No. 12-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2012

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES

Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Does Fed. R. Evid. 804(b)(6) allow admission of otherwise inadmissible hearsay evidence under the doctrine of forfeiture-by-wrongdoing where there is no evidence that the defendant intended to procure the unavailability of the declarant, and the government relies on evidence that the defendant could reasonable have foreseen that his co-coconspirator would murder the declarant in order to silence him?

II. Does Fed. R. Evid. 501 allow recognition of an absolute or qualified privilege for journalists in order to keep anonymous sources from being identified or called to testify?

III. Does Fed. R. Evid. 701 allow a witness to testify to alleged code words and phrases in conversations, when the witness neither participated in not observed the conversations, but merely read transcripts of them and reviewed the investigatory work of other law-enforcement personnel?

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STATEMENT OF THE CASE

Statement of Facts

William Barnes ("Barnes") and Alfred Anderson ("Anderson") were co-owners of the charity "Boerum 4 Animals" and Barnes was the sole proprietor of Big Top Circus ("Big Top") (R. 1.) "Although Big Top is nationally-known for its large herd of twenty elephants, by July 2011, it approached bankruptcy." (R. 1.) In July 2011, Big Top's accountant informed Barnes that Big Top required $500,000 of additional capital by December 2011 or be faced with bankruptcy. (R. 1.) Barnes confirmed that Big Top's finances were in jeopardy, and contacted Boerum City Circus ("Boerum City") and Flying Feats Circus ("Flying Feats") , and invited them to participate in the "greatest elephant show on earth" to begin that December. (R. 2.) For the show, Boerum City and Flying Feats each planned on transporting ten Asian elephants to arrive at Big Top on December 2, 2011. (R. 2.)

According to the Government, Barnes contacted Anderson in July 2011 and "offered him the opportunity to 'hunt' elephants on [Barnes's] property and … a share of the ivory in an attempt to reap what profit [Barnes] could from the crumbling circus." (R. 2.) The two then decided to find a third hunter. (R. 2.) In September 2011, the two discovered that James Reardon ("Reardon"), a long-time acquaintance of Anderson's, was interested in participating in the "elephant-hunting scheme." (R. 2.)

"On or about October 1, 2011, Anderson accepted [Barnes's] proposal on behalf of himself and Reardon, contingent on [Barnes] providing the necessary equipment for the hunt." (R. 2.) Barnes contacted Weapons Unlimited, located in Texas to determine the price of three assault rifles. (R. 2.) Barnes's contact at Weapons Unlimited was Jason Lamberti, an undercover Bureau of Alcohol, Tobacco, and Firearms ("ATF") agent. (R. 2.) Lamberti informed Barnes that each weapon would cost $1000, plus $300 in fees, and that there was a three month waiting

period to acquire a semiautomatic AK-47 legally in Boerum. (R. 2.) However, Lamberti also told Barnes "that if he was willing to deal under the table," Barnes could obtain the weapons immediately for $500 each. (R. 2.) Barnes accepted the offer, paid in full, and arranged for the weapons to be delivered on December 5, 2011. (R. 2.) Based upon information provided by Agent Lamberti, "the FBI obtained a warrant permitting interception of [Barnes's] telephone communications." (R. 2.)

In early October 2011, Barnes contacted a sales representative at Copters Corporation in Texas to arrange a one-day rental of a helicopter for December 15. (R. 3.) "On or about October 15, [Barnes] contacted Anderson and informed him that arrangements were complete." (R. 3.) According to the Government, "[Barnes] and Anderson finalized the deal, and agreed that the hunt would take place on December 15, 2011." (R. 3.) Anderson wired Barnes $1,000 on behalf of himself and Reardon to cover the cost of the weapons.

