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No. 12 - 23

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IN THE  
SUPREME COURT OF THE UNITED STATES

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United States of America,

*Petitioner,*

v.

William Barnes,

*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Fourteenth Circuit

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Brief for Respondent

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Team No. 31

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## **QUESTIONS PRESENTED**

- I. Does the forfeiture-by-wrongdoing exception codified in Federal Rule of Evidence 804(b)(6) require that a criminal defendant intend to make a declarant witness unavailable, as is required for the forfeiture-by-wrongdoing exception recognized to the Confrontation Clause, or is it sufficient to apply *Pinkerton* liability under the existing framework even if there is no evidence that the Defendant intended to procure the unavailability of the declarant witness?
  
- II. Does Federal Rule of Evidence 501 recognize a journalist's privilege which allows a journalist to keep the identity of an informant confidential where revealing that informant's identity would substantially hinder the journalist's ability to disseminate information to the public, and is that privilege absolute?
  
- III. Does Federal Rule of Evidence 701, which governs lay witness opinion testimony, allow a law enforcement officer to testify to alleged code words and phrases where the officer neither participated in firsthand nor observed any live conversations but merely reviewed transcripts and completed a post-arrest investigation?

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## SUMMARY OF THE ARGUMENT

In the immediate case, the District Court and Fourteenth Circuit correctly held that (1) the intent requirement delineated in *Giles v. California* applies to Federal Rule of Evidence 804(b)(6); (2) that journalists enjoy an absolute privilege pursuant to Federal Rule of Evidence 501; and (3) that a law enforcement officer cannot testify as a lay witness under Federal Rule of Evidence 701 where he neither participated in nor contemporaneously observed conversations that transpired between two parties. First, the Fourteenth Circuit properly concluded that the intent requirement should be applicable to Rule 804(b)(6), because, where a defendant does not have a design to make a witness unavailable, particular statements will be inadmissible hearsay.

Second, Ms. Crawley's motion to quash was properly granted because journalists enjoy an absolute privilege under Rule 501, which allows journalists to maintain confidentiality with respect to various newsgathering mediums, including informants. Further, if Ms. Crawley were required to disclose the identity of her confidential informant, the public's interests in maintaining the free flow of news would be significantly hindered. And, even if the Court were to conclude that Ms. Crawley enjoys only a qualified privilege, she would likely not be required to disclose the identity of her informant because the government has not shown a compelling need for that information.

Lastly, Agent Simandy's testimony was properly denied admission under Rule 701 because Agent Simandy neither participated in nor contemporaneously observed the conversations between Best and Mr. Barnes. It is imperative to preserve the line of demarcation between Rule 701, which governs lay testimony, and Rule 702, which governs expert testimony. A law enforcement officer cannot testify as a lay witness concerning the code words in a conversation if he has no firsthand knowledge of that conversation and is not privy to any live

recordings of that conversation. This rule is founded firmly in the principle that witnesses who testify to their credentials and specialized knowledge should not be permitted to testify as lay witnesses under Rule 701 because Rule 702 was specifically drafted to govern expert witness testimony.

Thus, for the reasons outlined above, the Court should affirm the lower court rulings.

### **STATEMENT OF THE CASE**

#### **Statement of Facts**

In May 2000, respondent William Barnes (“Mr. Barnes”) inherited the Big Top Circus (“the Circus”) from his father, a small business owner. (R. 1). Located in southern Boerum, the Circus proved to be a profitable venture. Surrounded by lush deciduous trees and expansive grasslands, a herd of twenty Asian elephants became the Circus’s “primary attraction.” (R. 1). However, by July 2011, the Circus’s success was dwindling and additional income became imperative if the Circus was to avoid bankruptcy. (R. 1).

To generate revenue, Mr. Barnes contacted two circuses—Boerum City Circus and Flying Feats Circus—with a proposal to put together an elephant show that upcoming December, 2011. (R. 1–2). Both circuses agreed, and transported ten Asian elephants to Big Top Circus. (R. 2). However, it became readily apparent that the income the Circus would generate from its collaboration with other circuses was insufficient to avoid bankruptcy. (R. 2). Mr. Barnes, in his free time, wanted to have an ordinary hunting expedition. (R. 2). The government theorizes, though, that Mr. Barnes and his friend and business partner Alfred Anderson (“Anderson”) conspired to hunt the elephants pastured on the Circus property for the purpose of harvesting ivory, an exorbitant black market commodity. (R. 2). Anderson, though, was Mr. Barnes’s

business partner and previously went on bear-hunting expeditions with Mr. Barnes. (R. 1). Mr. Barnes wanted to invite a third friend to join his friendly hunting expedition, and Mr. Barnes and Anderson agreed to “find a third hunter.” (R. 2).

As for the elephants that were pastured on Mr. Barnes’s land, and in order to “increase publicity,” Mr. Barnes invited Kara Crawley (“Ms. Crawley”), a local reporter for the Boerum Times, to visit the Circus and write a news story on the Circus’s upcoming elephant performance. (R. 2, 9). A professed animal rights activist, Ms. Crawley was given “unlimited access” to the Circus, and, having expressed a desire to inspect the area where the elephants were trained, made the acquaintance of an employee who would eventually reveal information to Ms. Crawley. (R. 9).

In early September 2011, Anderson, not Mr. Barnes, recruited a “long-time acquaintance,” James Reardon (“Reardon”), to join the friendly hunting expedition. (R. 2). Having decided that the best way to conduct the friendly hunting expedition was to rent a helicopter and use fast-acting assault rifles, Mr. Barnes received a price quote from Weapons Unlimited, a Texas weapons retailer. (R. 2). Unaware that the Weapons Unlimited salesperson he spoke with was actually undercover Bureau of Alcohol, Tobacco, and Firearms agent Jason Lamberti (“Lamberti”), Mr. Barnes accepted Lamberti’s offer to purchase the weapons “under the table” at the price of \$500 per rifle. (R. 2). Lamberti secured a warrant and recorded Mr. Barnes’s phone calls to uncover, in the government’s view, incriminating evidence. (R. 2).

In early October, Mr. Barnes rented a helicopter from Copters Corporation, a Texas business, for use in the friendly hunting expedition. (R. 3). A few weeks later, Mr. Barnes notified Anderson about finalizing the plans for the friendly hunting expedition, and the friendly hunting expedition was officially scheduled for December 15, 2011. (R. 3). But by mid-

November, Reardon was having second thoughts, as relayed by Anderson. (R. 18). In two telephone calls placed by Anderson to Mr. Barnes on November 15 and 29, 2011, Anderson and Mr. Barnes discussed Reardon's sudden reluctance to participate in their friendly hunting trip. (R. 18–19). Unable to reach an agreement about Reardon, Anderson believed that they should simply “get rid of him.” (R. 18). Anderson persistently suggested that he was “gonna take care of” Reardon, and that “things are gonna be messy,” but Mr. Barnes made clear that Anderson should “hold off” and that he “didn't want anything to do with this” and abruptly ended the phone call. (R. 18–19).

