issue In This Case Are Non-Testimonial And Thus, Do Not Trigger The *Giles* Intent Requirement For Admissibility Because Confrontation Clause Rights Are Not Implicated.

While this Court has refrained from providing an exhaustive classification of all conceivable statements as either testimonial or non-testimonial, it has provided some guidance. In *Crawford*, this Court defined testimonial statements as being made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. This Court went on to state that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. Statements that are made without any "indicia of formality" fall outside the scope of Confrontation Clause. *Giles*, 544 U.S. at 378 (Alito, J., concurring). Thus, statements made to "friends and neighbors" or that are otherwise private, are non-testimonial. *Id.* at 376.

In *Giles*, this Court set forth the intent requirement for admission of testimonial statements under the forfeiture exception to the Confrontation Clause. It held that the exception applied only when the defendant engaged in conduct that was designed or intended to prevent the witness from testifying. *Id.* at 360. If it can be shown that the criminal defendant acted with the

purpose of making the witness absent, testimonial statements may be admitted against him without violating his constitutional rights. *Id.* at 366-67. However, the majority opinion went on to state that non-testimonial statements, such as “statements to friends and neighbors,” would not be excluded by the Confrontation Clause, but only by hearsay rules, “if at all.” *Id.* at 376. Furthermore, this Court held that under such circumstances, courts are “free to adopt” a version of forfeiture by wrongdoing that does not require the defendant engaged in conduct intended or designed to prevent a witness from testifying. *Id.* at 376.¹

In the present case, Reardon’s statements to Best were non-testimonial and do not implicate Respondent’s constitutional rights to confrontation. Reardon’s statements were made over the telephone to his friend, Best, relating to him a narrative of the conspiracy and his concerns that Anderson might harm him. (R. at 24-25.) Consistent with all federal case law on this issue, Reardon’s statements fall squarely within the scope of non-testimonial. They were made privately to an acquaintance, and therefore, there is no basis from which to conclude that an objective declarant would reasonably believe they would be available for use at a later trial. Furthermore, such remarks made over the telephone to a mere friend lack any “indicia of formality.” Since Reardon’s statements are non-testimonial, the *Giles* intent requirement is inapplicable to the admission of his statements under Rule 804(b)(6).

2. *Pinkerton* Co-Conspiratorial Liability Is Applicable To Rule 804(b)(6) When Non-Testimonial Hearsay Statements Are At Issue And Confrontation Clause Rights Are Not Implicated.

Traditional principles of vicarious liability hold a criminal defendant liable for his co-conspirator’s acts. *Pinkerton v. United States*, 328 U.S. 640 (1946). The *Pinkerton* doctrine holds that the criminal intent to do the act is established by the formation of the conspiracy itself.

¹ *Giles* raised the standard for forfeiture of the Confrontation Clause beyond that which is required for hearsay. Adrienne Rose, Note, *Forfeiture Of Confrontation Rights Post-Giles: Whether A Co-Conspirator’s Misconduct Can Forfeit A Defendant’s Right To Confront Witnesses*, 14 N.Y.U. J. Legis. & Pub. Pol’y 281, 318.

Id. at 647. Substantive offenses are attributable to all co-conspirators if such acts fall within the scope, are done in furtherance, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. *Id.* at 647-48. “Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective.” *Id.* at 647.

Pinkerton conspiratorial liability is consistent with the “acquiescence” prong of Rule 804(b)(6) when Confrontation Clause rights are not implicated. In *United States v. Cherry*, the Tenth Circuit held that based on a plain reading of the language, the Rule permits admission of hearsay statements by unavailable witnesses against defendants if those statements are otherwise admissible under the Confrontation Clause. 217 F.3d 811, 816 (10th Cir. 2000).² The use of the words “engaged or acquiesced in wrongdoing,” supports the contention that forfeiture under hearsay rules “can be imputed under an agency theory of responsibility to a defendant who ‘acquiesced’ in the wrongful procurement of a witness’s unavailability but did not actually engage in wrongdoing apart from the conspiracy itself.” *Id.*; accord *Thompson*, 286 F.3d at 964.

The court in *Cherry* applied *Pinkerton* conspiratorial liability as an appropriate mechanism for assessing whether a co-conspirator’s acts could be imputed to a criminal defendant for purposes of Rule 804(b)(6). In doing so, the court held that a defendant waived his hearsay objections if a preponderance of the evidence establishes that the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy. *Cherry*, 217 F.3d at 820. The court noted that “[i]t would make little sense to limit forfeiture of a defendant’s trial rights to a narrower set of facts than would be sufficient to sustain a conviction.” *Id.* at 818; see also *Thompson*, 286 F.3d at 964

² Courts may continue to apply the *Cherry* doctrine to non-testimonial statements under Rule 804(b)(6) because the *Giles* holding only affects testimonial statements and not other hearsay. Adrienne Rose, Note, *Forfeiture Of Confrontation Rights Post-Giles: Whether A Co-Conspirator’s Misconduct Can Forfeit A Defendant’s Right To Confront Witnesses*, 14 N.Y.U. J. Legis. & Pub. Pol’y 281, 319.

(holding that without a rule of co-conspirator forfeiture, “the majority of members of a conspiracy could benefit from a few members engaging in misconduct.”).

