
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

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the court should apply conspiratorial liability to the forfeiture-by-wrongdoing hearsay exception codified in Federal Rule of Evidence 804(b)(6), where there is no evidence that an accused intended to procure the unavailability of the declarant, and the accused did not engage or acquiesce in the wrongdoing that silenced the declarant.
- II. Whether Federal Rule of Evidence 501 supports recognition of a privilege for a journalist who receives confidential information in the process of writing a news story that benefits society. Additionally, if a privilege exists, whether it should be recognized as absolute to ensure its validity.
- III. Whether the court should permit a law enforcement officer designated as a lay witness to offer opinion testimony interpreting code words and phrases used in an accused's telephone conversations, where the officer did not observe or participate in the conversations, merely having read transcripts of their contents, and the officer has no prior experience with the alleged underlying illicit activity.

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FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 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.

Fed. R. Evid. 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.

Fed. R. Evid. 804: Exceptions to the Rule Against Hearsay – When the Declarant Is Unavailable as a Witness

(b)(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.

STATEMENT OF THE CASE

The Conspiracy

In mid-2011, the Respondent, Mr. William Barnes, was faced with financial difficulty concerning his business, Big Top Circus. (R. 1). Because Asian elephants were the primary attraction at Big Top, Barnes contacted two other circus companies and invited them to join him in staging the “greatest elephant show on earth.” (R. 2). The two companies agreed to bring their elephants to Big Top for a month of holiday performances. (R. 2). Around the same time, Barnes contacted Alfred Anderson and discussed the possibility of hunting the elephants and harvesting their ivory to recoup some of the financial losses incurred by Big Top. (R. 2). Enticed by the profit-sharing scheme, Anderson agreed and suggested they find a third member of the conspiracy. (R. 2). Ultimately, the two agreed that James Reardon, a friend of Anderson’s, would be the third member of the hunting team. (R. 2). At the time he joined Anderson and Barnes, Reardon did not know the full extent of the conspiracy. (R. 21).

The Journalist

To gain publicity for the holiday elephant performances and make the scheme appear legitimate, Barnes contacted Kara Crawley, a reporter from the Boerum Times, and invited her to visit Big Top. (R. 2). The two agreed that Crawley would publish an article for the planned event if Barnes provided Crawley with unrestricted access to Big Top’s animals, employees, and facilities. (R. 2). Crawley accepted the offer, in part, to see first-hand how the animals at Big Top were treated. (R. 9). During one of her visits to Big Top, Crawley met an employee who, while speaking in hushed tones, indicated a desire to reveal information concerning Barnes’ true intention regarding the elephants. (R. 10). In order to reveal the information, the employee wanted to use a pseudonym and asked Crawley not to reveal the identity of the employee until the employee stopped working for Big Top. (R. 10). The employer, however, agreed to be

videotaped by Mrs. Crawley on the condition that Crawley be the only person with access to the video. (R. 10). In December of 2011, Crawley published an exposé of Barnes and his plan to hunt the elephants, based on information gathered from the employee. (R. 11).

The Government Agent

Based on conversations between Barnes and an undercover ATF agent posing as an employee of an automatic weapons dealer, the Government obtained a warrant to tap Barnes' telephone line. (R. 22-23). For approximately a two-month period, the Government intercepted several calls when Barnes was talking to either Anderson or Reardon. (R. 13). Originally, Agent Blackstock was assigned to the case, and he transcribed these conversations between the men as he listened to them. (R. 13). After Agent Blackstock passed away in unrelated events, Agent Thomas Simandy took over the case. (R. 12). Agent Simandy possessed no previous experience with poaching or animal-related cases. (R. 14). Having no first-hand knowledge of any of these conversations, Agent Simandy merely reviewed the transcripts of the conversations between Barnes, Anderson, and Reardon. (R. 13). Agent Simandy also spoke with the undercover ATF agent and an individual who spoke with Barnes about renting a helicopter. (R. 13).

The Government sought to introduce Agent Simandy as a lay witness regarding code words and phrases used during conversations intercepted by the Government between Barnes and other individuals. (R. 12). Without ever hearing any of the conversations and simply relying on his reading of the transcripts, Agent Simandy testified that he believed references to "blood diamonds" referred to the elephants' ivory, that "Charlie tango" referred to helicopters Barnes intended to rent, and that "black cat" referred to guns Barnes intended to purchase. (R. 13).

The Murder

In addition to conversations interpreted by Agent Simandy, other conversations between Barnes, Anderson, and Reardon evidenced the fact that Reardon was starting to question whether

he wanted to be involved in the hunt. (R. 18). Anderson contacted Barnes saying that he had “made a mistake with Reardon,” and that they should “get rid of him.” (R. 18). Barnes specifically instructed Anderson to not do anything about Reardon. (R. 18). Meanwhile, Reardon contacted his friend, Daniel Best, and told Best about the poaching conspiracy and about his fear that Anderson might try to harm him. (R. 24). The next day, Anderson and Barnes spoke again, where Anderson told Barnes that they needed to get Reardon out of the picture. (R. 19). After Anderson told Barnes that he was going to take care of Reardon, Barnes explicitly told Anderson to “hold off” on doing anything and concluded the conversation by telling Anderson that he didn’t “want anything to do with this.” (R. 19). Later that same day, Best drove by Reardon’s house and observed Anderson running out of the front door. (R. 24). When Best went inside Reardon’s home, he found Reardon’s dead body. (R. 24). Anderson was later arrested by police and subsequently confessed to murdering Reardon in order to silence him from revealing the truth about the elephant poaching conspiracy. (R. 24).

On December 4, 2011, Barnes was charged with two counts of conspiracy to deal unlawfully in firearms in violation of 18 U.S.C.A. §§ 371 and 922(a)(1)(a); two counts of conspiracy to commit a crime of violence against an animal enterprise in violation of 18 U.S.C.A. §§ 43 and 371; and one count of conspiracy to commit unlawful takings under the Endangered Species Act in violation of 18 U.S.C.A. §§ 371 and 1538. (R. 3-4). The District Court heard three motions: a motion by the Government to introduce the out-of-court statements by Reardon under the forfeiture-by-wrongdoing hearsay exception under Federal Rule of Evidence 804(b)(6); a motion by Mrs. Crawley to quash the subpoena ordering her to testify, pursuant to her argument that her conversations with the Big Top employee are protected by a

journalist privilege pursuant to Federal Rule of Evidence 501; and the Government's motion to introduce Agent Simandy as a lay witness under Federal Rule of Evidence 701. (R. 6-16).

The District Court ruled in favor of Mr. Barnes on all three issues. (R. 16-17).

Dissatisfied with the District Court's rulings, the Government filed an interlocutory appeal with the Fourteenth Circuit. (R. 20). On July 12, 2012, the Court of Appeals filed an opinion affirming the judgment of the District Court in all respects. (R. 20-32.) This Court granted certiorari on October 1, 2012 to address the issues presented above. (R. 36).