Anderson, sometime after the phone call, visited the home of Reardon and killed Reardon. (R. 7:46–50). Reardon's body was found by Daniel Best (“Best”) (R. 7:47–50). Anderson later confessed to police, claiming that he killed Reardon in order to cover up what Anderson believed was a scheme. (R. 7:46–50). Yet, at trial, the government also sought to admit statements of Reardon to Best, about Anderson's scheme. (R. 8:61–71).

The friendly hunting expedition never occurred. (R. 3). With assistance from her confidential informant, Ms. Crawley wrote an article about Anderson, Reardon, and Mr. Barnes's friendly hunting expedition, instead theorizing that it involved plans to harvest ivory from the Asian elephants pastured at the Circus. (R. 3). Two weeks before the friendly hunting expedition, the Boerum Times ran Ms. Crawley's elephant “expose.” (R. 3) Mr. Barnes was subsequently arrested and charged. (R. 3–4).

### **Procedural History**

On December 4, 2011, Mr. Barnes was indicted and charged with “two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922, two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and one count of

conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538.” (R. 21). Prior to trial, the government “moved to introduce out-of-court statements by the late James Reardon to a Mr. Daniel Best as an exception to the hearsay rules under Federal Rule of Evidence 804(b)(6).” (R. 6). Ms. Crawley moved to quash a subpoena compelling her to testify on the government’s behalf concerning the identity of her confidential informant at the Circus, arguing for a journalist’s privilege under Federal Rule of Evidence 501, and the government moved to introduce Agent Thomas Simandy’s testimony under Federal Rule of Evidence 701 as lay witness testimony. (R. 6:25–26, 29–30).

Oral arguments were heard May 1, 2012, before the United States District Court for the Southern District of Boerum. (R. 5). The following day, the District Court denied the government’s motions and granted Ms. Crawley’s motion to quash. (R. 5). As provided under 18 U.S.C. § 3731, the United States appealed to the United States Court of Appeals for the Fourteenth Circuit. (R. 20). The Circuit Court affirmed each District Court ruling on July 12, 2012, concluding that (1) conspiratorial liability does not apply to forfeiture-by-wrongdoing under Rule 804(b)(6) without a showing that the defendant had the intent to appropriate the witness’s unavailability; (2) journalists enjoy an absolute privilege under Rule 501 that cannot be disturbed by a showing of need; and (3) a law enforcement agent who neither participated in nor observed a particular conversation cannot testify as a lay witness concerning the code words within that conversation pursuant to Rule 701. (R. 20). After filing a petition for a writ of certiorari, the United States Supreme Court granted certiorari on October 1, 2012. (R. 36).

## ARGUMENT

### **I. THE FOURTEENTH CIRCUIT’S HOLDING THAT *PINKERTON* LIABILITY PRINCIPLES WERE INSUFFICIENT TO INSTIGATE THE FORFEITURE-BY-WRONGDOING EXCEPTION IN FEDERAL RULE OF EVIDENCE 804(B)(6) SHOULD BE AFFIRMED BECAUSE EITHER THE INTENT REQUIREMENT IN *GILES* IS BUILT INTO THE ANALYSIS OR BECAUSE THE MODIFIED *CHERRY* TEST IS NOT SATISFIED.**

The first issue is whether the forfeiture-by-wrongdoing common law exception codified in Federal Rule of Evidence 804(b)(6), as applied to criminal defendants, should be analyzed differently than the forfeiture-by-wrongdoing common law exception to the Sixth Amendment Confrontation Clause. Complimentary to this issue is whether the evidentiary rules should have a different functional analysis and whether *Pinkerton* liability principles can satisfy the requirements of the exception. Because both exceptions derive from the same common law exception, the intent requirement should apply to defendants who forfeit their right to confront a witness. Thus, *Pinkerton* conspiratorial liability alone is insufficient to satisfy the intent requirement. The Circuit court opinion should therefore be affirmed accordingly.

But even if the forfeiture by wrongdoing common law exception codified in the Federal Rules of Evidence was subject to a different analysis, *Pinkerton* conspiratorial liability, by itself, fails the requirements to hold that out-of-court statements are not hearsay. In this case, because the comments by Reardon to Best about what he believed Mr. Barnes said are hearsay statements, and fail to meet the forfeiture by wrongdoing exception; under the evidentiary rule, or the Constitutional analysis, they must be kept out. The decisions of the courts below, as to this issue, should be affirmed.

The Sixth Amendment to the United States Constitution provides that a defendant in a criminal prosecution shall enjoy the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. While the Confrontation Clause protects the defendant’s right to face his

accuser, it has long been recognized as a common law principle that when a defendant engages in conduct with the purpose of rendering a witness unavailable, he cannot benefit from a constitutional right to confront his accuser. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1879) (holding that “[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.”); *also United States v. Carson*, 455 F.3d 336, 362–63 (D.C. Cir. 2006) (aggregating cases recognizing that “[a]lthough the Confrontation Clause secures important rights, those rights are not absolute.” This Court’s analysis in *Giles v. California*, 554 U.S. 339 (2008), too, recognized that the forfeiture-by-wrongdoing exception has long been recognized within the context of the Confrontation Clause. The Federal Rules of Evidence also recognize this common law exception.

The Federal Rules of Evidence were amended in 1997 to recognize the common law exception. Rule 804(b)(6) provides that the rule against hearsay does not apply to “[a] statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant’s unavailability as a witness, and did so intending that result.” Fed. R. Evid. 804(b)(6). But, in light of the principles developed in *Giles* this Court should rule that for a criminal defendant, the same principles that apply to the forfeiture-by-wrongdoing exception in the Confrontation Clause analysis also apply to the hearsay rule.

**A. *The Principles Underlying the Giles Decision Must Also Guide the Analysis of Forfeiture by Wrongdoing in the Hearsay Context for a Criminal Defendant Because the Evidentiary Rule Codifies the Same Common law Exception.***

If the forfeiture by wrongdoing exception established in Rule 804(b)(6) is the codification of the common law exception, then the functional analysis of the evidentiary rule and the

exception to the Constitutional right must be the same in the criminal defendant context. Creating an incongruous functional analysis may lead to results that are inconsistent with advisory committee's goals when the Rule was enacted, and would also conflict with the principles outlined in *Giles*.