Furthermore, in 2012, after this Court’s decision in *Giles* setting forth the intent requirement for forfeiture, the Fourth Circuit applied conspiratorial liability as decided in *Cherry*. See *United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012). In applying *Cherry*, the *Dinkins* court held that the term “acquiesce,” within the meaning of Rule 804(b)(6), “encompasses wrongdoing that, while not directly caused by a defendant co-conspirator, is nevertheless attributable to the defendant because he accepted or tacitly approved the wrongdoing.” *Id.* Thus, the *Pinkerton* doctrine of co-conspiratorial liability is consistent with the “acquiescence” prong of Rule 804(b)(6) and is applicable in this case because non-testimonial hearsay statements are at issue and Confrontation Clause rights are not implicated.

B. The Unavailable Declarant’s Non-Testimonial Statements Are Admissible Under Rule 804(b)(6) Because The Respondent’s Co-Conspirator’s Wrongful Procurement Of The Declarant Was In Furtherance, Within The Scope, And Was Reasonably Foreseeable As A Necessary Or Natural Consequence Of The Ongoing Conspiracy.

The forfeiture by wrongdoing exception to hearsay admits statements against a defendant that (1) acquiesced in wrongdoing that, (2) was intended to render the declarant unavailable as a witness, and (3) that did, in fact, render the declarant unavailable as a witness. *Gray*, 405 F.3d at 241. A defendant is deemed to have “acquiesced in” the wrongful procurement of a witness’s unavailability for purposes of Rule 804(b)(6) when the government can satisfy the requirements of *Pinkerton*. *Cherry*, 217 F.3d at 820; *Pinkerton*, 320 U.S. at 647-48. Thus, the government must show by a preponderance of the evidence that a co-conspirator’s wrongful procurement of the declarant’s unavailability was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy. *Id.*

This Court should hold that the hearsay statements made by Reardon against Respondent are admissible because the Government can prove by a preponderance of the evidence that: (1) Respondent's co-conspirator, Anderson, wrongfully caused Reardon's unavailability as a witness when he murdered him to prevent him from exposing the conspiracy; and (2) Anderson's wrongful procurement of Reardon's unavailability was in furtherance and within the scope of the conspiracy to which Respondent was a party, making it reasonably foreseeable as a necessary and natural consequence of the ongoing conspiracy, that Anderson would engage in such conduct with the intent that Reardon would be rendered unavailable.

1. Respondent's Co-Conspirator Engaged In Conduct That Was Intended To, And That Did, Render The Declarant Unavailable As A Witness.

The forfeiture by wrongdoing doctrine requires conduct that was designed or intended to, and that did, render the declarant unavailable as a witness. Fed. R. Evid. 804(b)(6); *Giles*, 544 U.S at 360. In this case, the record states facts sufficient to support a finding that Anderson murdered the declarant, Reardon, to render him unavailable as a witness. (R. at 7, 24.) Shortly after Reardon was found dead in his home, Anderson was apprehended by police and confessed to killing Reardon in order to prevent him from exposing the conspiracy to law enforcement. (*Id.*) Furthermore, on the eve of Reardon's murder, Anderson remained adamant that he and Respondent had to "take care of" Reardon because of the chance that he would expose them to law enforcement. (R. at 19.) Thus, Anderson murdered Reardon to prevent him from being able to testify as a witness.

2. The Wrongful Procurement Of The Declarant Was In Furtherance, Within The Scope, And Was Reasonably Foreseeable As A Necessary Or Natural Consequence Of The Ongoing Conspiracy.

Under *Pinkerton* liability, a defendant is responsible for the crimes of his co-conspirators that are committed in furtherance of the conspiracy, are "within the scope of the unlawful

project,” and are therefore “reasonably foreseen as a necessary or natural consequence of the unlawful agreement.” *Cherry*, 217 F.3d at 820. A defendant will be deemed to have acquiesced in his co-conspirator’s wrongful procurement of a witness’s unavailability for purposes of Rule 804(b)(6) if the above requirements are satisfied. *Id.* Courts have stated that the scope of the conspiracy is not limited to its primary goal, but also includes secondary goals relevant to the evasion of apprehension and prosecution for the primary goal. *Id.* at 821; *United States v. Martinez*, 476 F.3d 961, 966 (D.C.C. 2007) (secondary goals include silencing a witness in order to “protect the privacy of the conspiracy.”). Misconduct designed to benefit the conspiracy’s members or to protect the conspiracy’s viability, is in furtherance of and within the scope of that conspiracy. *United States v. Johnson*, 495 F.3d 951, 972 (11th Cir. 2007).

In the present case, Anderson’s wrongful procurement of Reardon’s unavailability was within the scope and in furtherance of the conspiracy. Respondent, Anderson, and Reardon were co-conspirators in a scheme to hunt and kill endangered elephants, in order to harvest and sell their extremely valuable ivory. (R. at 21.) In November 2011, Reardon expressed concerns about the legality of the conspiracy. (R. at 24.) In conversations with Respondent, Anderson stated that they needed Reardon “out of the picture” and insinuated that telling Reardon they had “called it off” would be insufficient to protect the conspiracy. (R. at 19.) His statements regarding Reardon “seeing the news” and “people showing up” indicate his intent to protect the privacy and viability of the elephant hunt. (R. at 19.) Such statements indicate Anderson’s growing concern that Reardon would inform law enforcement of their plans, resulting in their apprehension. In response to these growing concerns, Anderson killed Reardon to protect the conspiracy and prevent him from testifying. (R. at 7, 24.) Thus, Anderson’s wrongful

procurement of Reardon's unavailability as a witness was done within the scope and in furtherance of the conspiracy.