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly affirmed the District Court's ruling that conspiratorial liability is inapplicable to the forfeiture-by-wrongdoing hearsay exception codified in Federal Rule of Evidence 804(b)(6) in regard to Mr. Barnes. This hearsay exception allows in otherwise inadmissible hearsay statements when two requirements are met: (1) a party caused or acquiesced in causing a declarant witness's unavailability; and (2) a party intended that result. The doctrine of conspiratorial liability considers a partnership in crime and holds a co-conspirator responsible for the acts of his co-conspirator as long as the conspiracy continues. Here, while Barnes and Anderson were in fact co-conspirators, Anderson's killing of Reardon was outside the scope of the conspiracy. Moreover, there is no evidence that Barnes either intended the wrongdoing that silenced Reardon or engaged or acquiesced in Anderson's plan to murder Reardon. As such, the District Court was correct in holding that Barnes should not be held responsible for the murder of Reardon and that Reardon's statements are inadmissible against Barnes.

The Fourteenth Circuit also correctly held that Federal Rule of Evidence 501 supports recognition of a journalist's privilege, which protects the confidential communications that arose as a result of the conversation between Ms. Crawley and the Big Top employee. First, significant public and private interests are advanced by acknowledgment of the privilege, namely the free flow of information to the community. Secondly, the burden that would be imposed on truth seeking is meek. When examined as a whole, the important interests to society that are advanced by recognizing the privilege outweigh any slight reduction. Lastly, reason and experience support recognition of the privilege, especially where the majority of states and federal circuits recognize a form of the journalist privilege. Furthermore, it was properly held that the journalist's privilege should be absolute. For the privilege to be most beneficial to society, it has to be adopted as an absolute rule so it is not easily circumvented to admit otherwise privileged testimony before the Court.

Finally, the Fourteenth Circuit correctly barred Agent Simandy's lay witness opinion testimony under Federal Rule of Evidence 701. First, his interaction with the conversations was not as a participant or witness, nor does he have personal knowledge of the criminal scheme or regarding Mr. Barnes. Such a second-hand contact with the underlying facts renders Agent Simandy without personal perception of the events in question, thus Rule 701 forbids him from providing opinion testimony thereto. Moreover, because Agent Simandy has been designated as a lay witness, he may not claim any special expertise garnered from his years as a law enforcement officer nor with regard to the animal poaching scheme. Since what he is offering is merely an analysis of second-hand fact-gathering (namely a review of transcripts and interviews of witnesses), his opinions will be unhelpful to the finder of fact, pursuant to Rule 701(b), as the

factfinder will be in as good a position as he to draw the conclusions based on the underlying facts to which he will testify.

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY HELD CONSPIRATORIAL LIABILITY INAPPLICABLE TO THE FORFEITURE-BY-WRONGDOING HEARSAY EXCEPTION WHERE THE ACCUSED NEITHER ENGAGED OR ACQUIESCED IN THE WRONGDOING NOR HAD THE INTENT TO PROCURE THE UNAVAILABILITY OF THE WITNESS.

Federal Rule of Evidence 804(b)(6) provides an exception to the rule against hearsay for statements offered against a party that wrongfully caused the declarant's unavailability. Fed. R. Evid. 804(b)(6). More commonly known as the forfeiture-by-wrongdoing hearsay exception, this rule 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" is not excluded by the rule against hearsay. *Id.* The rationale behind this hearsay exception was articulated by the United States Supreme Court in *Reynolds v. United States*, where the Court recognized that while an accused defendant has a Constitutional right to confront the witnesses testifying against him, "if a witness is absent by [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." 98 U.S. 145, 158 (1878).

Typically, in order for the forfeiture-by-wrongdoing hearsay exception to apply, the court must find 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). Although there is some variance in the specific tests that courts use when determining whether there is

forfeiture, the majority of Circuit Courts employ factors similar to those in *Gray*, using a preponderance of the evidence standard. Fed. R. Evid. 804(b)(6) advisory committee’s note.

Where the accused himself does not directly procure the unavailability of the declarant, courts have nonetheless found the accused responsible for the unavailability of the declarant under the doctrine of conspiratorial liability. *See, e.g., United States v. Cherry*, 217 F.3d 811, 920 (10th Cir. 2000). The Supreme Court addressed this doctrine in *Pinkerton v. United States*, describing a conspiracy as a “partnership in crime.” 328 U.S. 640, 644 (1946). The Court further recognized that “so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that ‘an overt act of one partner may be the act of all without any new agreement specifically directed to that act.’” *Id.* at 646-47 (citing *United States v. Kissel*, 218 U.S. 601, 608 (1910)). Using this rationale, Circuit Courts, like the Tenth Circuit in *Cherry*, have extended *Pinkerton* conspiratorial liability to the forfeiture-by-wrongdoing hearsay exception. *Cherry*, 217 F.3d at 813. However, before such liability will trigger the forfeiture-by-wrongdoing exception, and thus allow in otherwise inadmissible hearsay against an accused individual, the accused must either engage or acquiesce in the wrongdoing and must have personally intended to procure the unavailability of the declarant. *See United States v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005); *Giles v. California*, 554 U.S. 353, 361 (2008).

A. Conspiratorial liability does not apply to the forfeiture-by-wrongdoing hearsay exception when the accused did not engage or acquiesce in wrongdoing.

Although courts have held that wrongful acts of co-conspirators to procure the unavailability of a witness can trigger the forfeiture-by-wrongdoing hearsay exception, most courts that have considered the issue have explicitly held that the defendant must either engage or acquiesce in the wrongdoing before the witness’s statements can be used against the defendant. *Rivera*, 412 F.3d at 567. Understandably, an accused who actually engages in the act

that silences the declarant should be and is responsible for the acts of his co-conspirator to procure that declarant's unavailability. *Id.* The Fourth Circuit, among others, has further held that an accused can be responsible for the wrongful acts of his co-conspirator if he acquiesces in the wrongdoing. *Id.* Acquiesce means "[t]o accept tacitly or passively; to give implied consent (to an act)." Black's Law Dictionary 26 (9th ed. 2009). As such, when an accused gives implied consent to his co-conspirator in an effort to silence a declarant, the forfeiture-by-wrongdoing hearsay exception will be triggered, and the declarant's statements can be used against the accused. *Rivera*, 412 F.3d at 567.

For example, in *Rivera*, two defendants were convicted of murder and conspiracy to commit murder. *Id.* at 564-65. As his primary argument on appeal, Rivera argued that the lower court erred in admitting the hearsay statements of his former girlfriend, who was murdered shortly after talking to the Government concerning Rivera's involvement in the murder of which he was accused. *Id.* at 565. Specifically, Rivera contended that for purposes of Federal Rule of Evidence 804(b)(6) the wrongful acts of others (namely members of the gang to which he was affiliated) were improperly imputed onto him. *Id.* at 566. He argued that, because he was incarcerated at the time of the declarant's murder, he could not possibly be responsible for procuring her unavailability. *Id.* at 567. The Fourth Circuit, however, rejected this argument, instead interpreting Rule 804(b)(6) broadly, holding that "the plain language of [Rule 804(b)(6)] supports the district court's holding that a defendant need only tacitly assent to wrongdoing in order to trigger the Rule's applicability. Active participation or engagement, or, as Rivera would have it, the personal commission of the crime, is not required." *Id.* Thus, although active participation in the wrongdoing is not required, the accused must at least "tacitly assent" or acquiesce in the wrongdoing before hearsay statements can be used against him. *Id.*

While one Circuit has held that “[b]are knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver,” the facts of that case are unique in that the accused was the only person who benefitted from the witness’s death. *United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982). There, the witness who was murdered had no information on anyone involved in the conspiracy except for defendant Mastrangelo. *Id.* at 271. On the witness’s way to the courthouse to testify against Mastrangelo, he was chased by two individuals and shot in the street. *Id.* Because of the unique circumstances of the case, the Second Circuit noted that Mastrangelo was the only person who could benefit from the murder of the witness. *Id.* The Second Circuit followed the rationale of the trial judge who noted that “[i]t is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness, would have been taken without his knowledge, acquiescence, or orders.” *Id.* Being the only beneficiary of the witness’s death, the court held that Mastrangelo’s bare knowledge of any plot to kill the witness was sufficient to waive any hearsay objections he raised. *Id.* at 273-74.