Since 2004, the Confrontation Clause has re-entered criminal jurisprudence in a manner that deviates from years past. *Crawford v. Washington* overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), and introduced a refined interpretation of the Confrontation Clause. 541 U.S. 36, 69 (2004). This Court's subsequent opinions further refined *Crawford*, and *Giles* is quite forceful in its approach to the common law exception recognized in forfeiture by wrongdoing. Of course, the *Giles* forfeiture-by-wrongdoing analysis should apply to criminal defendants when examining Rule 804(b)(6).

In *Crawford*, this Court threw out the reliability approach previously adopted and used by the Washington Supreme Court in Crawford's conviction. In *Crawford*, the petitioner was convicted after a statement was introduced as evidence; the petitioner was given no opportunity to cross-examine the witness. *Id.* at 38. In the appeal, this Court examined the Sixth Amendment's requirement that criminals have the right to confront their witnesses, and this Court found that two inferences about the Sixth Amendment's meaning could be drawn. *Id.* at 38, 50. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id.* at 50. The Court concluded that "leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Id.* at 49–50. With respect to this first inference, the Court determined that not all hearsay falls within the exception of the Sixth Amendment, and

instead recognized that the exception should only apply to testimonial hearsay statements. *Id.* at 50–53.

But the Confrontation Clause did recognize a few exceptions to the Confrontation Clause. The second inference the *Crawford* Court drew was “[t]hat the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination...admitting only those exceptions established at the time of the founding.” *Id.* at 53–54. While the *Crawford* opinion did clarify the applicability of the Confrontation Clause to hearsay, it did not necessarily define what testimonial statements were. *See id.* at 68. Yet the importance of the opinion to this case is that the Sixth Amendment has but few exceptions, one of which is the forfeiture-by-wrongdoing exception as discussed in *Giles*.

This Court next turned its attention to testimonial statements. In *Davis v. Washington*, this Court examined two cases, the first involving statements made to a 911 operator during a domestic violence situation, and the second involving statements given to responding police officers where no emergency was in progress. 547 U.S. 813, 817–20 (2006). In the first situation, this Court held that the caller’s statements were made to assist police in an ongoing emergency and were therefore non-testimonial. *Id.* at 823–28. With respect to the second situation, the questioning by the officers served investigatory purposes and statements made to those officers were therefore testimonial. *Id.* at 829–32. The thrust of this case is in dicta, in which this Court “reiterate[d] what [it] said in *Crawford*: that ‘the rule of forfeiture by wrongdoing...extinguishes confrontation claims on essentially equitable grounds.’ That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Id.* at 833 (internal citations omitted). The forfeiture by wrongdoing was left open.

Focusing specifically on the common law forfeiture by wrongdoing exception, this Court determined that defendant's intent to make the declarant witness unavailable is a necessary requirement for the exception to apply in the context of the Sixth Amendment. The same requirement should apply here to Rule 804(b)(6). In *Giles v. California*, Giles was charged with murder and was subsequently convicted. 554 U.S. at 356. At trial, the prosecution offered into evidence the murder victim's statements made to a police officer that were made weeks before the murder. *Id.* at 356–57. The issue was whether California's forfeiture-by-wrongdoing exception was the forfeiture-by-wrongdoing exception recognized at common law. *Id.* at 358. The California exception allowed “out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy.” *Id.* at 357 (internal citation omitted). The Court first addressed the recognized exception that testimonial statements “made by a speaker who was both on the brink of death and aware that he was dying” were not hearsay subject to the Confrontation Clause restriction. *Id.* The second common-law doctrine examined by the Court was when a witness was “detained or ‘kept away’ by the ‘means or procurement’ of the defendant,” or commonly known as the forfeiture doctrine. *Id.* at 359.

The Court determined that “the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying.” *Id.* The Court's basis for its interpretation was supported by four pillars: (1) a natural of the plain language as it was understood in the common law, (2) the lack of common law cases that admitted statements based on forfeiture “when the defendant had not engaged in conduct designed to prevent a witness from testifying,” (3) the uniform exclusion by the common law cases of “unconfronted inculpatory testimony by murder victims,” and (4) “a subsequent history in which the [*Giles* dissent's] broad

forfeiture theory has not been applied. *Id.* at 368. While this Court came to its conclusion based on the common law forfeiture exception as applied to the Confrontation Clause, it did not address Fed. R. Evid. 804(b)(6), except to say that “[e]very commentator [the Court was] aware of has concluded the requirement of intent ‘means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.... The commentators come out this way because the [*Giles* dissent’s] claim that knowledge is sufficient to show intent is emphatically *not* the modern view.” *Id.* at 367–68 (emphasis in original) (internal citations omitted).

Today, this Court addresses the analysis of the forfeiture doctrine that is codified in Fed. R. Evid. 804(b)(6). It would be incongruous with the reasoning of *Giles* to hold that the intent requirement of *Giles* did not, also, apply in the 804(b)(6) analysis as it applied to criminal defendants.

Prior to *Giles*, the Federal Rules of Evidence were amended to incorporate the principle of forfeiture by wrongdoing. Rule 804(b)(6) codifies, for federal hearsay, the doctrine of forfeiture by wrongdoing. *Davis*, 547 U.S. at 833. The rule was added “to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.” Fed. R. Evid. 804(b)(6) advisory committee’s note. This statement essentially places the recognized common law exception of forfeiture by wrongdoing into the realm of evidentiary statements.

When a party intentionally makes a potential witness unavailable, the party cannot claim he is being denied his Confrontation Clause right. Similarly, The same party cannot then claim that hearsay should limit out-of-court testimonial statements when the declarant was made

unavailable at the hands or direction of the defendant. The general rule against the use of hearsay, Fed. R. Evid. 802, can therefore be superseded by a party's intentional action of making the declarant unavailable.

It is the intentional act of the defendant which makes the declarant unavailable hit at the heart of what the rules are meant to encompass. Rule 804(b)(6) was the answer to the "need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" Fed. R. Evid. 804(b)(6) advisory committee's note (citing *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982)). Indeed, this rule is perfectly suited for those situations where a defendant intends to make a witness unavailable. It would be preposterous to allow a defendant to murder a declarant witness, and then allow the defendant rely on a hearsay rule to exclude statements against him. Yet, *Pinkerton* conspiratorial liability, by itself, seems to stretch this analogy too far.