Agent Narvel Blackstock was initially assigned to the investigation of these previous conversations; and he listened to the conversations contemporaneously and transcribed them, but died on December 14, 2011 in unrelated events. (R. 23.) On December 15, the case was transferred to Agent Thomas Simandy who reviewed transcripts of the conversations between Barnes, Anderson, and Reardon and conducted interviews of Agent Lamberti and Alan Klestadt from Copters Corporation concerning their communications with Barnes. (R. 23.) The Government sought to introduce Agent Simandy's lay witness opinion regarding alleged code words and phrases recorded during the telephone conversations between Barnes, Anderson, and Reardon. (R. 23.) Agent Simandy testified that Barnes's "references to 'blood diamonds' referred to ivory tusks … 'Charlie tango' … [referenced]… the helicopter … "black cat" … [referenced] the three AK-47s." (R. 23-24.)

In further conversations, Barnes told Anderson "[j]ust tell [Reardon] we called it off and not to worry about it," "[h]old off," and "I don't want anything to do with this." (R. 19.) On November 28, 2011, Reardon told his friend, Daniel Best, of the conspiracy and "[Reardon's] concerns that Anderson might harm him." (R. 24.) On the evening of November 29, Best drove to Reardon's home and observed Anderson running out of Reardon's front door, and found Reardon dead inside. (R. 24.)

In August 2011, Barnes contacted Kara Crawley ("Crawley"), a reporter at the Boerum Times, and invited her to visit Big Top. Barnes granted her unrestricted access to the circus in order to research and write an article concerning the planned event. (R. 2, 22.) During Crawley's visits to Big Top she "met an employee who wished to reveal information the employee had learned regarding [Barnes's] plans for the elephants." (R. 22.) The employee requested that Crawley keep his or her identity confidential. The employee did permit Crawley to videotape interviews, however these were "intended solely for [Crawley's] notes and was not intended to be shown to the public." (R. 22.) On December 1, 2011, Crawley published an exposé of Barnes's plan to kill the elephants based upon information provided by the unidentified source, and Barnes was taken into federal custody later that day. (R. 3.)

Procedural History

On December 4, 2011, Barnes was indicted and charged with conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922 (2006), conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. (R. 21.) Before trial, the Government moved *in limine* to introduce out-of-court statements made by the late Reardon to Daniel Best, as an exception to the hearsay rules under Rule 804(b)(6). (R. 6.) The Government also moved to

introduce testimony of Agent Simandy as a lay witness under Rule 701. (R. 6-7.) Another motion was brought by Crawley, to quash a subpoena to testify based upon journalist privilege. (R. 6.)

On May 1 and May 2, 2012, the United States District Court for the Southern District of Boerum heard evidence and oral arguments on the motions, and on May 2, the District Court ruled against the Government on all three motions. (R. 25.) Pursuant to 18 U.S.C. § 3731, the United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 20.) On July 12, 2012, the Circuit Court affirmed the decision of the District Court on all issues, ruling against the government on all relevant motions. (R. 27, 28, 29, 30, 32.) The Government subsequently filed a petition for writ of certiorari, and this Court granted certiorari for its October 2012 term. (R. 36.)

SUMMARY OF THE ARGUMENT

In the present case, the lower courts both correctly ruled that: (1) Daniel Best's conversation with James Reardon is not admissible under Fed. R. Evid. 804(b)(6); (2) federal common law recognizes a journalist's privilege under Rule 501 and that privilege is absolute; and (3) the lay witness opinion testimony of Agent Simandy is not admissible under Rule 701. First, the hearsay statements made during the conversation with Best and Reason were properly excluded under Rule 804(b)(6). The government failed to meet its burden in demonstrating that Barnes wrongfully acquiesced in causing the declarant's unavailability nor that Barnes did so intending that result. Without proof that the defendant intended to prevent the witness from testifying, the forfeiture-by-wrongdoing exception of 804(b)(6) is not satisfied. Furthermore, the forfeiture-by-wrongdoing exception should not be extended through conspiratorial liability. The government failed to prove that Mr. Barnes engaged in conduct that was designed to prevent the witness from testifying, and only alleged that the declarant's death was reasonably foreseeable to Mr. Barnes.