In the present case, the Government concedes that Barnes did not direct anyone to murder Reardon nor was he present at the killing; rather, the Government argues that because Barnes’ co-conspirator procured the unavailability of the declarant, Barnes should also be held responsible for Reardon’s death. (R. 26-27). However, pursuant to *Rivera*, simply being a co-conspirator with the person who committed the wrongdoing is not enough to trigger the forfeiture-by-wrongdoing hearsay exception. *Rivera*, 412 F.3d at 567. Instead, at the very least, Barnes must have tacitly assented to Anderson’s plans to murder Reardon. Admittedly, tacit agreement is not high standard to overcome; nonetheless, it does require agreement or approval by the accused in the case of co-conspirators.

Here, Barnes did not tacitly assent to Anderson's plans to silence Reardon. To the contrary, when Anderson reiterated his desires to "get rid" of Reardon, Barnes specifically replied, "don't do anything." (R. 18). A few days later, when Anderson again told Barnes that they needed Reardon out of the picture, Barnes again told Anderson to "hold off" on doing anything. (R. 19). Barnes even concluded their last conversation before Reardon's murder by telling Anderson that he didn't "want anything to do with this." (R. 19). From these statements, it is clear that Barnes did not tacitly assent to Anderson's plans to silence Reardon; contrarily, Barnes explicitly told Anderson to do nothing. When Anderson persisted with beliefs that Reardon should be silenced, Barnes specifically told Anderson that he wanted nothing to do with Anderson's plans. (R. 19). Having neither engaged nor acquiesced in the wrongdoing committed by his co-conspirator, Reardon's statements do not fall within the forfeiture-by-wrongdoing hearsay exception. As such, the Fourteenth Circuit correctly held that Reardon's statements could not be used against Barnes.

Moreover, because Reardon was not murdered specifically for the sole benefit of Barnes, the rationale used by the Second Circuit in *Mastrangelo* is inapplicable to the present case. Presumably, Anderson killed Reardon, at least in part, for his own benefit. In one of their last conversations Anderson specifically told Barnes that "I [Anderson] made a mistake with Reardon." (R. 18). Thus, not only was it Anderson's idea to kill Reardon, Reardon's death would benefit Anderson and his desire to profit from the hunting scheme. (R. 18). Additionally, in *Mastrangelo*, the court found that Mastrangelo must have at least had knowledge of his co-conspirator's plot to kill the declarant testifying against Mastrangelo. 693 F.2d at 271. Here, although Barnes knew that Anderson considered silencing Reardon, Barnes explicitly told Anderson to refrain from doing anything. (R. 18). Finally, there is no evidence that Barnes

actually knew of any specific plot to kill Reardon. As such, the rationale employed by the Second Circuit is inapplicable here, and Barnes' hearsay objections have not been forfeited.

B. Conspiratorial liability does not apply to the forfeiture-by-wrongdoing hearsay exception when the accused did not intend to procure the witness's unavailability.

In speaking on the matter of forfeiture-by-wrongdoing, the United States Supreme Court concluded in *Giles v. California* that a defendant himself must have personally intended to render the declarant unavailable to testify as a witness. 554 U.S. 353, 361 (2008). Moreover, the forfeiture-by-wrongdoing rule itself requires that the party who committed the wrongdoing must have done so *intending* to make the declarant unavailable as a witness. Fed. R. Evid. 804(b)(6) (emphasis added).

It follows, therefore, that simply applying conspiratorial liability principles to the forfeiture-by-wrongdoing hearsay exception does not circumvent the requirement that the accused must have intended to procure the declarant's unavailability. Concededly, an accused can be held responsible for the acts of his co-conspirator under the rationale expressed by the Supreme Court in *Pinkerton*. 328 U.S. at 646. However, the language in that case specifically referred to works of co-conspirators in furtherance of the crime for which they joined forces. *Id.* As the Court specifically recognized, "so long as the partnership in crime continues, the partners act for each other in carrying *it* forward." *Id.* The Tenth Circuit noted that "[d]uring the existence of a conspiracy, each member of the conspiracy is legally responsible for the crimes of fellow conspirators. Of course, a conspirator is only responsible for the crimes of the conspirators that are committed in furtherance of the conspiracy. As stated by the Supreme Court, conspirators are responsible for crimes committed 'within the scope of the unlawful project' and thus 'reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" *United States v. Russell*, 963 F.2d 1320, 1322 (10th Cir. 1992) (quoting *Pinkerton*, 328 U.S. at 647-48).

The Tenth Circuit again spoke on this issue eight years later in *Cherry*, recognizing that “mere participation in a conspiracy does not suffice [to trigger forfeiture by wrongdoing]-yet 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.” 217 F.3d at 820. The Tenth Circuit concluded their opinion by holding that “a defendant may be deemed to have waived his [hearsay objection] if a preponderance of the evidence establishes one of the following circumstances: (1) he or she 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.*

The Supreme Court in *Pinkerton* specifically acknowledged that “[a] different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.” *Pinkerton*, 328 U.S. at 647-48. Because this was not at issue in *Pinkerton*, the court did not address such a situation. *Id.* at 648. In sum, nothing in *Pinkerton* or the doctrine of conspiratorial liability displaces the requirement of intent when a co-conspirator commits a wrongdoing unconnected to the offense for which the conspiracy was formed. In order for an accused to be liable for the acts of his partner in such a situation, the accused must have personally intended for the wrongdoing to occur.

Since the accused’s intent is required before conspiratorial liability will apply, the burden is not met if the accused could merely have reasonably foreseen that his co-conspirator would engage in the wrongdoing. As the Fourteenth Circuit specifically pointed out, the fact “that a

defendant could have reasonably foreseen that a co-conspirator would silence a witness does not mean that the defendant intended or designed that outcome.” (R. 27). While “...intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective,” there must be some act or declaration on the part of the accused. *Pinkerton*, 328 U.S. at 647 (citing *Wiborg v. United States*, 163 U.S. 632, 657 (1896)). Mere reasonable foreseeability is not enough to trigger the forfeiture-by-wrongdoing hearsay exception. *Id.*

Here, there is no evidence that Barnes intended to procure the unavailability of Reardon as a testifying witness against him. Although Anderson was in fact Barnes’ co-conspirator, the purpose of their partnership was to organize the elephant hunt and make a profit from the sale of the elephants’ ivory tusks. (R. 7). Anderson’s act of murdering Reardon was not in furtherance of this conspiracy and was not contemplated by Barnes when he and Anderson first joined forces. Because Anderson’s murder was outside the scope of the initial conspiracy between Barnes and Anderson, Barnes is not automatically responsible for the actions of his co-conspirator. Instead, in order for Barnes to be liable for Anderson’s wrongdoing, thereby triggering the forfeiture-by-wrongdoing hearsay exception, Barnes must have personally intended for Anderson to procure the unavailability of Reardon. This is precisely the situation the Court discussed in *Pinkerton* but declined to address because it was not at issue in that case.