The rule recognizes that the defendant not be the one to pull the trigger, as the defendant might acquiesce in making the declarant witness unavailable. Acquiesce means "[t]o accept tacitly or passively; to give implied consent to (an act)." *Black's Law Dictionary* 26 (9th ed. 2009). Thus, a defendant intending to kill a declarant witness can impliedly consent to a lower-level criminal obliterating the declarant witness and have Rule 804(b)(6) apply. Not only is the requirement in *Giles* met, in that the defendant intended to make the declarant witness unavailable, but so is the rule's requirement that the defendant acquiesced in the action that made the declarant witness unavailable. Given that *Pinkerton* liability applies in the example above is only incidental to the analysis that should be done. *Pinkerton* conspiratorial liability alone, though, should not guide the decision of the applicability

Rule 804(b)(6), as it applies to a criminal defendant, must receive the same functional analysis as the *Giles* court set forth: the defendant must have “intended to prevent a witness from testifying.” 554 U.S. at 361. But applying the *Pinkerton* standard, the offense committed by a co-conspirator must have only “have been reasonably foreseeable as a natural and necessary consequence of the conspiracy.” *United States v. Barnes*, No. 12-647 (14th Cir. July 12, 2012) (R. 27) (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)). Yet this standard clearly goes against the requirement set forth in *Giles*, which required the defendant to “engage in conduct ‘designed to prevent the witness from testifying.’” *Id.* (R. 27) (citing *Giles*, 554 U.S. at 359). As the district court found, and the Fourteenth Circuit recognized, Mr. Barnes did not act to make the declarant Reardon unavailable, nor is there any evidence that “he intended to do so or intended for Anderson to do so.” *Id.* (R. 27)

Therefore, this Court must affirm the decisions of the lower courts to read the intent requirement to apply to Rule 804(b)(6). This is not say, though, that this intent requirement should apply in all types of actions, but only in criminal actions. The applicability of the intent requirement to civil, regulatory, or maritime matters is a question not before this Court and should be address a different day. Nonetheless, the *Pinkerton* standard, by itself, fails to appropriately account for the intention of the defendant in wanting to make the declarant witness unavailable. Without this intention, the statements are hearsay and cannot be brought in.

**B. *Even if the Functional Analysis of the Forfeiture by Wrongdoing Exception is Functionally Different in the Federal Rules of Evidence than the Constitution, Pinkerton Conspiratorial Liability, Alone, is Insufficient to Exempt the Hearsay Statements Because Pinkerton Liability***

Among the Circuits, the generally accepted method for applying the forfeiture by wrongdoing exception requires that the trial court find by a preponderance 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. Dinkins*, 691 F.3d 358, 383 (4th Cir. 2012) (quoting *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005)). Contrary to the decisions of the circuit courts, *Pinkerton* liability should not be stretched to encompass the forfeiture by wrongdoing exception in a criminal context.

Prior to the announced logic in *Giles*, the Tenth Circuit Court of Appeals decided the *Pinkerton* doctrine as applied to the forfeiture-by-wrongdoing analysis for the Sixth Amendment should overcome the Defendant’s Confrontation right. In *United States v. Cherry*, defendant Teresa Price was part of a drug conspiracy, which included her husband. 217 F.3d 811, 813–14 (10th Cir. 2000). Teresa’s husband subsequently murdered a co-conspirator who had been working with the government. *Id.* at 814. Teresa’s husband was held to have “procured the absence of” another conspirator and the district court allow the hearsay statements of the murdered co-conspirator to be used against the husband under 804(b)(6). *See id.* Yet, the district court held that the statements could not be used against Teresa. *Id.* The issue in *Cherry* was “whether Rule 804(b)(6) and the Confrontation Clause permit a finding of waiver based not on direct procurement but rather on involvement in a conspiracy, one of the members of which wrongfully procured a witness’s unavailability.” *Id.* at 815. The court of appeals began its analysis by turning to the rule of evidence.

According to the *Cherry* court, “[w]hile the Confrontation Clause and the hearsay rules are not coextensive...it is beyond doubt that evidentiary rules cannot abrogate constitutional rights.” *Id.* at 816. Thus, according to the *Cherry* court, “if [the] statements are otherwise admissible under the doctrine of waiver by misconduct” then the unavailable declarant’s

statements are admissible. *Id.* After determining that “the acquiescence prong of Fed. R. Evid. 804(b)(6), consistent with the Confrontation Clause, permits consideration of a *Pinkerton* theory of conspiratorial responsibility in determining wrongful procurement of witness availability,” the court considered the acquiescence prong. *Id.* at 818.

The *Cherry* court found no “published opinions adopting or rejecting a theory of agency based on *Pinkerton* liability in the context of the doctrine of waiver by misconduct.” *Id.* But the court did examine several opinions address the general agency concept. *Id.* After examining cases from the First and Eight Circuits and the United States District Court for the District of Columbia, the Tenth Circuit determined that “failure to consider *Pinkerton* conspiratorial responsibility affords too much weight to Confrontation Clause values in balancing those values against the importance of preventing witness tampering.” *Id.* at 820.

Thus, the *Cherry* court held “that a co-conspirator may be deemed to have ‘acquiesced in’ the wrongful procurement of a witness’s unavailability for purposes of Rule 804(b)(6) and the waiver by misconduct doctrine when the government can satisfy the requirements of *Pinkerton*.” *Id.* The Court was well aware that it had to strike a balance between the Confrontation clause and the evil the forfeiture by wrongdoing exemption sought to prevent. *Id.* The *Cherry* court then derived two circumstances upon which it thought the forfeiture-by-wrongdoing exception applied: (1) the defendant “participated directly in planning or procuring the declarant’s unavailability through wrongdoing...; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” *Id.* at 820 (internal citations omitted).

Simply put, the *Cherry* court’s balance was in the wrong direction, especially after the consideration that *Giles* must put in place for the importance of the right of confrontation.

Instead, the importance of the Confrontation Clause should disallow *Pinkerton* liability, alone, to establish the elements of the forfeiture-by-wrongdoing exception. While the *Cherry* court reached its decision eight years prior to the decision in *Giles*, and even prior to the decision in *Crawford*, the impact of *Cherry* is still recognized by the Circuit Courts. Yet this reliance in *Cherry* is incorrect because the balancing test employed by *Cherry* must surely be reversed in light of *Giles*.

Two years after *Giles*, the Fourth Circuit decided *Dinkins*. In *Dinkins*, the court concluded that the language of Fed. R. Evid. 804(b)(6) “support[ed] the application of *Pinkerton* principles of conspiratorial liability in the forfeiture-by-wrongdoing context” because the rule applied to defendants that “acquiesced in wrongfully causing” the unavailability of the declarant witness. 691 F.3d at 385. The court was persuaded by the reasoning of *Cherry* and *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002) (adopting the *Cherry* analysis), and held that participation alone was insufficient, but did identify two circumstances where the forfeiture-by-wrongdoing exception would apply: “when (1) the defendant participated in directly in planning or procuring the declarant’s unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” *Id.* at 385. But the *Dinkins* court did recognize that *Giles* had some impact upon the *Cherry* analysis. The court noted that “a court’s decision under the second prong in *Cherry* must be supported by evidence that the defendant ‘engaged in conduct *designed* to prevent the witness from testifying.’” *Id.* at 385 (quoting *Giles*, 554 U.S. at 359) (emphasis in original)). This modified analysis cannot be met in this case.

