

No. 12-23

In the Supreme Court of the United
States

UNITED STATES OF AMERICA, PETITIONER,

v.

WILLIAM BARNES, RESPONDENT.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT*

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

The petition for a writ of certiorari to the Supreme Court of the United States presents the following questions:

- I. Whether under Federal Rule of Evidence 804(b)(6) a trial court in a criminal case may admit into evidence against a defendant the hearsay declaration of a murder victim under the doctrine of forfeiture by wrongdoing, where a recorded telephone conversation shows that the defendant was aware that his co-conspirator planned to murder the declarant in furtherance of a conspiracy.
- II. Whether under Federal Rule of Evidence 501 a trial court in a criminal case should compel a reporter to disclose the identity of the informant, where the informant voluntarily allowed video recording of his statements, where the reporter published the statements, and where the truthfulness of the statement cannot be determined without knowing the identity of the informant.
- III. Whether under Federal Rule of Evidence 701 a trial court in a criminal case may allow a witness to testify to code words and phrases in conversations, where the witness read transcripts of the conversation and reviewed the investigatory work of other law-enforcement personnel.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's ruling is unreported. The district court's opinion rejecting petitioner's request on motion in limine is unreported.

JURISDICTION

The judgment of the District Court for the Southern District of Boerum was entered on May 2, 2012. The district court's jurisdiction was based on 28 U.S.C. § 1331 and 18 U.S.C. § 3731. The court of appeals entered its judgment on July 12, 2012. The circuit court's jurisdiction was based on 28 U.S.C. § 1291. This Court granted a timely petition for certiorari on October 1, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Defendant William Barnes is the owner of Big Top Circus. Although nationally famous for its one-of-a-kind elephant show, Big Top Circus has struggled financially in recent years. On or around July 10, 2011, Defendant learned that Big Top Circus would have to file for bankruptcy unless it could raise \$500,000 by December 2011. Realizing his financial problem, Defendant conceived of two plans.

The first plan was to invite two other circuses from town to stage a joint elephant show for the holiday month of December. Thus, on or around July 12, 2011, Defendant contacted Boerum City Circus and Flying Feats Circus. To facilitate the plan, Defendant also offered to quarter their elephants on Big Top Circus's expansive grazing land. Both circuses agreed to Defendant's proposal. Next, Defendant sought to publicize the event. Thus, on or around August 30, Defendant offered Kara Crawley, a reporter from Boerum Times, unlimited access to

the circus's employees, facilities, and animals in return for an article about the planned event. Crawley accepted Defendant's offer.

The second plan was to hunt the elephants and sell the ivory. On or around July 30, 2011, Defendant contacted Alfred Anderson and offered him the opportunity to hunt the elephants on his property and to share the ivory. Anderson agreed and suggested that they find a third hunter. On or around September 1, 2011, Anderson informed Defendant that his long-term acquaintance, James Reardon was interested in participating in the elephant-hunting scheme. Defendant agreed to involve Reardon.

During September 2011, Defendant discussed the details of the planned hunt with Anderson. Defendant recommended that the three men use assault rifles and a helicopter for the hunt. On or around October 1, 2011, Anderson accepted Defendant's proposal on behalf of himself and Reardon, contingent on Defendant providing the necessary equipment for the hunt. During October 2011, Defendant made the necessary arrangements. First, on or around October 2, 2011, Defendant contacted Weapons Unlimited to purchase three assault rifles. Unbeknownst to Defendant, his contact at Weapons Unlimited, Jason Lamberti, was an undercover agent for the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). Lamberti told Defendant that it would cost \$3,300 and take three months to buy the semiautomatic assault rifles legally in Boerum. Lamberti also told Defendant that he could buy unregistered, fully automatic assault rifles immediately for \$1,500 if he was willing to deal under the table. Defendant accepted the latter offer, paid in full with his credit card, and requested delivery by December 5, 2011. Once Defendant had procured the assault weapon, he contracted for a helicopter. On or around October 6, Defendant contacted Alan Klestadt, a sales representative at Copters Corporation, and arranged for a helicopter rental for December 15, 2011. On or around October 15, 2011,

Defendant informed Anderson that he arranged for the weapons and a helicopter. Defendant and Anderson finalized their deal, and agreed that the hunt would take place on December 15, 2011. Anderson wired the defendant \$1,000 on behalf of himself and Reardon to cover the cost of the weapons.