With little guidance from the Supreme Court on the matter, deference should be given both to the Court’s position regarding forfeiture-by-wrongdoing and to the language of Federal Rule of Evidence 804(b)(6). Both *Giles* and Rule 804 require intent on the part of Barnes to procure the unavailability of Anderson before his hearsay rights will be forfeited. Barnes not only lacked the requisite intent to kill Reardon, he also specifically told Anderson to hold off on doing anything about Reardon and finally informed Anderson that he wanted nothing to do with

anything Anderson planned to do. (R. 19). From these statements, it is clear that Barnes had no intent to silence Reardon as a witness. Because Barnes had no intent to procure the unavailability of the declarant, conspiratorial liability does not apply to the forfeiture-by-wrongdoing hearsay exception. Thus, Reardon's hearsay statements cannot be admitted against Barnes.

Additionally, pursuant to both *Russell* and *Cherry*, mere participation in a conspiracy is not enough to trigger the forfeiture-by-wrongdoing hearsay exception. *Russell*, 963 F.2d at 1322; *Cherry*, 217 F.3d at 820. Instead, Barnes is only responsible for crimes committed by Anderson that are within the scope of the conspiracy and reasonably foreseeable as a natural consequence of the conspiracy. *Cherry*, 217 F.3d at 820. Here, Barnes and Anderson entered into a conspiracy for the sole purpose of harvesting ivory from elephants. (R. 7). Not only was the killing of Reardon not within the scope of this conspiracy, Reardon's murder was not reasonably foreseeable as a natural consequence of their elephant hunting scheme. As such, the forfeiture-by-wrongdoing hearsay exception is not triggered by conspiratorial liability because Barnes is not responsible for the acts of Anderson.

Moreover, even if Barnes could have reasonably foreseen that Anderson would silence Reardon, that alone is not enough to justify holding Barnes responsible for the unavailability of Reardon, thereby triggering the forfeiture-by-wrongdoing hearsay exception. Admittedly, Barnes likely could have reasonably foreseen that Anderson would engage in some act to silence Reardon. If that were sufficient to hold Barnes responsible for the actions of his co-conspirator, Reardon's hearsay statements would be admissible against Barnes. However, pursuant to *Pinkerton*, there must be motive or intent on the part of Barnes before the conspiratorial liability is triggered. 328 U.S. at 647-48. Had Barnes made a declaration or acted in a way to indicate to Anderson that he approved of the plans to silence Reardon, the intent requirement would be

satisfied. Much to the contrary, Barnes specifically told Anderson to hold off on doing anything about Reardon. (R. 19). Barnes later told Anderson that he wanted nothing to do with any plans to procure the unavailability of Reardon. (R. 19). From these declarations, it is apparent that Barnes lacked the requisite intent needed for conspiratorial liability to attach. As such, conspiratorial liability does not trigger the forfeiture-by-wrongdoing hearsay exception and Reardon's statements are inadmissible against Barnes.

II. **THE FOURTEENTH CIRCUIT CORRECTLY RECOGNIZED A JOURNALIST'S PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501.**

Federal Rule of Evidence 501 embodies Congress' mandate that the federal judiciary develop evidentiary privileges by interpreting "the principles of the common law . . . in the light of reason and experience." Fed. R. Evid. 501. During the drafting process for this proposed rule, the court submitted thirteen specific privileges to be codified and recognized. Fed. R. Evid. 501 advisory committee's notes. Rather than enumerating specific privileges, Congress gave the federal judiciary this mandate for flexibility, intending to shape new privilege law in response to a dynamic society, as they saw fit. *Id.* Consequently, Rule 501 did not freeze the law governing privileges at any particular point in history, but directed courts to "continue the evolutionary development of testimonial privileges." *Trammel v. United States*, 445 U.S. 40, 47 (1980).

To guide courts in the development privilege law, this Court, in *Jaffee.v. Redmond*, specified a list of factors to consider when deciding whether to recognize a privilege under Rule 501. 518 U.S. 1 (1996). When evaluating whether to add privileges, courts shall examine: (1) the significant public and private interests that would be served by the privilege; (2) the relative weights of interests to be served by the privilege and the burden on truth-seeking that might be imposed by it, and (3) reason and experience. *Id.* at 9-14

A. The great public and private interests that will be served and the minimal burden that will be imposed on truth-seeking mandate recognition of a journalist's privilege.

A reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). It is this basic concern that underlies the Constitution's protection of a free press. *Id.* Further, forcing a journalist to disclose his source would 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). Additionally, the freedom of press rights derivative of the First Amendment should not be infringed, absent a compelling or paramount state interest. *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958). Finally, courts have the responsibility of developing evidentiary privileges "in the light of reason and experience." *United States v. Gillock* 445 U.S. 360, 367-68 (1980). Thus, after examination of the relevant factors in *Jaffee*, a journalist's privilege would be supported under Rule 501.

First, significant private and public interest are served by recognizing a journalist's privilege. It is a principle fundamental to our way of life, that where the press remains free, so too will the people remain free. *Baker v. F & F Investment*, 470 F.2d 778, 785 (2d Cir. 1972). A journalist's inability to protect the confidentiality of sources he must use will jeopardize his ability to obtain information on a confidential basis. This lack of protection places the core function of the press, which is to distribute crucial information to the public, in grave danger. *Riley*, 612 F.2d at 714. "The press was protected so that it could bare the secrets of government and inform the people." *Id.* Thus, "[t]he strong public policy which supports the unfettered communication to the public of information. . . lead us to conclude that journalists have a federal

common law privilege. . .” *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (holding that a filmmaker could not be forced to disclose the identities of the interviewees he used to film a controversial documentary).

Next, under the second *Jaffee* factor, the weight of the interests to be served by the privilege far outweighs any burden on truth seeking. *Jaffee*, 518 U.S. at 11-12. The Government claims recognition of a journalist’s privilege would lead to a reduction of evidence placed before the court and also lower enforcement of some laws. Admittedly, there would be a slight decrease in the amount of evidence before the court; however, the minimal evidentiary losses would be dwarfed by the negative consequences brought by the comparable cutback of conversations between journalist and source. This Court acknowledged this as the “chilling” effect. *Jaffee*, 518 U.S. at 11-12. In *Jaffee*, it was held that a rejection of the privilege would lead to “chilled” or fewer conversations between psychotherapist and their patients. *Id.* Moreover, the slight decline in evidence and enforcement is certainly trumped, when compared to the public and private interests that the Petitioner asks this Court to ignore. *Baker*, 470 F.2d at 775 (holding that any compelling interest must be paramount to override the rights of the press and freedom of speech). Thus, it is clear that the public and private interests outweigh any burden on truth seeking.