Even if the two modified *Cherry* circumstances are found by this Court to be acceptable, neither is satisfied. First, in this case, there was no evidence before the lower court that Mr.

Barnes *directly* participated in the planning or procuring of the declarant Reardon's unavailability. The evidence is to the contrary, actually, when Mr. Barnes told Anderson to "hold off" on whatever Anderson was planning to. (R. 19). As to the second circumstance, if *Dinkins* reads the second prong to include *Giles*, the *Giles* intent cannot be had in this case based on the evidence before the district court and the Fourteenth Circuit.

For the reasons stated above, this Court should require that the *Giles* intent apply to the analysis under the forfeiture-by-wrongdoing exception codified in Rule 804(b)(6) for criminal defendants. This is not to say that the intent requirement applies to civil or regulatory matters, as this is not the question before the Court. But even if this Court adopts the *Dinkins* approach, Mr. Reardon's hearsay statements to Mr. Best should not come in because the first *Cherry* circumstance is not met, nor is the second, modified *Cherry* circumstance met here. Thus, the decisions of the lower courts should be affirmed.

**II. FEDERAL RULE OF EVIDENCE 501 RECOGNIZES A JOURNALIST'S PRIVILEGE THAT PERMITS JOURNALISTS TO KEEP THE IDENTITIES OF INFORMANTS CONFIDENTIAL BECAUSE REASON AND EXPERIENCE DICTATES THAT A JOURNALIST'S RELATIONSHIP WITH AN INFORMANT IS CRITICAL TO THE DISSEMINATION OF NEWS TO THE PUBLIC; THIS PRIVILEGE IS ABSOLUTE BECAUSE THE IMPORTANCE OF ENCOURAGING A FREE PRESS OUTWEIGHS THE GOVERNMENT'S NEED FOR THE REQUESTED EVIDENCE.**

Federal Rule of Evidence 501 holds that "the common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege unless any of the following provide otherwise: the United States Constitution, a federal statute, or rules provided by the Supreme Court." Fed. R. Evid. 501. As originally submitted to Congress, the rule contained a list of nine "specific non-constitutional privileges which federal courts must recognize," including the privilege to keep the identity of an informant confidential. Fed. R. Evid. 501 advisory committee's note. After amendment, the rules were condensed and the

original privileges eliminated from the text—the result being one fluid rule under which further privileges would “continue to be developed by the courts of the United States” in both the civil and criminal context. *Id.*

In *Branzburg v. Hayes*, this Court implied that journalists may be entitled to some level of confidentiality with respect to informants, but declined to recognize a privilege in the absence of federal law on the subject. 408 U.S. 665, 689 (1972). In that case, a reporter had written a news story about his observation of a marijuana operation, but had promised his informants that their identities would remain confidential. *Id.* at 667–68. The reporter was eventually subpoenaed to testify before a grand jury, but upon appearance “refused to identify the individuals.” *Id.* Although the majority did not believe there was enough evidence illustrating “a significant construction of the flow of news to the public” if no journalist’s privilege were recognized, Justice White acknowledged that journalists “frequently” rely on the information received from those who prefer to remain anonymous. *Id.* at 693–94. And despite this Court’s refusal to recognize a journalist’s privilege in the grand jury context, Justice White noted that “Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards as narrow or broad as deemed necessary...as experience from time to time may dictate.” *Id.* at 706.

In fact, states have legislated for a journalist’s privilege and several United States Courts of Appeal have ruled in favor of recognizing such a privilege based on federal common law and Rule 501. Further, because certain relationships demand “an atmosphere of confidence and trust,” the reporter’s privilege that has developed under the federal common law as well as Rule 501 should be absolute. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). In *Jaffee*, the Court determined that where confidentiality in a relationship “serves the public interest,” there exists a

privilege. *Id.* For example, in the psychotherapist-patient context in illustrated in *Jaffee*, the lack of a privilege would harm the effectiveness of the treatment sought—the therapist-patient interactions would “surely be chilled,” and a therapist’s “promises of confidentiality would have little value” if the information were easily discoverable with a subpoena. *Id.* at 13. This is especially true where states have taken great pains to create legislation granting certain professionals a privilege only to have those mandated privileges trumped in federal court. *Id.*

To protect the integrity of the newsgathering business and the importance of the public’s need to stay informed, this Court should interpret Rule 501 as granting an absolute journalist’s privilege to keep the identities of informants confidential regardless of the opposing party’s need for the evidence. The journalist’s privilege is based on the principles of “reason and experience,” and this Court should hold that the privilege is absolute since journalists cannot fully communicate information to the public without a high degree of protection for the trust-based relationships they must form with informants. Thus, because the public interest is best served by protecting a journalist’s ability to form trust-based relationships with informants, which in turn encourages the freedom of the press, this Court should affirm the Circuit Court ruling that journalist’s enjoy an absolute privilege.

**A. *The government’s subpoena compelling Ms. Crawley to reveal the identity of her confidential informant was properly quashed because journalists have a privilege to maintain the anonymity of informants under Federal Rule of Evidence 501.***

Ms. Crawley should not be compelled to reveal the identity of her confidential informant because doing so would significantly hinder her ability to provide the community with accurate information. Because journalists rely heavily on the information gleaned from interactions with informants, “compelling a reporter to disclose the identity of a source may significantly interfere” with a journalist’s essential function—newsgathering. *Zerilli v. Smith*, 656 F.2d 705,

711 (D.C. Cir. 1981). A journalist's privilege is applicable whenever the case at hand implicates "a public interest in protecting the reporter's sources" rather than an interest in breaking the confidentiality between journalist and informant. *Id.* at 712. Some Circuits have approached the journalist's privilege broadly, granting journalists generous flexibility in protecting their sources. For example, the Third Circuit has held that the journalist's privilege extends to gathered information that is both confidential and non-confidential, and those "resource materials" used during the newsgathering and editorial process." *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). But, most notably, the "talisman for invoking the journalist's privilege is [the] intent to disseminate to the public at the time the gathering of information commences." *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 145 (2d. Cir. 1987).