Second, the name of the journalist's informant was properly protected and excluded under Rule 501. Rule 501 is designed to allow the law to change in order to recognize new and different privileges, which this Court has done before in recognition of the psychotherapist-patient privilege. Currently, all of the federal circuits recognize some form of a journalist's privilege. An absolute privilege is the proper standard in order to ensure that the press is able to reveal information and hold members of society and elected officials accountable for their actions. Without this guarantee, informants will be reluctant to come forward, and the press may never have an opportunity to expose potential crimes. Thus, an absolute privilege is the only way to allow for a fully functioning free press as guaranteed by the First Amendment.

Finally, the lay witness opinion testimony by Agent Simandy was properly held inadmissible under Rule 701. First, the testimony by Agent Simandy is expert testimony governed by Rule 702 and therefore inadmissible as lay witness testimony under Rule 701. Agent Simandy offered his conclusions on what code words meant, rather than allowing the jury to draw these inferences on its own. Furthermore, Agent Simandy had no personal knowledge either as a participant in the conversation or as a listener to the conversation; rather Agent Simandy relied on transcripts created by a previous agent assigned to the case. Thus, Agent Simandy does not meet the traditional evidence rule that a witness must have personal knowledge. Finally, Rule 701 was changed in 2000 in order to narrow the rule, so that expert witnesses would not provide testimony in the guise of lay witness testimony. Therefore, it would violate congress's intent to allow Agent Simandy to offer expert testimony without first meeting Rule 702's requirements. Accordingly, this Court should affirm the ruling of the Circuit Court on all the issues.

ARGUMENT

I. THE EXPRESS LANGUAGE OF FEDERAL RULE OF EVIDENCE 804(b)(6) REQUIRES EVIDENCE THAT THE CRIMINAL DEFENDANT INTENDED TO PREVENT A WITNESS FROM TESTIFYING, AND THAT REQUIREMENT EXCLUDES THE APPLICATION OF CONSPIRATORIAL LIABILITY TO RULE 804(b)(6).

Federal Rule of Evidence 804(b)(6) makes otherwise inadmissible hearsay evidence admissible, provided the statement was "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) (emphasis added). This doctrine, known as forfeiture-by-wrongdoing, is a long-recognized exception to the rule against hearsay. *See Crawford v. Washington*, 541 U.S. 36, 62 (2004). Chief Justice Waite, writing for the majority in *Reynolds v. United States*, stated that "[t]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Reynolds v. United States*, 98 U.S. 145, 158 (1879); *see also United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005). With the adoption of Rule 804(b)(6) in 1997, the common law doctrine of forfeiture-by-wrongdoing was codified as an exception to the general rule barring admission of hearsay evidence universally recognized. In order to apply the forfeiture-by-wrongdoing exception, a court must first find, by a preponderance of the evidence, *see United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002), 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." *See, e.g., United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005).

This Court, in *Giles v. California*, concluded that the forfeiture-by-wrongdoing exception required "that the defendant intended to prevent a witness from testifying." *Giles v. California*, 554 U.S. 353, 361 (2008). Therefore, *Giles* distinguished California's version from the founding-era exception, and held California's version to contain no requirement that defendant intend the witness's absence. *Id.* at 366. Rather, Giles held that "[t]he terms used to define the scope of the forfeiture rule suggest that the exception applied *only* when the defendant engaged in conduct designed to prevent the witness from testifying." *Id.* at 358-59 (emphasis added). In order to properly define the scope of forfeiture-by-wrongdoing, Rule 804(b)(6) should be limited to those circumstances in which the criminal defendant himself "intended to prevent a witness from testifying" by engaging in "conduct designed to prevent a witness from testifying." *Id.* at 361.