Under the last *Jaffee* factor, courts hold that a privilege should be granted if it is supported by reason and experience. *Jaffee*, 518 U.S. at 13. “The fundamental basis upon which all rules of evidence must rest-if they are to rest upon *reason*-is their adaptation to the successful development of the truth.” *Funk v. United States*, 290 U.S. 371, 381 (1933) (emphasis added). “[I]f the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law. . . must cease to apply.” *Id.* at 385. Further, “where the reason of the rule ceases, the rule also ceases.” *Id.* In *Funk*, the Supreme Court

refused to adhere to an ancient rule, after the progression of the law had shown the rule to be unwise. *Id.* at 382. Moreover, the *Jaffee* court held that a “consensus among the States indicates that ‘reason and experience’ support recognition of the privilege,” because the denial of the federal privilege, in that instance, would frustrate the purposes of the state legislation enacted to foster these confidential communications. *Jaffee*, 518 U.S. at 13.

In asserting that no journalist’s privilege should be recognized, the Government relies on *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). In *McKevitt*, the Government prosecuted the defendant for illegal organizational affiliations and terrorist activities. *Id.* at 531. The defendant requested an order from the district court to require a group of journalists, who had relevant information concerning his defense, to produce their recordings. *Id.* The district court granted the order, which did not force the journalists to reveal any confidential sources. *Id.* at 531-32. The Seventh Circuit court affirmed the decision of the district court and rejected a special standard that would allow the party to not respond merely because he was a journalist. *Id.* The Government also relies on *Branzburg v. Hayes*, where it was held that courts were not required to provide newsgatherers with a privilege to withhold their sources during a grand jury proceeding conducted in good faith. 408 U.S. 665, 690-702 (1972).

In the present case, the significant public and private interests involved warrants recognition of the privilege. Here, the employee sought advice from Ms. Crawley regarding information that was very sensitive and delicate in nature. (R. 10). It was the employee’s desire to make the public aware of the important information, but he realized that alerting the public himself would jeopardize his employment status and risk his personal safety. Thus, the only way to notify the public, while keeping his job and remaining safe, was to allow a third party news reporter to disburse the information on his behalf. (R. 22). Accordingly, he agreed to provide Ms.

Crawley with enough of the critical information to write and publish a newspaper article. (R. 10). The only thing that made this possible, however, was Ms. Crawley's promise that his identity would never be released. Like *Baker*, a pseudonym was used in place of his actual name, and the story was published. (R. 10). Without publication of the story, it would have been difficult or impossible for the community to discover the heinous behavior they were supporting with their attendance. The lack of this privilege dissuades people from talking to the press, which ultimately interrupts the free flow of information. Here, it is clear that public interests support an acknowledgment of the journalist's privilege.

Furthermore, the evidentiary benefit from denying the journalist's privilege is modest, at best. Here, any small impediment to truth seeking is completely outweighed by the public and private interests supported by the privilege. The only reduction of evidence, in the current case, would be the actual identity of the employee, which is wholly irrelevant. It is further diminished, when compared to the key information that was disseminated to the public. Society and the public were much better off having realized the injustices of Big Top Circus than they would have been by knowing the employee's identity. Societal interests were much better served by disclosure because the authorities were able to take the appropriate actions to remedy the situation, in addition to saving the lives of countless animals. The community, as a whole, was better off. The benefit from the information flowing from the journalist to this communal far outweighed having the actual identity of some random employee.

Additionally, with no grant of confidentiality, the employee had decided not to talk to Ms. Crawley. (R. 10). Hence, it created the "chilled" lined of communication discussed as a concern in *Jaffee*. 518 U.S. at 12. There was no exchange of any information until the grant of privacy. So, although the Government claims the privilege is a burden on truth seeking, (due to

the identity of the employee being withheld) the privilege actually enhanced truth seeking. Without the privilege, the employee would have remained silent and none of the current information would have been brought before this tribunal. Thus, the unspoken evidence would have served no greater truth seeking function than if it had been spoken and privileged. *See Jaffee*, 518 U.S. at 12.

Finally, reason and experience support recognition of the journalist's privilege. Significantly, the majority of states currently recognize a form of the journalist's privilege. (R. 29). This is important because the Court, in *Funk*, recognized that reason supports a change in law when those positioning for a new rule become the majority in society. *Funk*, 290 U.S. at 385. Reason once dictated, that there was no need for a journalist's privilege. That rule is clearly no longer valid today. Reason now shows that journalists, and their sources, share a unique relationship, one in which the ability to communicate freely without the fear of public disclosure is key. The fact that the majority of states and circuits have adopted the privilege only bolsters this reasoning. Thus, under *Funk*, the rationale for the old rule (no recognition of privilege) has ceased, so the rule itself should cease. *Id.* Moreover, any state's promise of confidentiality would have little value if the source was aware that the privilege would not be honored in a federal court. Here, since the majority of states recognize the privilege, it would be errant to force the majority of confidential informants into federal court where they would have no protection. It is the general consensus in federal and state law that a journalist's privilege should exist. This shows reason and experience supports a recognition of the journalist's privilege.

Pursuant to *McKevitt*, Petitioner will argue that a journalist's privilege should not be recognized. However, a closer examination shows that the current situation differs from the one in *McKevitt*. In the current case, disclosure would result in the identity of the confidential source

being revealed. That was not the case in *McKevitt*, where disclosure did not include any confidential sources. *McKevitt*, 339 F.3d at 531-32. Additionally, the Government points out that *McKevitt* position is the super minority amongst the circuits. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). Petitioner also relies on the *Branzburg* case. This case is distinguishable from the current case because the reporter, here, did not witness the events that were the subject of the grand jury investigations. The current case simply presents a case where a journalist has been called as a witness to a matter, where she has no personal interest. Moreover, the court in *Branzburg* never held that a right to a journalist's privilege did not exist; rather, they held that it was the duty of the legislature to identify it and determine the scope. *Branzburg*, 408 U.S. at 706.

In conclusion, an examination of the facts of this case, under *Jaffee*, shows that a journalist's privilege should be found. Therefore, the lower court correctly recognized the privilege under Federal Rule of Evidence 501.

B. Having correctly recognized a journalist's privilege, policy considerations dictate that it be absolute.

This Court has held that certain privileges should be absolute. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). If the purpose of any privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether the particular discussions will be protected. *Id.* Furthermore, if we intend to serve the interests of justice by encouraging communication with parties free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain, for "[a]n uncertain privilege-or one which purports to be certain, but rests in widely varying applications by the courts-is little better than no privilege." *In re von Bulow* 828 F.2d at 100.

Similarly, this Court held that "making a promise of confidentiality contingent upon a trial Judge's later evaluation of the patient's interest in privacy, and the evidentiary need for

disclosure would eviscerate the effectiveness of the privilege.” *Jaffee*, 518 U.S. at 17. Because those who would benefit from the privilege would lack the power to control its application, they would be less able to rely on its protection when deciding whether to provide sensitive information. *Pearson v. Miller*, 211 F.3d 57, 71 (3d Cir. 2000).