The plan did not go as designed, however. First, based on the transaction between Defendant and Weapons Unlimited, the Federal Bureau of Investigation (“FBI”) obtained a warrant to tap Defendant’s telephone lines. Subsequently, the FBI intercepted several conversations between Defendant and his co-conspirators, Anderson and Reardon. The conversation contained phrases such as “blood diamond,” “Charlie tango,” and “black cat” that were not apparent in meaning. Thus, the FBI sought Agent Thomas Simandy’s lay opinion regarding these phrases. According to Agent Simandy, “blood diamond” refers to ivory, “Charlie tango” refers to a helicopter, and “black cat” refers to an AK-47.

Second, Reardon started having second thoughts about the legality of the hunt. On November 15, 2011, after he voiced these concerns to Anderson, Anderson called Defendant and proposed that they “get rid of” Reardon. Defendant suggested that Anderson “[not] do anything” but Reardon’s hesitation continued. In fact, on November 28, 2011, Reardon called his friend, Daniel Best, and related to him a narrative of the conspiracy and his concerns that Anderson might harm him. Reardon also told Best that he intended to invite Anderson to his home to speak again the following day. Unable to hold on much longer, Anderson called Defendant on November 29, 2011 at 2:00 AM and told him, “I’m gonna take care of him.” Despite these statements, Defendant did not intervene, and merely responded, “I don’t want anything to do with this.” That evening, Anderson went to Reardon’s home and killed him. Anderson was apprehended shortly thereafter; and his confession revealed the conspiracy.

Third, the plan was exposed by Crawley. Crawley visited Big Top Circus on September 15, 2011 and again afterwards. At first, Defendant guided Crawley in her tour of the circus, including the caging areas. In the course of her visits, she met an employee who wished to reveal information the employee had learned regarding Defendant's plan to hunt the elephants. The employee-informant requested that Crawley not publish the information until after he or she left the Circus. The employee also requested that Crawley use an alias and not reveal the informant's status as an employee at Big Top Circus in case Crawley publicized the information. Nonetheless, the employee-informant allowed Crawley to videotape the interview without altering the employee-informant's appearance or voice. On December 1, 2011, based on the information from the tour and the interview, Crawley published an exposé of Defendant's conspiracy.

The government charged Defendant on five counts. Counts one and two are for conspiracy to deal unlawfully in firearms in violation of 18 U.S.C. §§ 371 and 922(a)(1)(a). Counts three and four are for conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. §§ 43 and 371. Lastly, count five is for conspiracy to commit unlawful takings under the endangered species act in violation of 16 U.S.C. §§ 371 and 1538.

On May 1, 2012, the government brought a pre-trial motion in limine. The government first moved to introduce out-of-court statements made by Reardon to Best as an exception to the hearsay rule under Federal Rule of Evidence § 804(b)(6). Next, the government subpoenaed Crawley for the identity of her informant. Third, the government moved to introduce the testimony of Agent Simandy as lay witness opinion under Federal Rule of Evidence § 701. The District Court denied the government's request on all three accounts. The government promptly

appealed. And on July 12, 2012, the court of appeals upheld the trial court's ruling. The government timely filed a petition for a writ of certiorari and this Court granted review.

STANDARD OF REVIEW

Statutory interpretation is a question of law that requires a *de novo* standard of review. See e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Specifically, interpretation of the meaning of the text of the hearsay rule is a question of law that should be reviewed *de novo*. See e.g., *Orr. v. Bank of America*, 285 F.3d 764, 778 (9th Cir. 2002); *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999). Similarly, the lower courts' determination as to the scope of the privilege is a legal issue subject to *de novo* review. *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999). Lastly, the lower courts' construction or interpretation of the Federal Rule of Evidence 701, including whether particular evidence falls within the scope of the Rule, is subject to *de novo* review. In reviewing the appellate court's interlocutory judgment, this Court conducts an independent review of the record and without deference to the courts below. *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012).

SUMMARY OF ARGUMENT

I. Forfeiture By Wrongdoing Is an Exception to the Rule Against Hearsay

The lower court erroneously interpreted intent as required by the forfeiture by wrongdoing doctrine. Forfeiture by wrongdoing allows the admission of hearsay testimony where: (1) the defendant wrongfully caused or acquiesced to an action that procured the declarant's unavailability, and (2) the defendant acted with the intent to procure the unavailability of the declarant rather than for another purpose. *Giles v. California*, 554 U.S. 353,

358 (2008). Conspirator liability establishes the defendant's intent to procure the unavailability of a declarant where (1) the conspiracy was ongoing at the time the co-conspirator procured the unavailability of the declarant; (2) the defendant failed to withdraw from the conspiracy before procurement; and (3) the procurement was reasonably foreseeable in the furtherance of the conspiracy. *United States v. Cherry*, 217 F.3d 811, 817, 820 (10th Cir. 2000). Here, conspirator liability establishes that Defendant intended to prevent Reardon's testimony. Anderson murdered Reardon for the sole intention of preventing him from contacting the authorities or from testifying. Anderson murdered Reardon during the course of the ongoing conspiracy, and Defendant did not withdraw from the conspiracy despite his awareness of Anderson's conviction that the only way to prevent Reardon from exposing and ruining the conspiracy was to "get rid of" him.