Therefore, in order for hearsay statements to be admissible under Rule 804(b)(6), a criminal defendant must have actively participated in or sought out the silencing of a witness. Also, because *Giles*, 554 U.S. at 359 requires a defendant to have engaged in conduct "designed to prevent the witness from testifying," this Court ought to hold that conspiratorial liability, as articulated in *Pinkerton v. United States*, 328 U.S. 640 (1946), is inapplicable to forfeiture-by-wrongdoing analysis. However, if it is found that traditional principles of vicarious liability are applicable to forfeiture-by-wrongdoing analysis, then this Court should hold that the Government must prove by a preponderance of the evidence each component of conspiratorial liability, consistent with Rule 804(b)(6); the offense was committed (1) in furtherance of the conspiracy, (2) within the scope of the unlawful project, and (3) was reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. *Id.* at 647-48. Accordingly, the District Court judge properly denied the Government's motion *in limine* seeking to introduce Best's testimony because: (1) the language of Rule 804(b)(6) requires a showing that a defendant "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); and (2) that mere foreseeability and participation in an alleged conspiracy do not of themselves establish that a defendant has intended or designed to render the witness unavailable.

A. The Government Failed To Meet Its Burden In Demonstrating, By The Express Language Of Rule 804(b)(6), That Barnes Wrongfully Caused Or Acquiesced In Wrongfully Causing The Declarant's Unavailability Nor That Barnes Did So Intending That Result.

"Because the Federal Rules of Evidence are a legislative enactment, we turn to the traditional tools of statutory construction in order to construe their provisions. We begin with the language itself." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). "The text of Rule 804(b)(6) requires only that the defendant intend to render the declarant unavailable 'as a witness.'" *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). "A defendant who wrongfully and intentionally renders a declarant unavailable as a witness in any proceeding forfeits the right to exclude, on hearsay grounds, the declarant's statements at that proceeding and any subsequent proceeding." *Id. at 242; citing United States v. Aguiar, 975 F.2d* 45, 47 (2d Cir. 1992). Those statements are admissible only if the district court properly found, by a preponderance of the evidence, that "(1) [defendant] engaged in some wrongdoing (2) that was intended to procure [declarant's] unavailability as a witness and (3) that did, in fact, procure his unavailability as a witness." *Gray*, 405 F.3d at 243.

In *Gray*, the Fourth Circuit found out-of-court statements made by a deceased declarant admissible under Rule 804(b)(6). *Id.* The court noted that, "[a]lthough the Rule requires that the wrongdoing was intended to render the declarant unavailable as a witness, we have held that a defendant need only intend 'in part' to procure the declarant's unavailability." *Id.* at 242. The court held that the "district court in this case found that [declarant] 'was killed prior to the court

date on November 15 and 16, and after the defendant was well aware of his status as a witness, justified the inference that … the killing was motivated … to prevent [declarant] from being available … at court proceedings.'" *Id.* at 243.

Similarly, in *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001), the Second Circuit held hearsay statements made by two deceased declarants admissible because the record amply demonstrated that defendant murdered both individuals to "deprive the government of potential witnesses." *Id.* at 657-58. The criminal charges in *Dhinsa* revolved around defendant's role as leader of an unlawful enterprise and included offenses such as murder, conspiracy to commit murder, among others. *Id.* at 643-45. The court recognized the essential trial right of confrontation, but also noted that it may be waived by the defendant's misconduct. *Id.* at 651. "Consistent with that principle, [the Second Circuit], as well as a majority of [their] sister circuits, have also applied the waiver-by-misconduct rule in cases where the *defendant* has wrongfully procured the witnesses' silence through threats, actual violence or murder." *Id.* (emphasis added); citing *United States v. Cherry*, 217 F.3d 811, 814-15 (10th Cir. 2000) (murder); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (murder); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997) (per curiam) (murder); (citations omitted).