Policy considerations, including the effectiveness of the privilege and fairness, lean towards the journalist’s privilege not being relegated to a qualified one. First, it is important to note that the Court would not be taking extreme or extraordinary actions to recognize this privilege as absolute. Courts have held that some privileges should be absolute to adequately promote confidentiality; the attorney-client and psychotherapists-privileges are great examples. *Jaffee*, 518 U.S. at 10. The journalist’s privilege is similar in nature to those and, as a result, requires similar protection. All three involve extremely confidential relationships, where the ability to communicate freely is indispensable. Here, it is critical to both parties, in addition to the public. Confidentiality is imperative for the source due to the severe career and physical aspirations that could result from disclosure. For the journalist, it is vital to receive accurate information before publishing a new story. For the public, it is important to receive reliable information that is not censored so that the distorted picture is given.

Although rigid in application, as the Petitioner claims, courts must strive for a uniform system of application. This court, and many others, always maintains all persons similarly situated should be treated in a similar fashion. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The Court adheres to this principle through its usage of the stare decisis doctrine, sentencing guidelines, and jury verdict caps. If the journalist’s privilege adopted merely as a qualified privilege, there would be no guarantee that its application would be consistent. The privilege and the confidential information it protects would become fully contingent upon

whichever judge is appointed to the case. As the lower court pointed out, “faced with this kind of uncertainty, sources would be reluctant to speak,” thus reverting back to the original problem of having no privilege. (R. 30). To avoid this injustice, the lower court’s holding should be affirmed, and an absolute rule adopted.

Finally, the Court should not place itself in a position where continual exceptions could circumvent the rule. Those who wish to subvert the privilege for their own litigation goals will continuously probe to create additional exceptions eventually creating a gulf within the privilege. Eventually, there could be so many judicially created exceptions that they effectively make the privilege non-existent. The courts would struggle to apply the original privilege. This was the concern of the court in *Upjohn* and should be avoided whenever possible.

For example, it would be unwise for the Court to adopt a balancing-type standard as the court did in *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975). In *Farr*, the court held that a journalist’s privilege did exist. That court, however, chose to make the privilege a qualified one, adopting a balancing standard. The problem is this standard turns a confidential relationship test into one of need or availability, which has nothing to do with the policy that guided the inception of the privilege. The confidential information that was exchanged is unaltered; it is only a question of whether a third party agency can show sufficient need for the information. This standard is shaky and creates too much doubt and uncertainty. The source would, once again, be leery of providing vital information for fear of future disclosure. This standard places the journalist in no better position than if he never had a privilege.

In the present case, the relationship between Ms. Crawley, and the employee was a trusted one that warranted close protection. The information provided to her was confidential and was given only under the assumption of complete secrecy. It was the employee’s true belief that

he would never be recognized as the source. The concern for his job and safety left no other form of disclosure. Undoubtedly, if faced with the possibility, no matter how remote, of future disclosure, the employee would have remained silent. Finally, like in *Pearson*, placing the power to assert or waive the privilege in the hands of the court would undermine the value of the privilege. *Pearson*, 211 F.3d at 71. Societal interests and policy considerations both mandate that the proper protections should be given and an absolute privilege should be recognized.

III. THE FOURTEENTH CIRCUIT CORRECTLY RULED THAT A LAY WITNESS MAY NOT OFFER OPINION TESTIMONY INTERPRETING CODED WORDS AND PHRASES WHERE THE WITNESS NEITHER OBSERVED OR PARTICIPATED IN THE CONVERSATION, NOR HAD KNOWLEDGE OF THE UNDERLYING CRIMINAL ACTIVITY.

A witness may only testify to a matter about which she has personal knowledge. Fed. R. Evid. 602. Rule 602 makes explicit that expert opinion testimony is exempt from the need for personal knowledge. *Id.* However, the opinion testimony of a non-expert witness is limited to an opinion 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.” Fed. R. Evid. 701. This evidentiary rule preserves “the traditional objective” of providing the factfinder with an “accurate reproduction of the event.” Fed. R. Evid. 701 advisory committee’s note.

A. Agent Simandy merely read telephone transcripts and interviewed witnesses, thus his interaction with the concrete facts is second-hand, and any opinions drawn therefrom are not based upon his perception as required under Rule 701(a).

Rule 701 has three separate elements. The first requires that lay witness opinion testimony be rationally based on the witness’s perception. Fed. R. Evid. 701(a). Several circuits have interpreted Rule 701(a) to require first-hand observation and recollection of the facts about which the lay witness is offering an opinion. *See, e.g., Asplundh Mfg. Div. v. Benton Harbor*

Eng’g, 57 F.3d 1190, 1198 (3d Cir. 1995); *Randolph v. Collectramtic, Inc.*, 590 F.2d 844, 847-48 (10th Cir. 1979).

Furthermore, some courts have adopted a standard that combines Rule 701(a) and (b) and requires a finding that lay opinions are (1) “based upon his or her personal observation and recollection of concrete facts,” and (2) “that those facts cannot be described in sufficient detail to adequately convey to the jury the substance of the testimony.” *United States v. Jackson*, 688 F.2d 1121, 1124 (7th Cir. 1982). With respect to part (1) of this test, the courts’ Rule 701 analysis makes clear that *concrete facts* refer to those specific facts or events which fundamentally underlie the case as a whole. *See Krueger v. State Farm Mut. Auto. Ins. Co.*, 707 F.2d 312, 316 (8th Cir. 1983); *Id.* Concrete facts are those that directly lead to criminal prosecution, as distinct from “procedural history-type facts” that develop after the start of police investigation, during fact-marshaling, or courtroom advocacy itself, for example. *See Kreuger*, 707 F.2d at 316-17; *Jackson*, 688 F.2d at 1124. Accordingly, part (1) of this Rule 701 test requires that these particular facts be personally observed by the lay witness. *Krueger*, 707 F.2d at 317.

Moreover, the Eighth Circuit has applied Rule 701(a) specifically to law enforcement officers designated as non-experts, and created a rule for the admissibility of testimony offered to interpret coded meanings within a defendant’s conversation. *See United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). There, the court held that a lay witness may only proffer opinions when she participates in the conversation, has personal knowledge of the facts discussed, or contemporaneously observes the conversation. *Id.* To illustrate, in *United States v. Parsee*, the court upheld a witness’s assertion that the word “pants” referred to drugs, when she was a participant in the conversation. 178 F.3d 374, 379 (5th Cir. 1999). In *United States v. Saulter*, the witness had first-hand knowledge and intimate experience with coded drug terms, thus the Court

similarly upheld the interpretation testimony. 60 F.3d 270, 276 (7th Cir. 1995). Finally, the court in *United States v. Awan*, admitted an undercover agent's explanation of coded conversations pertaining to money laundering, identifying the agent's first-hand observation of the speech and gestures of the defendants as the dispositive fact. 966 F.2d 1415, 1430 (11th Cir. 1992).