II. There is No Reporter's Privilege In a Federal Criminal Case

The lower courts erroneously held that there is a reporter's privilege in a federal criminal case and that the privilege is absolute. Federal Rule of Evidence 501, as evidenced by the language of the Rule as well as Congress's legislative history, calls for a flexible and case-by-case approach in recognizing a privilege. Fed. R. Evid. 501; H.R. Rep. No. 93-650 p. 8 (1974); S. Rep. No. 93-1277 p. 13 (1974). Furthermore, this Court has consistently applied a balancing test in determining the existence and scope of privileges. *See generally, Branzburg v. Hayes*, 408 U.S. 665 (1972); *Jaffee v. Redmond*, 518 U.S. 1 (1996).

In *Jaffee*, this Court articulated three considerations that govern the recognition or creation of a privilege under federal common law: (1) the significance of public and private interests that would be served by the privilege; (2) the significance of the evidentiary burden that

might be imposed by the privilege; and (3) the extent to which the privilege is recognized by the states. *Jaffee*, 518 U.S. at 9–14. The lower courts erroneously held that the interest served by the reporter’s privilege outweighed the evidentiary burden imposed by the privilege.

First, the lower courts did not even entertain a private interest. And while the informant’s desire to remain anonymous is in part due to his fear of safety, this Court in *Branzburg* firmly held that this was not a valid reason to not disclose the information, especially to the law enforcement officers. *Branzburg*, 408 U.S. at 695.

The lower courts also held that public interest in recognizing a reporter’s privilege without providing any basis for the analysis. The only basis suggested by the court of appeals was that there is need to protect the newsmen from governmental abuse and harassment. But there is no harassment in case, especially when the subpoena was issued only once and only to compel production of a highly relevant material. *United States v. Smith*, 153 F.3d 963, 969 (5th Cir. 1998). As to the district court’s concern that disclosure of sensitive information will be stifled absent a privilege, this Court in *Branzburg* held that “agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.” *Branzburg*, 408 U.S. at 696.

The lower courts failed to consider the evidentiary burden that would be placed on the government by a reporter’s privilege. The information sought by the government is crucial not only in confirming the accuracy of the alleged crime, but it has the potential of revealing a source of first hand knowledge of the alleged crime. That the evidence in question—namely, the out-of-court statement of an informant—may be excludible due to the hearsay within hearsay rule increases the value of the information sought.

Lastly, the lower courts improperly applied the “experience” analysis of *Jaffee*. In *Jaffee*, this Court considered whether all states had adopted some form of a psychotherapist’s privilege. But *Jaffee*’ holding regarding the “experience” has limited applicability to this case. First, Rule 501 distinguishes federal criminal cases from state or civil cases. Second, unlike the psychotherapist’s privilege, not all states have adopted the reporter’s privilege. This is especially so considering that most states do not recognize a reporter’s privilege for non-confidential information.

III. Agent Simandy’s Opinion Is Admissible Under Rule 701

Federal Rule of Evidence 701 lists three requirements that must be met in order for lay witness opinion on words and phrases to be admissible: (a) it is rationally based on the witness’s perception; (b) it is helpful to clearly determining a fact in issue; and (c) it is not based on scientific, technical, or other specialized knowledge of an expert. Fed. R. Evid. 701 (2011). Agent Simandy, although an agent of the Federal Bureau of Investigation, is not an expert in crimes against animals. His experience is limited to general crimes and drug-related crimes. His knowledge, skill, experience, training and education would not qualify him as an expert in crimes against animals. Thus, agent Simandy’s opinion meets the requirements set forth in Rule 701(c).

Agent Simandy’s opinion did not set forth a “narrative gloss,” or confuse the jury as to the meaning of words or phrases that were neutral. Unlike “buying a ticket,” in *United States v. Peoples*, 250 F.3d 630 (Eighth 2001), the phrases agent Simandy opined on were “blood diamond,” “Charlie tango,” and “black cat,” all of which do not make sense in an ordinary context. Moreover, agent Simandy’s opinion does not set forth conclusions about the charges.

Instead, his opinions are well supported by other facts in evidence, including Crawley's news report, the transaction between Defendant and Copters Corporation, and the transaction between Defendant and Weapons Unlimited. Thus, agent Simandy's opinion helps clarify the meaning of those phrases.