Gray and *Dhinsa* are distinguishable from the present case. In both cases, the government met their burden in establishing, by a preponderance of the evidence, that defendant (1) engaged in some wrongdoing (2) intended to procure [the declarant's] unavailability as a witness and (3) that did, in fact, procure his unavailability as a witness. *Gray*, 405 F.3d at 243. In *Gray*, the government admitted corroborating evidence that established the defendant's participation in murdering the declarant as well as intent to do so. *Id.* at 239-40. Similarly, in *Dhinsa*, the government presented substantial evidence showing defendant specifically instructed other

individuals to kill declarants in order to eliminate the risk of declarants cooperating with law enforcement. *Id.* at 644-45. Moreover, the government's evidence showed that the defendant, in both *Gray* and *Dhinsa*, directly participated in or schemed to bring about the witness's absence from trial. In *Gray*, evidence proved the defendant's motive and demonstrated that she was an active participant in murdering the declarant. *Id.* at 239-240. . In *Dhinsa*, evidence proved the defendant's motive for bringing about the declarant's absence from trial. *Dhinsa*, 243 F.3d at 644-45.

However, in the present case the Government failed to prove either that Barnes "engaged or acquiesced in wrongdoing" or "intended to render the declarant unavailable as a witness." *Gray*, 405 F.3d at 241. The sole piece of evidence presented consists of two telephone conversations between Barnes and Alfred Anderson. (R. 18-19.) During the first conversation, after Anderson voiced his concerns about Reardon's "second thoughts," Anderson proposed: "Let's get rid of [Reardon]." (R. 18.) Barnes responded, "Yeah, well, don't do anything" and "You're worried over nothing." (R. 18.) In the second conversation, Anderson stated "I'm gonna take care of him" and "I'm doing it." (R. 19.) In contrast, Barnes attempted to calm Anderson and said "Just tell [Reardon] we called it off and not to worry about it," and specifically stated "Hold off." The content of the conversations demonstrates that Barnes did not wrongfully cause or acquiesce in wrongfully causing Reardon's death nor did Barnes do anything intending that result. Instead, the transcripts show that Anderson was the catalyst behind Reardon's death; in fact, Anderson confessed to killing Reardon. (R. 7.) The transcripts failed to establish that Barnes "engaged in conduct designed to prevent [Reardon] from testifying," as is required for the forfeiture-by-wrongdoing exception under *Giles*, 554 U.S. at 359. Rule 804(b)(6) "establishes the general proposition that a defendant may not benefit from *his or her wrongful prevention* of

future testimony from a witness or potential witness." *Emery*, 186 F.3d at 926 (emphasis added). The government concedes that "[Barnes] was neither present at Reardon's murder," nor did [Barnes] order Anderson to kill Reardon. (R. 26-27.)

Therefore, the Circuit Court properly determined, in accordance with the decision of this Court in *Giles*, the forfeiture-by-wrongdoing exception of 804(b)(6) applies only when the defendant intended to prevent the witness from testifying.

B. Extending Forfeiture-By-Wrongdoing Through Conspiratorial Liability Is Inappropriate, Here, Because The Government Failed To Prove Barnes' Engaged In Conduct "Designed To Prevent The Witness From Testifying," And Alleged Only That The Declarant's Death Was Reasonably Foreseeable To Barnes.

As discussed above, this Court concluded that forfeiture-by-wrongdoing required that defendant "intended to prevent a witness from testifying." *Giles*, 554 U.S. at 361. In fact, this Court stated: "[w]e are aware of *no case* in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying." *Id.* (emphasis added). The Court went further and explained that "[t]he manner in which the rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the defendant *intended* to prevent a witness from testifying." *Id.* (emphasis added). Thus, the court of appeals was correct when it held:

> Forfeiture through conspiratorial liability is inconsistent with this requirement. That a defendant could have reasonably foreseen that a co-conspirator would silence a witness does not mean that the defendant intended or designed that outcome.

(R. 27.) This line of reasoning is consistent with decision of this Court in *Pinkerton* as well as decisions in both the Tenth and Eleventh Circuits.