In the case at bar, Agent Simandy's opinion testimony offering meanings for code words used by Barnes and his partners fails to satisfy the Rule 701(a) perception requirement. It is Agent Simandy's belief that Mr. Barnes and his partners used the term "blood diamonds" to refer to elephant ivory tusks, "Charlie tango" for a helicopter, and used "black cat" to denote three AK-47s. (R. 13). This opinion was reached after reading conversation transcripts and interviewing the previous lead agent and the helicopter salesman. (R. 13). Agent Simandy's first-hand observations and knowledge are therefore not of the conversations themselves, but rather of the conversation transcripts. His testimony fails to provide the factfinder with an accurate reproduction of the *event*, instead producing a reproduction, albeit accurate, of the contents of the transcripts in addition to the statements of those witnesses who did, in fact, interact with Barnes. As the court below shrewdly analogized, this testimony is akin to one's "reading a book and then asserting first-hand knowledge to the events the book describes[.]" (R. 15).

Under the Seventh and Eighth Circuits' Rule 701 test, part (1) of the relevant inquiry invokes the question of whether or not Agent Simandy's opinion testimony is based upon his personal observation and recollection of "concrete facts." That is, whether what he observed and is recollecting concrete facts or something else. Since the Seventh and Eighth Circuits make clear that "concrete facts" are those facts and events that fundamentally underlie the case, Agent Simandy's testimony does not pass this test. *Kreuger*, 707 F.2d at 317; *Jackson*, 688 F.2d at 1124. To say that transcripts of telephone calls are underlying facts of the case makes little sense.

The conversations themselves are the concrete facts/events, and without any personal observation thereof, Agent Simandy fails part (1) of this test.

Further, Agent Simandy's interaction with the actual conversations between Barnes and his alleged co-conspirators is remarkably tenuous and does not satisfy the specific rule that the Eighth Circuit has fashioned for a law enforcement officer's interpretation of code words and phrases. Agent Simandy was not a participant in the conversations at issue, nor does he have any experience or intimate knowledge of poaching or crimes against animals, nor did he observe the conversations first-hand. (R. 14). The only criterion of the three that Agent Simandy arguably satisfies is the personal knowledge requirement. However, the *Saulter* case, from which the rule is derived, involved a witness who was personally familiar with the criminal enterprise, the speaker's behavior and speech, and "had at least similar knowledge of the relevant terms as federal agents who routinely testify . . . about the meaning of drug phrases." 60 F.3d at 276. Although Simandy interviewed other law enforcement and studied transcripts, his knowledge of Barnes' alleged illicit conduct is negligible and is fundamentally dissimilar from the knowledge held by a witness who has enjoyed years of first-hand exposure to the relevant criminal scheme and intimate personal familiarity with the defendant. *Id.*

B. Although relevant, Agent Simandy's opinions of the telephone conversation could be drawn equally by the finder of fact and are thus unhelpful under Rule 701(b).

The second Rule 701 element requires that the witness's opinion be helpful to a clear understanding of her testimony or to determining a fact in issue. Fed. R. Evid. 701(b). At first blush, this limitation seems only to require that the lay opinion testimony be relevant. Indeed, this Court has stated that the helpfulness standard "goes primarily to relevance," when helpfulness is required elsewhere in Article VII of the Federal Rules of Evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) (explaining Rule 702

“helpfulness”). Certainly 701(b) invokes relevancy, but additionally, 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.

Part (2) of the aforementioned Seventh and Eighth Circuits’ test goes to helpfulness, and illuminates the purpose of Rule 701 as a whole. “The theory behind Rule 701 is ‘that wherever inference and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous; . . . a lay opinion is received because and whenever his facts cannot be so told as to make the jury as able as he to draw the inference.’” *Jackson*, 688 F.2d at 1124 (quoting 7 Wigmore on Evidence § 1917.8 (Chadbourn rev. 1978) at 10). Plainly, if the jury can make the same inferences and conclusions that the witness intends to make, the witness may not provide opinion testimony. *Jackson*, 688 F.2d at 1124. Only when the jury is unable to arrive at the same conclusions as the lay witness, may that witness provide opinion testimony. *Id.*

This two-part test reflects the interplay between all the Rule 701 requirements. While easily separated, the tripartite elements of Rule 701 frequently overlap, and are best analyzed in conjunction rather than in a vacuum. *See United States v. Freeman*, 498 F.3d 893, 902-04 (9th Cir. 2007). Lay opinion testimony must not only be rationally based on the witness’s perception, but it must simultaneously help the factfinder understand testimony or determine an important fact. All lay witnesses likely have innumerable opinions based on rationally-based perceptions, however the Rule does not end with a 701(a) analysis. Instead, upon application of the second 701 provision, only a small subset of these rationally-based opinions are likely to offer testimony that is 701(b) helpful.¹ To take this conjunction approach a step further, Rule 701(c) comes into play when a lay witness submits an opinion which, by rule, cannot be based on any specialized

¹ These perceptions must be relevant and put forth an opinion at which the jury could not arrive on its own.

expertise. In such a case, the opinion testimony must have independent guarantees of helpfulness to the jury. *See* Fed. R. Evid. 701(c).

While Agent Simandy's lay opinion testimony is relevant, it is not helpful to the jury under Rule 701(b). It is undisputed that Agent Simandy has no special training that facilitated his analysis of the telephone conversations. (R. 14). The testimony at issue simply concerns an interpretation of words and phrases, based upon a general review of conversation transcripts and interview of witnesses. (R. 13). The fact that the jury will be presented with this same evidence, coupled with Agent Simandy's non-expert status suggests that the jury will be in a position to make the same inferences and conclusions that Agent Simandy intends to make, thus his opinion testimony is inappropriate. *See Jackson*, 688 F.2d at 1124. Agent Simandy's opinions not only usurp the role of the jury, but his opinions represent the exact kind of meaningless assertions amounting to "choosing up sides," against which Rule 701(b) was created to defend. Fed. R. Evid. 701 advisory committee's note.

C. Since Agent Simandy is a lay witness, under Rule 701(c) his testimony may not be based on any special expertise, thus his opinions are constrained to those grounded purely upon his first-hand perception.

The final Rule 701 element requires that lay opinions are not based on expert knowledge within the scope of Rule 702. Fed. R. Evid. 701(c). This Rule and its underlying policy considerations illuminate the strictures of lay opinion testimony vis-à-vis expert opinion testimony. Lay witnesses are strictly forbidden from providing specialized interpretations or explanations that an untrained layman could not provide if perceiving the same events. *See United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244-45 (9th Cir. 1997). An important distinction between lay and expert witnesses holds that an expert witness is permitted wide latitude to offer opinions, including those opinions not grounded upon personal knowledge or

observation. *Daubert*, 509 U.S. at 592. Relaxation of the requirement of first-hand knowledge with respect to expert testimony is “premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.” *Id.* Conversely, Rule 701 requires that lay opinions be directly based on the witness’s perception, and thereby creates a separate, narrower standard for offering lay opinions than Rule 702 provides for expert opinions.