In *von Bulow*, the United States Court of Appeals for the Second Circuit broadly interpreted Rule 501 to include a journalist's privilege, holding that the relevant inquiry is whether the journalist intended to share the information with the public at the time it was gathered. *Id.* There, the District Court had ordered the appellant to turn over a manuscript, investigative documents, and notes she had taken during a criminal trial. *Id.* at 138. The Court of Appeals held that if a journalist can establish "through competent evidence" that she intended to disseminate the news to the public at the time she gathered it, she may invoke the journalist's privilege. *Id.* at 144. Thus, even though it declined to extend the privilege to the appellant in *von Bulow* based on the particular facts involved, the court expressly recognized a journalist's privilege under Rule 501. *Id.*

In fact, other Circuits have held that the journalist's privilege allows a journalist to keep sources other than informants confidential, suggesting that the privilege should be applicable to a broad variety of news sources. *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). In

*Cuthbertson*, the Third Circuit held that “resource materials” are also protected by the journalist’s privilege if the “free flow of information to the public” would be hindered as a result of the compelled disclosure. *Id.* at 147. The Ninth Circuit also adopted the construction that “the journalist’s privilege is designed to protect investigative reporting regardless of the medium used” during investigation. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993). Thus, the journalist’s privilege offers broad protection for many types of resources relied upon in the newsgathering process—confidential or non-confidential—that federal courts have continued to recognize as legitimate.

States have also carved out a similar privilege via statutory provisions and judicial decisions. As of 2007, over half of the states, including the District of Columbia, had recognized a journalist’s privilege. Anthony L. Fargo & Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist’s Problem*, 33 Wm. Mitchell L. Rev. 1347, 1379 (2007). Even those states without “shield laws,” or laws granting journalist’s a privilege, there is either a common law journalist’s privilege or constitutional provision recognizing one. *Id.* at 1356. For example, the Washington State Supreme Court adopted a broad approach, noting that the common law “is a living, vital body of law which should address the problems of the day.” *Senear v. Daily Journal-American Division of Longview Publishing Co.*, 97 Wash. 2d 148, 156 (1982). In recognizing a journalist’s privilege in criminal cases, the Court reasoned that “it is absolutely essential for a reporter to have the privilege against disclosure of confidential sources and information” because a journalist is “no better than his or her sources of information.” *State v. Rinaldo*, 36 Wash. App. 86, 89 and 96 (1983).

Similarly, the Supreme Court of Vermont ruled that a journalist may decline to answer “inquiries put to him in a deposition proceeding conducted in a criminal case.” *State v. St. Peter*,

132 Vt. 266, 271 (1974). In *St. Peter*, a journalist was held in contempt for refusing to answer questions about his source of information concerning a drug raid. *Id.* at 267. The Court articulated that the *Branzburg* decision “confines itself to grand juries” and should not bar the recognition of a journalist’s privilege in other contexts. *Id.* at 269–70. The Court also concluded that the question of whether the journalist’s privilege should prevail over a request for discovery depends on the situation at hand, especially since “legitimate objections to disclosure based on First Amendment grounds require careful evaluation by the judicial officer before answers are compelled.” *Id.* at 271. Thus, state courts have aptly concluded that journalists do enjoy at minimum a qualified privilege to protect confidential sources.

State legislatures have also specifically addressed the journalist’s privilege conundrum by clearly articulating its scope. For instance, the Utah legislature outlined the journalist’s privilege with respect to the disclosure of confidential information. Utah R. Evid. 509. Under Rule 509, the Utah legislature defined “news reporter” to include any individual “gathering information for the primary purpose of disseminating news to the public.” Utah R. Evid. 509(1)(a). This is a broad classification that applies to journalists working with a variety of mediums. *Id.* Further, a “confidential source” constitutes any person or piece of information that would be “likely to lead to disclosure of the identity of a person who gives information to a news reporter *with a reasonable expectation of confidentiality.*” Utah R. Evid. 509(2) (emphasis added). Thus, journalists in Utah enjoy a broad—albeit qualified—privilege to avoid disclosing the identities of their confidential sources if that source had a reasonable expectation that his or her identity would remain private. *Id.*

While state law is not binding in federal courts, the Second Circuit has referenced state law for guidance in determining the scope of the journalist’s privilege. *See, e.g., von Bulow*, 811

F.2d at 144. In *von Bulow*, the court consulted New York state law to identify “the boundaries of the journalist’s privilege.” *Id.* Although the Court noted that it was not required to adhere to New York’s approach, the court did recognize that it should not “ignore New York’s policy of giving protection to professional journalists.” *Id.* Because New York’s law on the journalist’s privilege was “congruent” with the federal law, the Court concluded that there was indeed a journalist’s privilege to protect confidential and non-confidential sources. *Id.* at 144–45.

But some Circuits have failed to recognize a journalist’s privilege altogether—qualified or otherwise— and have adhered strictly to the confines of the *Branzburg* decision without considering the public policy repercussions of affording journalists no privilege to maintain confidentiality. *See, e.g., McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987). In *McKevitt*, the Seventh Circuit argued that there was no “need for special criteria merely because the possessor of the documents or other evidence sought is a journalist” and that non-confidential sources do not implicate protection under the First Amendment. 339 F.3d at 533. The court did not engage in any discussion about the possible benefits of recognizing a journalist’s privilege and quickly concluded that a journalist’s privilege would only be justified where compelling a journalist to reveal her sources is used “not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources.” *See id.* This proposition is problematic because recognizing a journalist’s privilege under such limited circumstances would not maintain the trust-based relationships journalists must have with informants in order to freely communicate news to the public. This trust-based relationship is imperative both in situations where journalists are compelled to reveal their sources and in situations in which they are not, and the significance of that trust does not change simply because a journalist is involved in litigation.

The Court should recognize a journalist's privilege under Rule 501 because United States Courts of Appeal have continuously granted journalists a privilege pursuant to Rule 501 and federal common law, as have states through constitutional provision, statute, or common law. Several Circuits have broadly interpreted Rule 501 as granting journalists a wide range of protection for many types of news sources, including confidential informants. Here, recognizing a journalist's privilege under Rule 501 is the only effective method for preserving the trust-based relationship that is imperative in the newsgathering process. Ms. Crawley testified that her confidential informant was very concerned with keeping his or her identity confidential, and it is highly likely that he or she would have been unwilling to speak with Ms. Crawley if confidentiality was not promised. (R. 10). Additionally, the importance of maintaining the confidentiality of Ms. Crawley's informant is critical because the informant expressed a serious concern for his or her safety. (R. 10).