In *Pinkerton*, 328 U.S. 640, the Court recognized the law of conspiracy and held "the overt act of one partner in crime is attributable to all." *Id.* at 647. "Motive or intent may be

proved by the acts or declarations of some of the conspirators in furtherance of the common objective." *Id.* "The criminal intent to do the act is established by the formation of the conspiracy. *Id.* The substantive offense need only be shown to have been reasonably foreseeable as a natural and necessary consequence of the conspiracy. *Id.* However, the Court also stated, "A different case would arise if the substantive offense committed by one of the conspirators … was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *Id.* at 647-48. In the present case, Barnes' declarations prove anything but a motive or intent either to murder Reardon or a scheme to silence him; rather, the conversations between Barnes and Anderson indicate Barnes's attempts at restraining Anderson and alleviating his concerns of Reardon's "second thoughts." (R. 18-19.) Assuming Anderson, Reardon, and Barnes did in fact conspire to participate in an "elephant hunt," the formation of the conspiracy gives no suggestion as to a criminal intent to commit murder. Thus, even if hearsay statements may be admitted under forfeiture-by-wrongdoing pursuant to a conspiracy theory of liability, the facts of this case do not demonstrate that Reardon's murder was done in furtherance of the conspiracy, nor was it within the scope of the unlawful project, and it could not have been reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

In *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), the 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*, 328 U.S. at 647-48." 217 F.3d at 820. The *Cherry* court went onto to explain that defendant may waive his hearsay objections if he or she: (1) "participated directly in the planning or procuring the defendants unavailability," or (2)

met the requirements of co-conspirator liability. *Id.* The court found that the district court did not abuse its discretion in holding that the government failed to show "that any of the defendants directly participated in the execution of the murder, but remand[ed] for application of the *planning* and *Pinkerton tests*." *Id.* at 821 (emphasis added). Specifically, *Cherry* remanded the case to the district court to determine: "(1) did [co-conspirator 1] participate in the planning or carrying out of [declarant's] murder by [co-conspirator 2]; or (2) was [co-conspirator 2's] murder of [declarant] within the scope, in furtherance, and reasonably foreseeable as a necessary or natural consequence," of the conspiracy involving defendants? *Id.* at 822. This two-part test is also supported by the United States District Court for the District of Columbia's decision in *United States v. White*, 838 F. Supp. 618, 622-23 (D.D.C. 1993). In *White*, the court rejected the government's reliance on *United States v. Mastrangelo*,[1] 693 F.2d 269 (2d Cir. 1982) as casting an overly extensive net. *White*, 838 F. Supp. at 623. In rejecting *Mastrangelo's* overly broad interpretation, the *White* court stated that "[m]ere failure to prevent the murder, or mere participation in the alleged drug conspiracy at the heart of this case, *must surely be insufficient* to constitute a waiver of a defendant's constitutional confrontation rights." *Id.* (emphasis added). The court believed that "a ruling to that effect would provide too little protection for so important a right." *Id.* Ultimately, *White* held the government must "show that the particular defendant participated in some manner in the planning or execution of the murder." *Id.* The *Cherry* court also analyzed the Eleventh Circuit's description of how lower courts applied Pinkerton liability in two situations:

> (1) where the substantive crime is also a goal of the conspiracy, e.g., where there is a narcotics conspiracy and a corresponding substantive crime of possession or

[1]The Second Circuit held "Bare knowledge of a plot to kill [the unavailable witness] and a failure to give warning to the appropriate authorities is sufficient to constitute a waiver." *Id*. quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

> distribution of cocaine. … (2) where the substantive offense differs from the precise nature of the ongoing conspiracy, but facilitates the implementation of its goals. For example, a particular co-conspirator, found guilty of conspiring to distribute drugs, may also be held liable for the substantive crime of possession of a firearm.[2]

Id. at 817; citing *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996) (citation omitted). However, the *Cherry* court also noted that, they have not, "like the Eleventh Circuit, gone as far as extending the doctrine to substantive crimes occurring as a result of an unintended turn of events." *Cherry*, 217 F.3d at 817; citing *Mothersill*, 87 F.3d at 1218 (quotations omitted).