Lastly, practical policy considerations favor admitting lay opinion testimony that are based on information gathered after-the-fact observations and investigations. Changes in the investigative forces are often unavoidable; likewise, many investigations continue after the facts have been collected rather than live. If perceptions made after-the-fact, but nonetheless based on a complete review of all the facts and circumstances, become inadmissible under Rule 701, the burden on the government in preventing and prosecuting crimes would be substantial.

ARGUMENT

I. Forfeiture By Wrongdoing Is an Exception to the Rule Against Hearsay

a. Reardon's Testimony Is Admissible Under The Forfeiture by Wrongdoing Doctrine

The forfeiture by wrongdoing doctrine provides that hearsay testimony shall be admitted if it is found, by a preponderance of the evidence, *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005), that the Defendant wrongfully acted or acquiesced to an action that procured the declarant's unavailability and did so with the intent to procure the declarant's unavailability. *Giles v. California*, 554 U.S. 353, 358 (2008); *United States v. Rivera*, 412 F.3d 562, 568 (4th Cir. 2005) (holding that Defendant only had to acquiesce to the declarant's death for forfeiture by wrongdoing). Evidence presented during the course of the trial provides the support for such a finding. *Gray* at 241; *United States v. Cherry*, 217 F.3d 811, 821 (10th Cir. 2000). Since the founding of the Sixth Amendment, there have been exceptions to a defendant's right to confront

witnesses, including the exception of forfeiture by wrongdoing. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The forfeiture by wrongdoing exception provides that where a defendant “voluntarily keeps the declarant away,” the defendant cannot depend on the right to confront that declarant as a witness. *Reynolds v. United States*, 98 U.S. 145, 158 (1878). Public policy requires this exception in order to protect the integrity of the jury trial by eliminating incentives for defendants to tamper with witness testimony through bribery, kidnapping, or murder. *Giles* at 374.

Federal Rule of Evidence 804(b)(6) codifies the doctrine of forfeiture by wrongdoing and 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” will be excluded from the rule against hearsay where the declarant is unavailable. The *Giles* court holds as admissible statements made against a defendant by an unavailable witness when the defendant “engaged in conduct designed to prevent the witness from testifying.” *Giles* at 353. The opposing party must show that Defendant intended to make the witness unavailable through his actions. *Id.* at 354. These actions can include the use of an “intermediary for the purpose of making a witness absent.” *Id.* at 360. *Id.* at 357. Forfeiture by wrongdoing does not apply to cases where the defendant caused the witness to be unavailable but did not do so with the intent to procure the witness’s unavailability. *Id.* at 362 (overturning California’s position that Defendant had forfeited his right to confront the witness through his intentional act of killing her because he did not kill her with the intent to prevent her testimony).

Unconfronted witness testimony will always be admissible, however, where Defendant committed the wrongdoing in order to prevent such testimony. *Id.* at 373; *Gray* at 240 (stating that “by 1996, every circuit to address the issue had recognized the doctrine”). Rule 804(b)(6)

applies in any circumstance where Defendant's wrongdoing was intended to and did cause the unavailability of the witness without regard for which trial or charge Defendant intended to cause the unavailability. *Gray* at 241. The content of admissible statements is not limited, and even implication of a crime against the declarant may be admissible. *Id.*

Here, Reardon's out of court statements to Best should be admitted based on Exhibit A. Exhibit A is a transcript of a telephone conversation between Defendant and Anderson, which shows that it is more likely than not that the co-conspirators intended to prevent Reardon from exposing the conspiracy, after which Anderson prevented Reardon from exposing the conspiracy by murdering him. Defendant waived his right to confront Reardon by allowing Anderson to murder Reardon in order to prevent him from exposing the conspiracy. Through the act of killing Reardon for the sake of their illegal scheme, the co-conspirators tampered with the integrity of the jury trial by eliminating an essential witness.

Reardon's death was not an end in itself. Rather, Reardon was murdered to be silenced. Anderson murdered Reardon for the sole purpose of keeping his testimony out of the hands of the police and the courts. Due to the aforementioned nature of this murder, Rule 804(b)(6) allows the admission of the statements Reardon made to Best. Anderson may have only intended to prevent Reardon's statement to the police that would have prevented the completion of the conspiracy, but the waiver of confrontation also applies to the testimony that Reardon would have given at trial. The doctrine of forfeiture by wrongdoing allows statements made by Reardon to Best, including those statements that refer to the conspiracy at issue.

b. Conspirator Liability Establishes Intent Under the Forfeiture By Wrongdoing Doctrine