When a co-conspirator commits an act in furtherance of and "within the scope of the unlawful project," it follows that the act is "reasonably foreseen as a necessary or natural consequence of the ongoing conspiracy." *Cherry*, 217 F.3d at 817; *United States v. Russell*, 963 F.2d 1320, 1322 (10th Cir. 1992) (quoting *Pinkerton*, 328 U.S. at 646-48). Furthermore, when a defendant has "actual knowledge of a co-conspirator's intent to murder a witness in order to prevent discovery or prosecution of the conspiracy," such knowledge "may prove relevant" to the elements under *Pinkerton*. *Cherry*, 217 F.3d at 820. In *Mastrangelo*, the court stated that "[b]are knowledge of a plot to kill and a failure to give warning to appropriate authorities is sufficient to constitute waiver." *Mastrangelo*, 693 F.2d at 273-74. On the other hand, a defendant will not be responsible for such acts taken by a co-conspirator if "he or she took affirmative steps to withdraw from the conspiracy," such as some step to "disavow or defeat" the conspiracy's purpose." *Cherry*, 217 F.3d at 820.

In this case, it was reasonably foreseeable as a necessary and natural consequence of the ongoing conspiracy that Anderson would wrongfully procure Reardon's unavailability as a witness. Respondent told Anderson to "shut him up for a while," making it reasonably foreseeable that Anderson would engage in conduct designed to render Reardon unavailable. Additionally, Anderson made it clear to Respondent that he was going to "take care of" Reardon because they were "out of time" and needed him "out of the picture." (R. at 19.) Therefore, Respondent had actual knowledge, or at the least, a "bare knowledge of a plot to kill." Respondent's failure to warn law enforcement that Anderson intended to murder Reardon to prevent him from exposing the conspiracy is sufficient to constitute forfeiture. Furthermore,

Respondent did not take affirmative steps to withdraw from the conspiracy because he failed to disavow the conspiracy's purpose, such as calling off the elephant hunt altogether. For the aforementioned reasons, this Court should reverse the Fourteenth Circuit's decision and find that *Pinkerton* conspiratorial liability is applicable to Reardon's statements under Rule 804(b)(6).

II. This Court Should Refuse To Recognize A Journalist Privilege Under Federal Rule Of Evidence 501 Because The Burden It Imposes On Truth-Seeking Outweighs Any Uncertain Interests It Would Serve And The Common Law Does Not Compel Its Recognition; In The Alternative, This Court Should Only Recognize A Qualified Privilege, Which Is Overcome In This Case By The Government's Need For Evidence Relevant To Its Prosecution Of Respondent.

This Court should reverse the Fourteenth Circuit's decision and decline to recognize a journalist privilege. 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” Fed. R. Evid. 501. The Advisory Committee's Note to Rule 501 acknowledges that it was Congress's intention to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.” Fed. R. Evid. 501 advisory committee's note. However, this Court declared that it is “disinclined to exercise this authority expansively.” *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 189 (1990).

Moreover, the general rule disfavoring testimonial privileges still stands, as this Court has long recognized that testimonial exclusionary rules and privileges contravene “the fundamental principle that ‘the public . . . has a right to every man's evidence.’” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Further recognizing this fundamental principle, this Court has held that testimonial privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974); accord *Trammel v. United States*, 445 U.S. 40, 50 (1980). Therefore, in assessing judicial recognition of a proposed privilege “we start with the primary assumption

that there is a general duty to give what testimony one is capable of giving.” *In re Sealed Case*, 148 F.3d 1073, 1075 (D.C.C. 1998) (quoting *Jaffee*, 518 U.S. at 9).

This Court should reverse the Fourteenth Circuit’s decision recognizing an absolute journalist privilege under Federal Rule of Evidence 501 because the public’s interest in the effective administration of criminal justice outweighs any uncertain interests that may be gained by such a privilege. In the alternative, should this Court recognize a privilege, it should be qualified, and in this case must yield to the Government’s significant need for evidence.

A. This Court Should Decline To Recognize A Journalist Privilege Under Federal Rule Of Evidence 501 Because The Public And Private Interests That It Would Serve Are Outweighed By Its Burden On Truth-Seeking And The Common Law Does Not Compel Its Recognition.

A journalist privilege was once considered, but properly rejected by this Court. In *Branzburg v. Hayes*, this Court held that “the consequential, but uncertain burden on news gathering” that may result from the failure to recognize a journalist privilege was insufficient to override the public interest in law enforcement and the effective administration of criminal justice. 408 U.S. 665, 690-91 (1972). This Court held that reporters, like other citizens, are required to “respond to relevant questions put to them in the course of a valid criminal trial.” *Id.* Furthermore, this Court has never overruled *Branzburg*.

In *Jaffee*, this Court set forth the following three factor test governing the creation of a new testimonial privilege under Federal Rule of Evidence 501: (1) the significant public and private interests that would be 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) common law principles “in the light of reason and experience.” *Jaffee*, 518 U.S. at 9-14.

This Court should decline to recognize a journalist privilege under Rule 501 for the following reasons: (1) the burden on truth seeking imposed by such a privilege outweighs any

interest that might be served by it, and (2) the common law in light of reason and experience does not compel recognition of a federal journalist privilege.

1. The Public And Private Interests That May Be Served By Recognizing A Journalist Privilege Are Outweighed By Its Burden On Truth-Seeking.