Further, because Ms. Crawley visited the Circus with the intention of writing a news article, she had the requisite intention to disseminate news at the time she investigated her news story, pursuant to the test promulgated in *von Bulow*. (R. 9). Ms. Crawley testified that she intended to expose any animal rights violations at the Circus when she spoke with her confidential informant. (R. 9). Thus, because Ms. Crawley's ability to disseminate news to the community would be significantly hindered if she were compelled to disclose the identity of her confidential informant, the Court should uphold the ruling of the Fourteenth Circuit granting her a journalist's privilege under Rule 501.

**B. *The Courts Should Recognize An Absolute Journalist's Privilege Because Public Policy Requires That The Trust Between Journalists And Informants Be Maintained As Much As Possible.***

“The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source.” *Branzburg*, 408 U.S. at 728 (Stewart, J., dissenting). If no absolute privilege is recognized, “an unchecked power to compel” will force a break-down between journalists and informants, and an informant’s desire to come forward as well as a reporter’s desire to publish will be significantly hindered. *Id.* at 731. Furthermore, a qualified journalist’s privilege will discourage informants from speaking with the press because “making the promise of confidentiality contingent upon a trial judge’s later evaluation” of whether an informant’s identity should remain confidential “would eviscerate the effectiveness of the privilege.” *Jaffee*, 518 U.S. at 17.

Even where the journalist’s privilege is not absolute, most Courts of Appeal have adopted at the very minimum a qualified privilege that requires courts to balance the interests of protecting confidential sources against the requesting party’s interests in disclosure. *See, e.g., U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). Under such a balancing test, the requesting party’s burden of proof is high, and information will only be disclosed if the requesting party demonstrates a strong “need for the material against the interests of the underlying privilege.” *See id.* at 148. Only where the requesting party cannot access the information from other sources will the journalist’s privilege be disturbed. *See id.* Thus, the journalist’s privilege will usually receive deference and will not be overcome if the information is available through other channels.

Other Courts of Appeal have required requesting parties to explore the availability of the information sought from alternative sources and will evaluate whether there is a “compelling

need for disclosure.” *Shoen*, 5 F.3d at 1296 (9th Cir. 1993). For example, the Ninth Circuit has ruled that disclosure will not be required absent “a sufficiently compelling need for the journalist’s materials,” and only where the information sought is not available through other avenues will the court compel disclosure. *Id.* In *Shoen*, the Ninth Circuit noted that this applies to situations where a journalist guarantees confidentiality and situations where a journalist does not. *Id.* at 1292. There, the appellant was an author involved in a defamation lawsuit between a father and two sons. *Id.* at 1290. After refusing to reveal information pertaining to his communications with the father in the lawsuit, the District Court compelled the author to disclose the information and eventually held him in contempt when maintained his refusal to reveal his sources. *Id.* at 1291. On appeal, the Ninth Circuit concluded that pursuing “all reasonable alternative means for obtaining the information” is a “threshold requirement,” and that parties who fail to look elsewhere for the requested information before moving to compel a journalist to reveal confidential sources will not be permitted to “penetrate the journalist’s shield.” *Id.* at 1296.

The Fourth Circuit has also reached a similar conclusion. *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 2000). In *LaRouche*, a National Broadcasting Corporation producer refused to reveal the source of inflammatory statements in a defamation action. *Id.* at 1136. In affirming the District Court’s ruling, the Fourth Circuit concluded that because the requesting party did not exhaust all alternative avenues of obtaining the requested information, he had not demonstrated a sufficient need to override the journalist’s privilege. *Id.* at 1139.

The immediate case demonstrates that recognition of an absolute journalist’s privilege under Rule 501 is the only way to adequately safeguard the newsgathering process and preserve its significance in a free society. However, even under a qualified journalist’s privilege, the Court

should not permit the disclosure of the confidential informant's identity because the public's interest in maintaining a trust-based relationship with journalists outweighs any evidentiary interest in this information. Rule 501 permits the Court to develop privileges "in the light of reason and experience." Fed. R. Evid. 501. Here, Ms. Crawley obtained information from a then-employee of the respondent, who expressly requested that his or her identity remain anonymous for fear of retaliation. (R. 10, ll. 141–45). Ms. Crawley would have been unable to acquire this information if she were unable to assure the informant that his or her identity would not be revealed. And, if Ms. Crawley's informant was too uncomfortable to come forward, the public would not have benefitted from the information Ms. Crawley gathered. Reason and experience has been the cornerstone in the development of Rule 501, and should continue to be as long as journalists rely on an informant's trust to continue disseminating news to the public. The Fourteenth Circuit correctly addressed these public policy concerns when it concluded that Ms. Crawley enjoyed an absolute journalist's privilege, and its ruling should be upheld accordingly.

**III. FEDERAL RULE OF EVIDENCE 701 PROHIBITS AGENT SIMANDY FROM TESTIFYING AS A LAY WITNESS CONCERNING ALLEGED CODE WORDS OR PHRASES BECAUSE A LAY WITNESS MUST EITHER PARTICIPATE IN THE ACTUAL CONVERSATION OR CONTEMPORANEOUSLY OBSERVE THE SPEAKER IN ORDER TO TESTIFY PURSUANT TO RULE 701.**

Federal Rule of Evidence 701 provides that "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 understand the witness's testimony or determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge with the scope of rule 702." Fed. R. Evid. 701. A "witness's perception" is limited to information obtained by first-hand knowledge or observation. Fed. R. Evid. 701 advisory committee's note. This limitation

prevents Rule 701 from being used as an improper avenue for admitting expert testimony as lay witness testimony. *See* Fed. R. Evid. 701 advisory committee’s note.

To preserve a clear line of demarcation between Rules 701 and 702, Congress created two rules rather than just one. Rather than distinguishing “between expert and lay witnesses,” Rule 701 distinguishes between what constitutes lay testimony and expert testimony. Fed. R. Evid. 701 advisory committee’s note. *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997). Lay witnesses are only allowed to testify based on their personal firsthand knowledge or observation. Fed. R. Evid. 701. Rule 702, on the other hand, governs admission of expert opinion testimony concerning specialized knowledge based on skill, experience, training, or education. Fed. R. Evid. 702. .

One specific situation that invokes the fine line between Rule 701 and Rule 702 is when a law enforcement officer provides lay witness testimony. *See, e.g., United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). When not qualified as an expert, the testimony of law enforcement personnel is relegated to the realm of Rule 701’s requirement of first-hand knowledge or observation. *Id.* at 641. Where the lay testimony of a law enforcement officer becomes indistinguishable from expert testimony, the line between lay and expert testimony has been overstepped. *United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006). Allowing officers to offer specialized opinions based on training, experience, knowledge, and education would circumvent Rule 701—a result Congress specifically intended to avoid by drafting Rule 702. *Figueroa-Lopez*, 125 F.3d at 1246.