Conspirator liability, by preponderance of the evidence, *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000), can establish the intent necessitated by the forfeiture by wrongdoing doctrine. *United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) (concluding that conspiracy principles apply to the forfeiture by wrongdoing doctrine.); *United States v. Thompson*, 286 F.3d 950, 961 (7th Cir. 2002); *Cherry* at 813. See *Olsen v. Green*, 668 F.2d 421, 429 (8th Cir. 1982) (noting that someone acting on Defendant's behalf to procure the unavailability of a witness can operate to waive Defendant's hearsay objection). All members of the conspiracy are responsible even if only one person acts, and the formation of a conspiracy establishes intent. *Pinkerton v. United States*, 328 US. 640, 647. Acts of co-conspirators can prove intent. *Id.* Conspirator liability applies to forfeiture by wrongdoing where the following three criteria are met: (1) the conspiracy was ongoing at the time the co-conspirator procured the unavailability of the witness; (2) Defendant did not withdrawal from the conspiracy before the co-conspirator procured the unavailability of the declarant; and (3) the action that caused the unavailability of the declarant was reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. *Pinkerton* at 646, 648; *Cherry* at 817, 820. Liability attaches to acts that were not originally a part of the conspiracy, but were conducted to facilitate the conspiracy. *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1989).

Here, Defendant's intent to procure the unavailability of Reardon as a witness is established through transcripts of recorded telephone conversations between Defendant and Anderson, which show that it is more likely than not that Defendant and Anderson engaged in a conspiracy. Anderson murdered Reardon, but as Anderson's co-conspirator, Defendant is responsible for Anderson's action, and through their conspiracy Anderson's intent imputes to

Defendant. Because the co-conspirators scheduled the hunt for December 15, 2011, and Anderson murdered Reardon on November 29, 2011, the conspiracy was ongoing at the time of the murder. Defendant merely told Anderson “hold off for a while” and that he “want[ed] nothing to do” with murdering Reardon. Defendant did not, however, withdrawal from the conspiracy. Exhibit A shows that Defendant had no intention to withdrawal from the conspiracy when he agreed that there would be a problem when Reardon saw the events of the hunt on the news after December 15, 2011. Further, Exhibit A shows that Anderson intended to murder Reardon for the purpose of preventing Reardon from exposing and ruining the conspiracy.

The defendant had substantial reason to foresee the death of Reardon as part of furtherance of the conspiracy, again shown by the conversations in Exhibit A, where Anderson said multiple times that he planned on silencing Reardon. Murdering Reardon was within the natural and necessary scope of the furtherance of the conspiracy because Anderson feared that Reardon was planning to expose the conspiracy, thereby rendering it impossible to complete. Killing Reardon, to Anderson, was the only way to continue the plan, and Defendant knew of Anderson’s belief. Defendant foresaw the action that Anderson would eventually take. Murdering Reardon was not part of the original plan, but considering that Reardon’s murder took place during the conspiracy in order to facilitate the conspiracy, in conjunction with Defendant’s failure to withdrawal from the conspiracy, conspirator liability establishes Defendant’s intent to procure Reardon’s unavailability as a witness. Therefore, Reardon’s statements to Best should be admitted under Rule 804(b)(6).

II. There Is No Reporter’s Privilege, Whether Qualified or Absolute, in a Federal Criminal Case Involving an Informant Who Appeared Voluntarily in Front of a Video Camera

a. The Lower Courts Erroneously Held that Federal Law Recognizes an Absolute Reporter’s Privilege.

The court of appeals held that the federal law created a reporter’s privilege that protects a reporter’s source from disclosure, and that the privilege extends so broadly as to be absolute. The lower court’s conclusion about the existence of an absolute reporter’s privilege is foreclosed by this Courts decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *Jaffee v. Redmond*, 518 U.S. 1 (1996).

In *Branzburg*, this Court held that there is no constitutional reporter’s privilege arising from receipt of confidential information. *Branzburg*, 408 U.S. at 682. This Court explained that “neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing ... information that he has received in confidence.” *Id.* This Court further held that “the public’s right to every man’s evidence” outweighed the interest in encouraging “informants to make disclosures to newsmen.” *Id.* at 674. Based on the foregoing analysis, this Court declined to “grant newsmen a testimonial privilege that other citizens do not enjoy.” *Id.* at 690. That this Court in *Branzburg* adopted a balancing approach clearly suggests that the law on privileges cannot be absolute but rather qualified and case specific.

The adoption of Federal Rule of Evidence 501 several years after *Branzburg* did not change the weight to be attached to *Branzburg*. Rule 501 states, “[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 (emphasis added). This language of Rule 501 reflects the

Congress's intent to "[leave] the law of privileges in its present state" and at the same time to let the federal courts develop the law on privileges. *See* H.R. Rep. No. 93-650 p. 8 (1974). Further, Congress intended that "the recognition of a privilege based on a confidential relationship ... be determined on a case-by-case basis." *See* S. Rep. No. 93-1277 p. 13 (1974). Thus, both *Branzburg's* outcome—that federal common law did not recognize the reporter's privilege—and the methodology—that a balancing of the interests be used to determine whether a particular privilege should be recognized still represents this Court's resolution of the issue.