In evaluating whether a novel evidentiary privilege should be recognized, the proposed privilege must first be shown to serve both important public and private interests. Such interests must be so significant as to “transcend the normally predominant principle of utilizing all rational means for ascertaining truth” and therefore, “outweigh the need for probative evidence.” *Jaffee*, 518 U.S. at 9. A party seeking judicial recognition of a new evidentiary privilege under Rule 501 must “demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance a public good.” *Sealed Case*, 148 F.3d at 1076; *United States v. Gillock*, 445 U.S. 360, 375 (1980). Even in cases where the proposed privilege is intended in part to protect constitutional rights, the proponent is nevertheless required to put forth “a compelling empirical case for the necessity of the privilege.” *Sealed Case*, 148 F.3d at 1076 (citing *Branzburg*, 408 U.S. 665, 693-94, n. 32).

The overriding public interest in the fair and effective administration of criminal justice outweighs public and private interests that may be served by federal judicial recognition of a journalist privilege. In *Branzburg*, this Court rejected the argument that a privilege to keep sources confidential furthers the First Amendment guarantee protecting the free flow of news to the public. *Branzburg*, 408 U.S. at 682-83. This Court declined to grant a journalist privilege, holding that there was an overriding public interest in pursuing and prosecuting the crimes reported to the press by confidential sources. *Id.* at 694-95. This Court found that the administration of criminal justice in connection with reported crimes would deter the commission of future crimes. *Id.* Furthermore, the claimed burden on news gathering and the

diminished flow of news was uncertain and based on widely divergent and speculative estimates. *Id.* This Court reasoned that the lack of evidence made it unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are compelled to testify in criminal proceedings. *Id.* In addition, this Court recognized that the press has operated from the beginning of our country's founding without a journalist privilege and has nevertheless flourished, adding that the lack of such a privilege has not "been a serious obstacle to either the development or retention of confidential news sources by the press." *Id.* at 695, 698-99.

Reinforcing its initial ruling in *Branzburg*, this Court stated it is unwilling "to embark the judiciary on a long and difficult journey to . . . an uncertain destination." *Univ. of Pa.*, 493 U.S. at 190 (quoting *Branzburg*, 408 U.S. at 703). Consistent with these holdings, this Court should not restrict the Government's ability to administer justice by recognizing a journalist privilege under Rule 501.

2. The Common Law, In Light Of Reason And Experience, Does Not Compel Recognition Of A Federal Journalist Privilege.

The common law does not compel recognition of a federal journalist privilege. Rule 501 authorizes federal courts to define new privileges by interpreting the common law in light of reason and experience. Fed. R. Evid. 501. In doing so, however, federal courts are not universally compelled to consider the extent to which that privilege is recognized by the states. *Gillock*, 445 U.S. at 367-68. Long standing principles of this Court hold that the admissibility of evidence in federal criminal trials "is to be controlled by common law principles, not by local statute." *Wolfe v. United States*, 291 U.S. 7, 13 (1934); *Funk v. United States*, 290 U.S. 371, 383 (1933). Furthermore, the Advisory Committee's Note to Rule 501 provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy being enforced. Fed. R. Evid. 501 advisory committee's note; *see also Gillock*,

445 U.S. at 367-68 (holding that a state created privilege does not compel an analogous privilege in federal prosecution under Rule 501).

In accordance with *Branzburg*, lower federal courts have also refused to recognize proposed evidentiary privileges on the basis of state law. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); *Spencer Sav. Bank, SLA v. Excell Mortg. Corp.*, 960 F. Supp. 835, 836 (D.N.J. 1997). In *McKevitt*, a criminal defendant sought the production of tape recorded interviews with the prosecution's key witness from a group of journalists. *McKevitt*, 339 F.3d at 531. The 7th Circuit rejected the journalists' claim that the tapes were protected from compelled disclosure by a federal common law reporter's privilege in accordance with this Court's holding in *Branzburg*. *Id.* at 531, 533. In following this Court's ruling in *Branzburg*, Judge Posner correctly reiterated that journalists are afforded sufficient protection via the motion to quash and that "courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances" *Id.* at 533.

Thus, this Court should reverse the Fourteenth Circuit's decision and hold that Federal Rule of Evidence 501 does not compel recognition of a journalist privilege under the common law in light of reason and experience. Furthermore, the burden on truth-seeking imposed by such a privilege outweighs any incidental interest that might be served by it.

B. Should This Court Choose To Recognize A Journalist Privilege Under Rule 501, It Should Only Recognize A Qualified Privilege That Is Overcome By The Government's Need For Disclosure In The Present Case.

Should this Court nevertheless decide to embark upon a drastic and abrupt change of course in public policy, and effectively overrule its decision in *Branzburg*, this Court should find that a journalist's privilege is, at the very most, a highly qualified one. This Court has continued to hold that a journalist is not relieved of the obligation to answer questions relevant to a criminal

investigation merely because the journalist might be required to reveal a confidential source. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Rather, this Court has provided that when a journalist has some reason to believe that his testimony calls for disclosure of “confidential source relationships without a legitimate need of law enforcement,” a motion to quash may be granted on a case-by-case basis. *Branzburg*, 408 U.S. at 711 (Powell, J., concurring). As Justice Rehnquist stated, this Court has “eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring); *Nixon*, 418 U.S. at 713 (holding that the President does not have an absolute privilege to withhold information relevant to a criminal prosecution); *see, e.g., Herbert v. Lando*, 441 U.S. 153, 175 (1979).