Law enforcement officers may only provide lay witness testimony concerning code words or phrases if they have firsthand knowledge of a particular conversation, actually participated in that conversation, or observed the conversation. *Peoples*, 250 F.3d at 641. Rule

701 does not preclude law enforcement officers from offering lay witness testimony about code words or phrases, but does require that law enforcement officers have first-hand knowledge or observations concerning a particular conversation. Fed. R. Evid. 701 advisory committee's note.

The Eleventh Circuit has addressed the firsthand knowledge and observation requirement concerning the interpretation of unclear words. *United States v. Awan*, 966 F.2d 1415, 1429–31 (11th Cir. 1992). In *Awan*, an undercover agent was physically present during the conversations between the defendants. *Id.* at 1429. The Agent also participated in the conversation and observed the speakers' body language. *Id.* at 1430. Because the agent could testify to his interpretation of the ensuing conversation, the defendants' body language, and the mannerisms involved, the court concluded that the agent's testimony was admissible under Rule 701. *Id.* The court then described the agent's testimony as "well within the ambit of Rule 701" because agent had witnessed a live conversation and had first-hand knowledge of the conversations. *Id.*

If a law enforcement officer was not present during a conversation, did not participate in a conversation, or does not have any personal knowledge of the live information dispensed during that conversation, then the officer's testimony is not based on first-hand knowledge or live observations. *Peoples*, 250 F.3d at 641. In *Peoples*, an agent was called upon to testify concerning the meaning of code words and phrases used between defendants. *Id.* at 640. The agent did not personally observe the events or activities discussed, nor did she hear or observe the conversations as they occurred. *Id.* at 640. In fact, the agent only joined the investigation after the alleged perpetrators were in custody. *Id.*

The court held that the agent did not formulate her opinion through interaction, observation, or personal experience because she had reached her conclusions based on post hoc investigation. *Id.* In addition, the agent's testimony did not assist the jury in understanding the

evidence. *Id.* The court concluded that the agent’s testimony was merely argument parading around as evidence. *Id.* at 641. Additionally, the court held that admitting the agent’s testimony under Rule 701 would permit expert testimony to come in under the guise of lay testimony, a purpose Congress expressly wanted to avoid by drafting Rule 702. *See id.*

Testimony elicited from a law enforcement officer concerning his credentials and training rather than his firsthand knowledge or observations is also not permissible under Rule 701. *United States v. Johnson*, 617 F.3d 286, 292–93 (4th Cir. 2010). In *Johnson*, the government called an agent to testify regarding his interpretation of recorded phone calls. *Id.* at 292. The testimony was focused on the agent’s credential and training, and did not touch upon any of the agent’s firsthand knowledge or observations. *Id.* at 293. The agent formulated his opinions about the case based on interviews with suspects rather than his own perceptions of recorded conversations, and the court therefore held that the agent’s post-hoc assessments could not “serve as a substitute for personal knowledge or observation.” *Id.*

Where a law enforcement officer’s testimony is “rationally based on his perception,” his testimony is only admissible under Rule 701 if the officer has expended large amounts of time studying a particular case. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). In *Jayyousi*, an FBI agent did not personally participate in any conversations and was not present when conversations took place, but had listened to several live telephone conversations in both Arabic and English. *Id.* Because the agent had worked on the case for several years, had read hundreds of transcripts, and was able to link the defendant’s specific code words to existing actions, the court concluded that the agent had based his testimony on his rational perception and admitted the testimony under Rule 701. *Id.* at 1102–03.

Here, Agent Simandy's testimony fails to qualify under Rule 701 as firsthand knowledge or observation because he did not participate in any of the conversations in question, and was not even physically present when those conversations occurred. In fact, while the agent in *Awan* had firsthand knowledge from listening to voice inflection and observing the speakers' body language, Agent Simandy's only knowledge and observation of the conversations in this case are derived from a transcript prepared by a third party and someone else's perception of an unrecorded phone call. Additionally, Agent Simandy's testimony will be inadmissible even under the expansive rule promulgated in *Jayyousi* because Agent Simandy had no live interaction with the defendant's words.

The immediate case is distinguishable from *Jayyousi* for a number of reasons. First, although the agent in *Jayyousi* was not physically present during any conversations, he had the benefit of listening to several conversations in two different languages. Here, Agent Simandy did not listen to any live recordings. Further, the agent in *Jayyousi* worked on a case for five years and was able to connect code words and phrases with specific actions, such as travel or the establishment of terrorist training camps, but Agent Simandy worked on the case only after the respondent had been in custody for just fifteen days. Finally, Agent Simandy had no pre-arrest interaction with the case, and could not connect code words with specific actions until he discussed the case with other federal agents, unlike the agent in *Jayyousi*, who had put significant amounts of time into his investigation and was able to testify to his personal perception of recorded phone calls.

Conversely, the instant case is very similar to both *Peoples* and *Johnson*. In *Peoples*, the court found that a law enforcement agent was barred from giving lay testimony as to the meaning of code words and phrases. The court barred the agent from giving lay testimony because the

agent based her entire testimony on post-hoc investigations and interviews rather than first-hand knowledge or observation. Like the agent in *Peoples*, Agent Simandy did not personally observe, interact, or observe any conversations between Anderson, and Reardon, and Mr. Barnes. Further, in *Johnson*, the court held that because a law enforcement agent did not rely on recorded phone calls to reach his conclusion but rather relied only on post-arrest investigations, his testimony was not properly admitted under Rule 701. And, just as the agent's investigation in *Johnson* was confined to materials prepared by someone else, Agent Simandy reached his conclusions based solely on his perception of information he himself did not actually hear or even transcribe.

In conclusion, admitting Agent Simandy's testimony under Rule 701 would circumvent the purposes of Rule 702, which was specifically drafted to cover expert testimony. Here, Agent Simandy's testimony was based on his rational perception of records compiled by others. Agent Simandy was not present during the conversations in question and he was not a participant in those interactions. In fact, Agent Simandy formulated his opinions based on information compiled for others, and was not privy to any live recordings. The bulk of Agent Simandy's conclusions were part of a post-arrest investigation, whereas the agent in *Peoples* had engaged in a pre-arrest investigation, relying on his own perceptions as the information was intercepted. Like the court's conclusion in *Johnson*, it is logical to conclude that if Agent Simandy's testimony is permitted under Rule 701, Agent Simandy would be testifying more as an expert witness than a lay witness, and therefore violating Rule 702. Thus, Agent Simandy's testimony should not be admissible under Rule 701.

**CONCLUSION**

For the reasons stated above, Respondent respectfully requests that the decision of the United States Court of Appeals for the Fourteenth Circuit be affirmed.

Respectfully submitted,

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Counsel for Respondent

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