That this Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996) recognized the psychotherapist's privilege reaffirms the validity of *Branzburg's* balancing approach to the issue of privileges. In *Jaffee*, this Court articulated the concept of "reason and experience" under Rule 501. As to "reason," this Court held that courts may recognize a privilege if the privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee*, 518 U.S. at 6, 9–10. In other words, the "reason" entails a balancing of the public and interest to be served by the privilege against the evidentiary benefits that would be lost due to the privilege. *Id.* at 6. This is the same balancing approach that was used in *Branzburg*.

Lastly, the decision of the court of appeals is not supported by the decision of its sister circuits. The existence and scope of the reporter's privilege vary from circuit to circuit. *Compare McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) ("We do not see why there need to be special criteria merely because the possessor ... is a journalist.") *with Price v. Time, Inc.*, 416 F.3d 1327, 1343 (5th Cir.) ("[A] reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informant."). But "every federal court that had recognized a reporter's privilege under Federal Rule of Evidence 501 had concluded that any such privilege was a qualified one." *New York Times, Co. v. Gonzales*, 459 F.3d 160, 169 (2d

Cir. 2006). Thus, the court of appeals in recognizing an absolute reporter's privilege widely departed from the common and uniform practice of the courts.

b. The Lower Courts Erroneously Held that the Public and Interest to Be Served By a Reporter's Privilege Outweighed the Evidentiary Benefits That Would Be Lost From Recognizing Such Privilege.

In *Jaffee*, this Court articulated three considerations governing the recognition of a privilege: (1) the significance of public and private interests that would be served by the privilege; (2) the significance of the burden on truth-seeking that might be imposed by the privilege; and (3) the extent to which the privilege is recognized by the states. *Jaffee*, 518 U.S. at 9–14. The balancing of the first two considerations pertains to the “reason” for interpreting federal common law. *Id.* at 6. As explained below, the lower courts application of the balancing test was improper.

Regarding private interests to be served by a reporter's privilege, it is alleged that the informant requested anonymity because he or she was very concerned for his or her safety if Defendant found out about the disclosure. But as this Court in *Branzburg* remarked, there is little before [this Court] indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position ... if they risked placing their trust in public officials as well as reporters.” *Id.* at 695. In fact, this Court observed that the preference for anonymity of confidential informants is often “a product of their desire to escape criminal prosecution,” which is not a proper interest deserving legal protection. *Id.* at 691. Either way, any concerns that the informant in this case might have about his or her safety would not be a valid interest that would need to be protected.

Equally lacking in this case is a consideration of the overall public interest that would be served by a reporter's privilege. The lower courts expressed hope that "[b]y protecting sources from exposure, the privilege will encourage the disclosure of sensitive information to the press." With respect to criminal cases, however, public interest in possible future news about crime from undisclosed, unverified sources does not take precedence over public interest in ... prosecuting those crimes reported to the press by informants. *Id.* at 695. In addition, "agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696. Hence, according to this Court, public interest analysis would disfavor recognition of a reporter's privilege.

As to the court of appeal's notion that the press would be limited in its ability to report on government if sources could not be protected from exposure, it is irrelevant to this case. Justice Powell, in his concurring opinion in *Branzburg*, reasoned that "if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash." *Id.* at 709. As one Circuit Court noted, however, "[a] single subpoena issued only after considered decision by ... the United States to compel production of evidence at a federal trial of a multicounty felony indictment is no harassment." *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998). Applying *Smith* to the case at hand, there is no harassment since the government has issued only one subpoena, and the purpose of the subpoena was to compel production of an information, namely the identity of the informant, that is relevant in assessing the credibility of his or her out-of-court statement. Thus, the lower courts' concern about government's abuse of power has no application here.