In determining whether a qualified journalist privilege should protect a news source from compelled disclosure, a proper balance must be struck “between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Branzburg*, 408 U.S. at 711 (Powell, J., concurring). To aid in the balancing of these interests, circuit courts have applied the following three-part test: (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information. *LaRouche v. N.B.C.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *see, e.g., Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

This Court should find that if a qualified privilege does exist, it is outweighed by the substantial interests in effectively prosecuting the present criminal trial for the following reasons: (1) the information sought is relevant to the government’s case, (2) it cannot be obtained by alternative means, and (3) there is a compelling interest in the information.

1. Disclosure Of The Journalist's Source Is Relevant To The Government's Prosecution Of Respondent.

To demonstrate that a qualified journalist privilege should be overcome, the information sought must be relevant to a significant issue in the case. Such information includes that which is relevant to determining a criminal defendant's guilt or innocence. *United States v. Treacy*, 639 F.3d 32, 39, 43 (2d Cir. 2011). Additionally, evidence is relevant to a significant issue in a case if it may assist the jury in determining a disputed issue of fact. In *Gonzales v. N.B.C.*, both parties to a civil rights action subpoenaed a broadcaster for production of unedited, unbroadcasted camera footage of a traffic stop involving the plaintiffs and the defendant. 194 F.3d 29, 30-31 (2d Cir. 1998). The court held that the tapes were relevant to a significant issue in the case, reasoning that they may assist the trier of fact in assessing whether the defendant had probable cause to stop the vehicle and whether he engaged in a pattern or practice of stopping vehicles without probable cause. *Id.* at 36.

Furthermore, information is relevant when it relates to statements made by a criminal defendant in furtherance of an alleged conspiracy. In *Treacy*, the government subpoenaed a journalist to testify as to the accuracy of published statements made by a defendant nearly two years prior to being indicted with conspiracy to commit securities fraud. *Treacy*, 639 F.3d at 39. The court held that the statements were relevant to a significant issue in the case and that the journalist privilege must yield to the government's need for disclosure. *Id.* at 43. The court found that the defendant's statements to the journalist were made in furtherance of the conspiracy, showed consciousness of guilt, and demonstrated his knowledge of the subject matter of the long-term conspiracy. *Id.*

In this case, the information sought by the Government is relevant to its prosecution of Respondent for multiple counts of conspiracy. Like the journalist in *Treacy*, the source of

Crawley's published news story is a possible eyewitness to acts in furtherance of the conspiracy. The source told Crawley that he or she overheard conversations between Respondent and another party regarding their plans to kill the circus elephants for their ivory. (R. at 10.) Thus, these conversations include statements made by Respondent "in furtherance of a conspiracy."

Respondent, however, has stated that no such conspiracy ever existed and alleges that Anderson was a "very mentally ill man" who suffered from a "delusion" that he and Respondent were co-conspirators in an "outlandish elephant hunt." (R. at 7.) The source's testimony will be highly relevant to a significant and highly disputed issue in this case – whether or not Respondent was in fact a party to a conspiracy to hunt elephants for their ivory. Thus, like the evidence sought in *Treacy*, the evidence sought here will assist the jury in determining a significant issue in this case, such as the Respondent's participation in the conspiracy.

2. The Government Seeks Evidence That Cannot Be Reasonably Obtained By Alternative Means.

The second factor the courts will consider in determining whether a qualified journalist privilege has been overcome is whether the information sought is reasonably obtainable from other sources. When information consists of verbatim and substantially verbatim statements, those statements are by their very nature, not obtainable from any other source. In *Treacy*, the court held that the source was the only potential witness who could confirm that the defendant had made the statements quoted in the article, and thus, the information was not reasonably obtainable from other sources. *Treacy*, 639 F.3d at 43.

Furthermore, in *United States v. Cuthbertson*, a television network broadcasted an investigative report focused on the activities of a fast-food franchise. 630 F.2d 139, 142 (3d Cir. 1980). A year later, several of the franchise's principals were indicted with conspiracy and fraud. *Id.* The television network moved to quash the subpoena prior to trial, claiming a

journalist privilege not to disclose information related to interviews with franchisees and employees. *Id.* The Third Circuit held that statements made by franchisees and former employees to the journalists were not obtainable from any other source because “they are unique bits of evidence that are frozen at a particular place and time.” *Id.* at 142, 147.

In the present case, Respondent’s conversation with an alleged co-conspirator at Big Top Circus regarding plans to kill the elephants for their ivory is not available from another source. Like the statements from employees sought in *Cuthbertson*, testimony from Big Top Circus’s employee as to Respondent’s conversations with his co-conspirator are unique bits of evidence that are frozen in time. There is no other known source from which the Government is able to obtain evidence of this particular conversation. Furthermore, it is this employee, and only this employee, that is able to substantiate the information published in the Boerum Times, which implicates Respondent in the conspiracy that he was arrested for later that same day. (R. at 3.)

3. The Government Has A Compelling Interest In The Information That Justifies Disclosure Of The Journalist’s Source.

The compelling interest in the information sought should be balanced against the journalist’s interest in protecting the confidentiality of sources, on a case-by-case basis. *LaRouche*, 780 F.2d at 1139; *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 n. 12 (4th Cir. 2000). In order to show a compelling interest sufficient to outweigh a qualified privilege, courts consider both society’s interest and the interests of the party seeking disclosure. *Ashcraft*, 218 F.3d at 287; *United States v. Cutler*, 6 F.3d 67, 74 (2d Cir. 1993). It is a deeply rooted principle in American jurisprudence that there is a compelling interest in having “every man’s evidence” at a criminal trial. *Branzburg*, 408 U.S. at 688 (quoting *Bryan*, 339 U.S. at 331). As this Court has held, “[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government” *Branzburg*, 408 U.S.

at 690. In furtherance of this federal policy, this Court has placed particular emphasis on the production of evidence in criminal trials, requiring that courts assure all relevant and admissible evidence is produced. *Nixon*, 418 U.S. at 711.