Approaching the lay/expert distinction from the expert side, the Advisory Committee amended Rule 701 in 2000 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.” Fed. R. Evid. 701 advisory committee’s note. Similarly, courts must channel expert testimony to Rule 702 to protect against a party’s attempt to subvert the expert witness disclosure and discovery requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16. *Id.*

Thus, for a law enforcement officer’s testimony, the Government must make a timely designation of lay or expert, and the testimony must fit within the parameters (while enjoying the benefits) of either that lay or expert designation—never both.² *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005). This principle has been adopted by a line of Eighth Circuit cases holding that what is essentially expert testimony may not be admitted under the guise of lay testimony. *See, e.g., Harvey v. Wal-Mart Stores, Inc.*, 33 F.3d 969, 971 (8th Cir. 1994); *Kostelecky v. NL Acme Tool/NL Indus., Inc.*, 837 F.2d 828, 830 (8th Cir. 1988).

Finally, several courts have applied this lay/expert distinction to law enforcement officers, and when qualified as experts, these officers were often permitted to interpret coded conversations using their knowledge of slang, street language, and the jargon of the illegal drug

² *United States v. Freeman*, presents the rare case of a witness acting both as an expert and a lay witness. 498 F.3d 893, 900 (9th Cir. 2007). But even that case noted several dangers of this practice. *See id.*; *see also United States v. Dukagjini*, 326 F.3d 45, 50 (2d Cir. 2002) (enumerating improper bolstering of testimony, impeded cross-examination, and juror confusion as serious risks of witness dual-designation). Moreover, such a witness still must satisfy the strict Rule 702 expert witness requirements, and Agent Simandy’s aforesaid dearth of experience insofar as the alleged underlying criminal enterprise would likely fall short of Rule 702’s standard.

trade. *See, e.g., United States v. Valenzuela*, 484 F. App'x 243, 246 (10th Cir. 2012) (upholding the use of a DEA agent's expert interpretation of coded drug terms); *United States v. Plunk*, F.3d 1011, 1016 (9th Cir. 1998) (*reversed in part on other grounds*) (admitting a detective's interpretation of cryptic drug-related conversations as valid expert testimony); *United States v. Delpit*, 94 F.3d 1134, 1144 (8th Cir. 1996) (ruling an expert sergeant was permitted to interpret drug and weapon-related street slang and a form of "pig latin" used by the defendants).

It is undisputed that Agent Simandy was designated as a lay witness, thus his testimony cannot be based on any specialized law enforcement or animal poaching expertise. (R. 14). Petitioner cannot simply cloak Agent Simandy as a lay witness in an attempt to enter expert testimony. Fed. R. Evid. 701 advisory committee's note. If Petitioner wanted to designate the testimony as expert, it could have done so before trial. Instead, Agent Simandy must adhere to the narrow first-hand observation underpinnings of Rule 701. By not seeking admission of Simandy's opinions as expert testimony, Petitioner has forfeited the opportunity to follow the example set by the Eighth, Ninth, and Tenth Circuits which have accepted law enforcement jargon-interpretation as expert testimony. *See Valenzuela*, 484 F. App'x at 246; *Plunk*, 153 F.3d at 1016; *Delpit*, 94 F.3d at 1144.

Finally, The Eighth and Eleventh Circuits were asked to apply Rule 701 to facts extremely similar to those in the instant case. The courts handed down opposing rulings as to whether the explanation of coded phrases was proper lay witness opinion testimony. In *Peoples*, the court struck down the admission of an FBI Special Agent's opinion regarding the meaning of code words and phrases between co-conspirators in recorded conversations involving the murder-for-hire of an informant. 250 F.3d at 641. Special Agent Joan Neal testified that "buying a plane ticket" meant the act of killing, and that "lost and found situations" referred to the fact

that the victim's body had yet to be found by authorities. *Id.* at 640. The court opined that the district court inappropriately allowed Agent Neal's opinions about these hidden meanings to serve as a "narrative gloss" over the content of the conversations. *Id.* at 640-41. Finding that opinions were drawn from her investigation after the fact, rather than her first-hand perception of the conversations, the court overruled the admission of Agent Neal's lay opinion testimony. *Id.*

Conversely, the Eleventh Circuit found no Rule 701 violation where FBI Agent John Kavanaugh offered his interpretations of code words used by the defendants voicing support for overseas Islamic violence. *United States v. Jayyousi*, 657 F.3d 1085, 1103-04 (11th Cir. 2011). In *Jayyousi*, Agent Kavanaugh, an investigator in over twenty terrorist-related cases, testified that words like "football" and "soccer" meant jihad, "iron" signified a weapon, and the word "married" referred to martyrdom. *Id.* at 1095. Not only did Agent Kavanaugh investigate the case for several years, but he reviewed summaries of wiretaps and listened to the intercepted calls in English and Arabic. *Id.* at 1102. The court held that the testimony was rationally based on Kavanaugh's perception, helpful in interpreting the meaning of the conversations, and not rooted in specialized, expert knowledge. *Id.* at 1103-04.

The facts of the case at bar align more closely with those of *Peoples* than *Jayyousi*. The dispositive fact in *Peoples* was that Agent Neal's basis of knowledge of the drug code words was an investigatory review of the conversations, rather than a first-hand perception. 250 F.3d at 641. This detached analysis of conversation transcripts is indistinguishable from Agent Simandy's purely investigatory review of the animal poaching facts. *Id.* at 640. Neither Agent Neal nor Agent Simandy observed the concrete facts first-hand, thus neither should be permitted to apply an opinion-based "narrative gloss" over basic fact testimony.

Conversely, two important facts in *Jayyousi* distinguish it from the case before this Court. First, unlike Agent Simandy who has never before investigated an animal crime case, Agent Kavanaugh was a seasoned veteran of terrorism cases before he was presented with the conversations in *Jayyousi*. 657 F.3d at 1095. While the court didn't apply the *Peoples* 701(b) law enforcement test, Agent Kavanaugh's substantial experience would likely suffice for the "personal knowledge" standard. 250 F.3d at 641. In terms of general 701(b) helpfulness, an agent with twenty cases of experience would be able to provide a much more helpful opinion than an agent with no previous experience insofar as the alleged illicit activity in question.

A second distinguishing fact is that *Jayyousi* presents concepts related to Islamic terrorism which are likely unfamiliar to the average juror. 657 F.3d at 1095. While most jurors are not intimately familiar with animal poaching, the alleged criminal scheme in the case at hand is fairly straightforward and clear, whereas *Jayyousi*'s crime presented concepts and terms foreign to American culture. Thus it seems likely that the *Jayyousi* court allowed Agent Kavanaugh's interpretation not primarily for code-word interpretation, but for clarification of what words like "jihad" specifically denote. Additionally, some of these conversations were in Arabic, a language in which Agent Kavanaugh was fluent. *Id.* at 1103. Thus, his value to the factfinder, not only as an interpreter of code words, but also as an intermediary between cultural barriers is fundamentally greater than Agent Simandy's. These material distinctions cut against this Court's following of the Eleventh Circuit's reasoning in *Jayyousi*. Instead *Peoples*, and its analysis, is more on point.

CERTIFICATE OF SERVICE

We, Team 24R, hereby certify that a copy of the foregoing brief was mailed first class, postage paid, this 20th day of February, 2013 to:

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