Third, the evidentiary benefit resulting from denial of a journalist's privilege is substantial. In *Jaffee*, this Court looked to see if there were other alternative means to confirm the allegations. *Jaffee*, 508 U.S. at 7 (“[T]he evidentiary need for the contents of the confidential conversation was diminished in this case because there were numerous eyewitnesses.”). Other circuits have applied a similar test. For example, the Ninth Circuit held that there is no reporter's privilege if the information goes to the heart of the case, and alternatives to the subpoena have been exhausted. *Lee v. Dep't. of Justice*, 413 F.3d 535 (D.C. Cir. 2005). Another circuit similarly held that the reporter's privilege must yield when “all alternative means to independently confirm the allegations had been exhausted.” *Price*, 416 F.3d at 1344. In this case, the identity of the informant as well as the content of his or her statement goes to the heart of the case, namely the charges against Defendant for violence against an animal enterprise and for unlawful takings under the Endangered Species Act. The identity of the informant is particularly important because his or her entire statement may be excluded from the evidence as hearsay, and thus the only means to independently confirm the charges are through the informant's testimony at trial. As such, the evidentiary benefits that would be lost from recognizing a reporter's privilege is significant.

c. The Lower Courts Relied on the Wrong Survey in Determining the “Experience” With Respect Reporter’s Privilege.

Another factor this Court considered in recognizing psychotherapists' privilege is the extent to which the privilege is recognized by the states. *Jaffee*, 518 U.S. at 9. In *Jaffee*, this Court observed that all fifty states had adopted some form of the psychotherapists' privilege, and concluded that “experience” called for recognizing such a privilege. *Id.* at 5. But this analysis

has limited application to the case at hand. The limited applicability of the “experience” analysis is supported by the language of the Federal Rule of Evidence 501. Federal Rule of Evidence 501 states, “But *in a civil case*, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” Fed. R. Evid. 501 (emphasis added). As Rule 501 suggests, privileges in criminal cases are not necessarily governed by the same considerations—namely, the extent to which states uniformly recognize a privilege—as civil cases. Courts have acknowledge the distinction between a civil and a criminal case as well. *See e.g., Gonzales v. Nat’l. Broadcasting Co.*, 155 F.3d 618, 622 (2d Cir. 1998); *United States v. Smith*, 135 F.3d at 969. Unlike *Jaffee*, this is a criminal case. Hence, the criminal-civil distinction expressed by Rule 501 and followed by the courts should limit the application of the “experience” analysis to this case.

Rule 501 further limits the applicability of state law to cases involving federal question claims. Fed. R. Evid. 501 (“But in a civil case, state law governs privilege regarding a claim or defense *for which state law supplies the rule of decision.*”) (emphasis added). Again, the courts have acknowledge the distinction. *See e.g., McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) (“State-law privileges are not ‘legally applicable’ in federal-question cases”). This case is distinguishable from *Jaffee* in this respect. In *Jaffee*, the complaint sought damages under 42 U.S.C. § 1983 and the Illinois wrongful-death statute, Ill. Comp. Stat., ch. 740, § 180/1 *et seq.* (1994). *Jaffe*, 508 U.S. at 2. Because *Jaffee* was a civil case involving a state-law claim, this Court considered whether states uniformly adopted the psychotherapist’s privilege. In contrast, the case at hand is a criminal case founded upon purely federal claims. Thus, the extent to which states have adopted the reporter’s privilege is less relevant here.

Rather pertinent is the extent to which federal courts have rejected or upheld reporters' privilege in federal criminal cases. And there is no uniformity among the federal courts on the issue of reporters' privilege. Some courts refuse to recognize any privilege. *See e.g., McKevitt v. Pallasch*, 339 F.3d 530. Others recognize a narrow form of qualified reporters' privilege only under limited circumstances. *See e.g., United States v. Smith*, 135 F.3d 963.

Even if this Court were to hold that states' law regarding reporters' privilege would be relevant in a federal criminal case as the case at hand, the law is far from uniform. Part of this Court's basis for recognizing a psychotherapists' privilege in *Jaffee* was that all states, and not just a majority of them, had adopted some form of psychotherapists' privilege. *Jaffee*, 508 U.S. at 9. States' treatment of the reporters' privilege, in contrast, is far from uniform. At the time *Branzburg* was decided, only twenty-six states, barely the majority, recognized some form of reporters' privilege. Forty years later, in 20013, only thirty-one states have enacted statutes that recognize reporters' privilege. Joel Campbell, *States Revisiting Reporter's Privilege laws*, Society of Professional Journalists (February 17, 2013, 5:00PM), <http://www.spj.org/rrr.asp?ref=30&t=foia>. Five states still do not recognize any form of reporters' privilege, legislative or judiciary. *Id.*

III. Agent Simandy's Opinion Is Admissible Under Rule 701 Because It Is Not an Expert Testimony Disguised As a Lay Opinion, and Because It Is Based on His Rational Perception Acquired Through the Investigation

a. Agent Simandy's Did Not Give an Expert Testimony That Was Disguised As a Lay Opinion

Federal Rule of Evidence 701 states:

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. 701 (2011).