Consistent with this principle, federal courts recognizing a qualified journalist privilege have consciously lowered the bar for overcoming it in criminal cases. *Treacy*, 639 F.3d at 43; *United States v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980). A journalist's claim of privilege will be more carefully scrutinized when the needs of effective criminal proceedings and the government's ability to administer justice are at issue. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1180-82 (1st Cir. 1988) (in refusing to grant a journalist's privilege under a balancing test, the court reasoned that it narrowed its holding based, in part, on the fact that it involved a criminal case, as opposed to the "ordinary run of cases."); *see, e.g., In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1149 (D.C.C. 2005) (recognizing that a higher standard set forth in civil cases is not controlling in criminal cases because "the public interest in effective law enforcement is absent.").

In this case, the public's needs and the needs of the party seeking disclosure are aligned. Here, the federal government, acting on behalf of the people, is prosecuting a heinous federal crime that poses serious threats to the health, safety and welfare of society. Respondent is charged with a conspiracy involving the intentional damage of personal property, namely forty Asian elephants, owned by three animal enterprises and protected under the Endangered Species Act. (R. at 3-4.) Thus, the compelling public interest in fair and effective law enforcement and administration of criminal justice, aimed at providing security for persons and property, weighs heavily in favor of the Government based on the facts and circumstances in this case.

When the information sought is relevant to the case, not reasonably obtainable from other sources, and serves society's interest in the fair administration of criminal justice, a compelling interest that overrides the journalist privilege should be found. While some circuits may consider whether a source had a reasonable expectation of confidentiality, a journalist is not exempt from answering questions relevant to a criminal investigation merely because she might be required to reveal a confidential source. *See Cohen*, 501 U.S. at 669; *Cuthbertson*, 630 F.2d at 147. Furthermore, courts that do consider a source's reasonable expectation of confidentiality nevertheless require that the proponent of the privilege sufficiently demonstrate that the information was conveyed in confidence. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 310 (2d Cir. 2011).

In this case, Crawley revealed to the district court that her source was employed by Respondent at Big Top Circus and had given Crawley permission to publish the information once he or she no longer worked at the circus. (R. at 10.) Since Crawley did in fact publish the information, it is no longer confidential and furthermore, it is reasonable to presume that the source is no longer Respondent's employee. (R. at 11.) Therefore, the employee could not have reasonably expected to remain anonymous after their employment ended and would no longer have a "fear of reprisal" by Respondent. (R. at 10.) Additionally, the employee agreed to be interviewed on camera and did not ask to disguise their face or voice. (R. at 11, 22.) Under such circumstances, a person could not have a reasonable expectation to remain anonymous because of the risk that the tape would fall into other hands. (R. at 11.) Thus, even if this Court considers confidentiality as a factor, the employee did not have a reasonable expectation of such, and even if the employee did, it no longer exists. Therefore, the public's need for disclosure of evidence outweighs the press's need for protection under a journalist privilege.

III. Agent Simandy’s Lay Witness Opinion Testimony As To Alleged Code Words And Phrases Is Admissible Under Federal Rule Of Evidence 701 Because It Is Rationally Based On His Perception, Helpful To A Clear Understanding Of His Testimony, And Is Not Otherwise Expert Testimony.

Federal Rule Of Evidence 701 allows a lay witness to testify in the form of an opinion that is (a) rationally based on the perceptions of the witness, (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, governing expert witness testimony. Fed. R. Evid. 701. Subsection (a) is the “familiar requirement of first-hand knowledge or observation,” and subsection (b) requires “testimony to be helpful in resolving issues.” Fed. R. Evid. 701 advisory committee’s note. Further, subsection (c) is intended “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” *Id.*

This Court should reverse the Fourteenth Circuit’s decision and find that Agent Simandy’s lay witness opinion testimony is admissible under Rule 701 for the following three reasons: (1) it is rationally based on his perceptions, (2) it is helpful to the jury in understanding his testimony and determining a fact in issue, and (3) it is based solely on his personal experience in the investigation relevant to this case, and not on past experience, specialized skills, or knowledge.

A. Agent Simandy’s Interpretation Of The Meaning Of Code Words And Phrases From Transcripts That He Personally Reviewed During His Investigation Was Rationally Based On His Perceptions Because It Constitutes First-Hand Knowledge.

A lay witness’s opinion testimony must be rationally based on his perceptions to be admissible. Fed. R. Evid. 701(a). Under this limitation to admissibility, the witness must base his testimony on “first-hand knowledge or observation.” Fed. R. Evid. 701 advisory committee’s

note. First-hand knowledge or observation may be based on a federal agent's overall investigation on a particular case. *United States v. Jayyousi*, 657 F.3d 1085, 1102-03 (11th Cir. 2011). An agent's testimony, therefore, may be based on what he has learned through reviewing transcripts prepared by other law enforcement personnel, as well as his own examination of documents and records. *Id.* Furthermore, there is no requirement that the agent directly participated in or observed the underlying events for which he is giving lay opinion testimony. *Id.*; see also *United States v. Hamaker*, 455 F.3d 1316, 1331-32 (11th Cir. 2006); *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984). In addition, first-hand knowledge may be obtained through interviews of witnesses familiar with the defendant and the alleged crimes. *United States v. Rollins*, 544 F.3d 820, 831-32 (7th Cir. 2008).

An agent has first-hand knowledge when he reviews and examines transcripts and wiretap summaries prepared by other law enforcement personnel. In *Jayyousi*, a federal agent was allowed to testify as to "his interpretation of the meanings of alleged code words" the defendant used in intercepted telephone calls. *Jayyousi*, 657 F.3d at 1102-03. The agent testified about the meanings of code words that he learned through his examination of voluminous documents during his criminal investigation, which included reading wiretap summaries and verbatim transcripts prepared by other agents who listened to the conversations contemporaneously. *Id.* He testified that he was able to detect the speakers were using code words based on the "context of the conversations." *Id.* at 1095. Despite not personally observing or participating in the defendant's conversations, the court held that the agent's testimony was rationally based on his perception. *Id.* at 1102. The court reasoned that the agent's "familiarity with the investigation allowed him to perceive the meaning of coded language that the jury could not have readily discerned." *Id.* at 1104.

First-hand knowledge is also gained through interviewing witnesses that personally know the defendant and are familiar with the alleged conspiracy. In *Rollins*, a federal agent testified as to the meaning of certain code words used by defendants in intercepted telephone conversations. *Rollins*, 544 F.3d at 831-32. The court held that the agent’s testimony was admissible because it was based, in part, on his “personal, extensive experience with this particular drug investigation.” *Id.* at 828. The court reasoned that the agent’s “personal, extensive experience” included the agent’s participation in interviews of witnesses who were themselves familiar with the defendants and the conspiracy, and in obtaining proffers from the conspirators. *Id.* at 832.

In the present case, Agent Simandy’s opinion testimony is rationally based on his perceptions because his extensive investigation of the alleged conspiracy constitutes first-hand knowledge. (R. at 13.) Like the federal agents in *Jayyousi* and *Rollins*, Agent Simandy’s investigation included thoroughly reviewing a dozen certified transcripts between Respondent and his co-conspirators. (R. at 13.) Furthermore, like the federal agent in *Jayyousi*, Agent Simandy did not directly participate in the intercepted conversations and instead read transcripts prepared by the former agent on the case. (R. at 13.) Therefore, like in *Jayyousi* and *Rollins*, this Court should hold that Agent Simandy’s “personal, extensive experience” and “familiarity” with this particular investigation allowed him to perceive the meaning of the code words and phrases, thus satisfying the first-hand knowledge requirement.

Agent Simandy’s witness interviews further supports a finding that his opinion testimony is rationally based on his perceptions because it constitutes first-hand knowledge. Agent Simandy interviewed undercover Agent Lamberti who sold Respondent the AK-47s, as well as Klestadt of Copters Corporation, who arranged for Respondent’s one-day helicopter rental. (R. at 2-3.) Similar to the witnesses interviewed in *Rollins*, the witnesses here were familiar with

Respondent and received proffers from him in connection with the conspiracy. (*Id.*) By interviewing these witnesses, Agent Simandy was able to put the conversations into context based on the dates of those conversations and the dates Respondent contacted them regarding the AK-47s and the helicopter. (R. at 13-14.) Like the agent in *Jayyousi*, Agent Simandy explained that the context of the conversations made it apparent what Respondent was discussing and allowed him to decipher the meaning of the code words and phrases used. (*Id.*) Thus, Agent Simandy gained first-hand knowledge and his lay opinion is rationally based on his perceptions.

B. Agent Simandy's Lay Opinion Is Helpful To Clearly Understanding His Testimony Or In Determining A Fact In Issue.

Lay witness opinion testimony must be helpful to the jury to clearly understanding the witness's testimony, or in determining a fact in issue. Fed. R. Evid. 702(b). A lay witness may interpret and testify as to the meaning of code words when that meaning would not be perfectly clear to the jury without the witness's interpretation. *United States v. Awan*, 966 F.2d 1415, 1430-31 (11th Cir. 1992). However, a lay witness may not give his interpretation of clear conversations, or what may otherwise be straightforward, potentially legitimate statements. *United States v. Hoffecker*, 530 F.3d 137, 170 (3d Cir. 2008).

When a jury cannot easily understand a defendant's conversation in intercepted telephone calls because of code words that appear to make little sense, lay opinion testimony helps the jury to better understand those conversations. In *Rollins*, the court found that the defendant's conversations included terms and phrases "that would appear at first to be virtually nonsensical." *Rollins*, 544 F.3d at 832. The court held that the agent's testimony helped the jury to understand what the parties said and what they meant. *Id.* at 831-32. For example, the agent testified that "the singer" and "the band" were both references to a co-defendant conspirator. *Id.* at 828. Thus, the lay opinion helped the jury to clearly understand the agent's testimony.

Testimony that draws inferences about the meaning of code words which the jury could not easily draw on their own is also considered helpful to the jury. In *Jayyousi*, the court held that the agent's testimony helped the jury to understand the defendant's conversations that related to their support of international terrorism. *Jayyousi*, 657 F.3d at 1103. The agent's knowledge of the present investigation enabled him to draw inferences about the meanings of code words that the jury could not have readily drawn. *Id.* For example, the agent testified to the use of code words such as "football" and "soccer" for jihad. *Id.* at 1095.