Regarding subsection (c), the court of appeals expressed concerns that the government might disguise an expert's testimony as a lay witness opinion. However, this concern is without merit. Federal Rule of Evidence 702 states that a witness may qualify as an expert by knowledge, skill, experience, training, or education. Fed. R. Evid. 702. In this case, agent Simandy has been an agent of the Federal Bureau of Investigation for five years. Thus, his knowledge, skill, experience, training, or education would qualify as an FBI agent in general. With respect to specific categories of crimes, however, agent Simandy's expertise is limited to drug-related crimes. Agent Simandy testified that this case—involving crimes against animals—was not a typical case he would work on. Thus, he would most likely lack the requisite knowledge, skill, experience, training, or education to qualify as an expert in that area.

The lower courts cite *United States v. Peoples* in excluding agent Simandy's opinion. But the holding of *Peoples* is inapplicable to this case. In *Peoples*, the lay opinion of an FBI agent regarding the meaning of words and phrases used by the defendants were excluded because the agent in fact had expertise in the crime at issue. *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). Applying a similar standard, the Ninth Circuit held that a police officer gives expert testimony if the testimony is based on his *specialized knowledge* of narcotics code terminology. *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (emphasis added). Implicit in these cases is the observation that the witnesses were essentially experts in the subject matter they were testifying about. Thus, the reasoning of *Peoples* and *Plunk* would have limited applicability to this case.

b. Agent Simandy's Opinion Helps Clarify the Meaning of Words and Phrases

Regarding subsection (b), the court of appeals expressed concerns that the government might make an argument from the witness stand instead of help clarify the meaning of words and phrases for the jury. In *Peoples*, the Eighth Circuit admonished the prosecution for “offering a narrative gloss.” *Peoples*, 250 F.3d 630, 640 (“... phrased as contentions supporting her conclusion ... that the defendants were responsible for Ross’s murder.”). Moreover, the witness opined on words that already had neutral and apparent meanings, such as “buying a ticket.” *Id.* This added to the ambiguity and confusion, rather than clarify. Finally, the fact that the witness testimony was essential in supporting a guilty verdict because there were no other pieces of evidence to buttress the charges played a crucial role. *Id.* at 642. This case is distinguishable from *Peoples* in all three respects. First, agent Simandy’s opinion relates to terms such as “blood diamond,” “Charlie tango” that do not have neutral meanings such as “buying a ticket.” Second, agent Simandy’s opinion did not express any conclusions as to whether Defendant was responsible or not. Third, agent Simandy’s opinion does not add ambiguity nor does it stand on its own. Agent Simandy’s interpretations—that “blood diamond” referred to ivory, “Charlie tango” referred to a helicopter, and “black cat” referred to AK-47—supported by other facts in evidence—such as Crawley’s exposé, Defendant’s agreement with Copters Corporation for a helicopter rental, and Defendant’s transactions with Weapons Unlimited. Thus, the lower courts’ concerns as to the helpfulness of agent Simandy’s opinion is misplaced.

c. Agent Simandy's Opinion Is Rationally Based on His Perception as an Investigator

Regarding subsection (a) of Rule 701, the court of appeals required that witness opinion be “rationally based on his perception.” Fed. R. Evid. 701. But there is no precedence by this

Court as to the interpretation of “rationally based on his perception.” The Circuits disagree as to what it means. The court of appeals followed the Eight Circuit’s holding that lay opinion testimony is admissible only in cases witness “personally participated in or contemporaneously observed” the subject of their testimony. *Peoples*, 250 F.3d 630, 641. Several circuits agree with *Peoples*. See e.g., *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *Swajian v. General Motors Corp.*, 916 F.3d 201, 212 (2d Cir. 2005). On the other hand, the Fifth, Tenth and Eleventh Circuits disagree and hold that lay opinion testimony is admissible even if based solely on information gathered during an after-the-fact investigation. See e.g., *United States v. Jayyousi*, 657 F.3d 1085, 1102–03 (11th Cir. 2011); *United States v. El-Mezain*, 664 F.3d 467, 512–13 (5th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1217–22 (10th Cir. 2007). Practical concerns call for the latter approach. It is often the case that the same persons who initiated them cannot always complete investigations into crimes. If this Court were to require actual “first-hand knowledge” for all investigators who make lay witness opinions, Rule 701 will seriously damage the government’s ability to prevent and prosecute crimes. Also as to conversations, there is little reason to hold that perceptions and opinion based on a complete and accurate recording and transcript of the conversation is any less rational than one made by eavesdropping the conversation live. Thus, as a matter of practical concern, subsection (a) of Rule 701 should be interpreted to allow observations made after-the-fact.

CONCLUSION

For the foregoing reasons, judgment of the lower courts should be reversed.

Respectfully submitted.