In addition, testimony that puts code words into context also helps the jury to better understand witness testimony. In *Jayyousi*, the agent's testimony linked the defendant's specific calls to checks and wire transfers that put the code words into context. *Id.* Such context was helpful to the jury in better understanding the testimony because they were likely "unfamiliar with the complexities" of terrorist activities. *Id.* Given the complexity of the charged crimes, the jury could not have easily drawn such inferences without the witness's testimony.

Testimony that assists a jury in resolving a fact in issue is also helpful. In *Rollins*, the court held that the agent's testimony assisted the jury in determining several facts at issue. *Rollins*, 544 F.3d at 831-832. For example, his interpretation of code words used by the defendants helped the jury in deciding whether the defendants knowingly and intentionally participated in the charged conspiracy, their roles, and the extent of their involvement in that conspiracy. *Id.* Thus, the agent's lay opinion aided the jury in determining a fact in issue.

In the present case, Agent Simandy's opinion testimony is helpful to the jury to clearly understand his testimony regarding the code words and phrases and determining a fact in issue. Like the terms and phrases used in the intercepted conversations in *Rollins* and *Jayyousi*, the code words and phrases used by Respondent and his co-conspirators "would appear at first to

be virtually nonsensical.” For example, references to “Charlie tango,” “blood diamonds,” and “black cat” would not be clear to a jury that has not extensively investigated the case or interviewed key witnesses. (R. at 13.) Agent Simandy’s extensive knowledge of this particular investigation enabled him to put Respondent’s conversations into context and to draw inferences as to the meaning of these code words. (R. at 13.) Thus, his lay opinion would assist a jury, unfamiliar with elephant poaching, in clearly understanding his testimony by putting those code words into context, giving them their intended meaning. Further, like the court held in *Rollins*, the testimony here could assist the jury in determining whether Respondent “knowingly and intentionally participated in the charged conspiracy,” and what his role was.

C. Agent Simandy’s Testimony Was Not Based On Scientific, Technical, Or Other Specialized Knowledge Falling Within The Scope Of Expert Witness Testimony.

Lay witness opinion testimony is only admissible when it is based on the witness’s personal knowledge and experience, and not on scientific, technical or other specialized knowledge falling within the scope of expert witness testimony under Rule 702. Fed. R. Evid. 701(c). Therefore, law enforcement officers may give lay opinion testimony when it is limited to what they observe or to other facts derived exclusively from the particular investigation relevant to the defendant’s case. *United States v. Oriedo*, 498 F.3d 593, 603 (7th Cir. 2007). Such witnesses may not, however, base their testimony on any specialized knowledge gained from training or from previous investigations unconnected to that case. *Rollins*, 544 F.3d at 832.

In *Rollins*, a federal agent testified that certain words were code words for illegal drugs and interpreted various conversations to show that the defendant’s activities were consistent with the charged conspiracy. *Id.* at 820. The court held that the testimony did not fall within the scope of expert testimony because it was not based on any specialized knowledge gained from his law enforcement training and experience in narcotics trafficking. *Id.* at 832. The court

reasoned that the code words were unique to the particular conspiracy alleged and that the agent was “intimately familiar with the unusual manner of communicating used by the conspirators.”

Id. Thus, the agent’s testimony was based solely on his extensive experience with the case. *Id.*

Agent Simandy’s testimony is based solely on his perceptions from extensively investigating this case. As the record shows, this is Agent Simandy’s first case that involves poaching elephants and furthermore, he has never been assigned to a case involving crimes against animals at all. (R. at 14.) In fact, he testified that this is not a typical case for him, as his previous investigatory work involved general crimes, which were mostly drug-related. (R. at 14.) Like the agent in *Rollins*, Agent Simandy’s opinion testimony is not couched in his prior experience or specialized knowledge as a law enforcement officer. Rather, it is based on his extensive review of the conversation transcripts and his interviews of key witnesses in this case.

Furthermore, like the code words interpreted in *Rollins*, the code words used by the defendant in this case are “unique” to this particular conspiracy. Thus, Agent Simandy’s interpretation of such code words is based solely on his personal knowledge and experience regarding this particular investigation and not on scientific, technical or other specialized knowledge. Therefore, this Court should find Agent Simandy’s testimony falls within the scope of lay witness opinion under Rule 701.

CONCLUSION

This Court should REVERSE the decisions of the United States Court of Appeals for the Fourteenth Circuit on each of the three pre-trial motions.

Date: February 20, 2013

Respectfully Submitted,

/s/

17P
Counsel for Petitioner

APPENDIX I

The Constitution of the United States

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX II

Federal Rules of Evidence

Federal Rules of Evidence Rule 501. Privilege in General

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.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Federal Rules of Evidence Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that 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.

Federal Rules of Evidence Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rules of Evidence Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

- (a) Statement. “Statement” means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) Declarant. “Declarant” means the person who made the statement.
- (c) Hearsay. “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
 - (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
 - (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (C) identifies a person as someone the declarant perceived earlier.
 - (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
 - (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make a statement on the subject;
 - (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
 - (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Federal Rules of Evidence Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Federal Rules of Evidence Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) Former Testimony. Testimony that:
 - (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
 - (B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
- (2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- (3) Statement Against Interest. A statement that:
 - (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
 - (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
- (4) Statement of Personal or Family History. A statement about:
 - (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Transferred to Rule 807.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. 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.