In the present case, Barnes had no participation in the planning or carrying out of Reardon's murder. The government conceded that "defendant was neither present at Reardon's murder," nor did Barnes "[order] Anderson to kill Reardon." (R. 26-27.) Likewise, Reardon's murder was not within the conspiracy's scope, not in furtherance of the conspiracy, nor was it reasonably foreseeable as a necessary or natural consequence of the alleged conspiracy. Moreover, the *Cherry* court acknowledged that the Tenth Circuit "[has] *never* extended the doctrine to hold co-conspirators liable for first-degree murder that was not the original object of the conspiracy." *Id.* at 818 (emphasis added). Reardon's murder was not a part of the original conspiracy to kill elephants and sell their ivory, and Anderson was the individual that initiated a conversation about murdering Reardon; whereas, Barnes continuously attempted to delay Anderson's decision, alleviate his fears concerning Reardon's "second thoughts," and even ordered Anderson to "Hold off." (R. 18-19.)

[2] Even under the Eleventh Circuit's more expansive interpretation of Pinkerton liability, the hearsay statements ought not be admissible under Rule 804(b)(6). The substantive crime, Reardon's murder, was not also a goal of the conspiracy to kill elephants and sell their ivory. Nor do the facts of this case support extension of co-conspirator liability to "reasonably foreseeable but originally unintended substantive crimes." *Cherry*, 217 F.3d at 817 (quoting *United States v. Alvarez*, 755 F.2d 830, 851 (11th Cir. 1985)).

This Court stated: "Every commentator we are aware of has concluded the requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *Giles*, 554 U.S. at 361. In remaining consistent with the *Giles'* requirement to prove defendant intended to procure the unavailability of the witness, this Court ought to hold that conspiratorial liability is inapplicable to forfeiture-by-wrongdoing analysis. However, if this Court does find forfeiture through conspiratorial liability consistent with the *Giles'* requirement, then it should likewise adopt the Tenth Circuit's test in *Cherry*; requiring the government to prove by a preponderance of the evidence that (1) the conspirator directly planned or procured 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. *Cherry*, 217 F.3d at 811. Because the government failed to provide any evidence that Barnes engaged in conduct "designed to prevent the witness from testifying," *Giles*, 554 U.S. at 359, and, likewise, failed to establish either component of the *Cherry* test; this Court likewise should hold that the District Court properly excluded Reardon's hearsay statements.

II. THIS COURT SHOULD RECOGNIZE A JOURNALIST'S PRIVILEGE AS ABSOLUTE, AND UPHOLD AND PROTECT A JOURNALIST FROM REVEALING HER CONFIDENTIAL SOURCES OF INFORMATION

"Every person within the jurisdiction of the government is bound to testify upon being properly summoned." *Branzburg v. Hayes*, 408 U.S. 665, 677 (1972). However, "FRE 501 authorizes federal courts to define new privileges…" *Jaffee v. Redmond,* 518 U.S. 1, 8 (1996). Ultimately, this court has ruled that certain privileges exist that can be invoked to shield a person from having to testify in court. Such privileges include attorney-client, spousal, and psychotherapist-patient. *Id.* Without this privilege, a chilling effect will be imposed upon the

dissemination of information. *Id.* at 11. The same holds true for a journalist. Fed. R. Evid. 501 states that:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.

Fed. R. Evid. 501. The courts have developed an evolving standard in order to determine what privileges exist or do not exist. When applying this rule to journalists, there are three predicate reasons for the invocation of such privilege: "(1) newsmen require informants to gather news; (2) confidentiality… is essential to the gathering relationship informants; and (3) an unabridged subpoena power, in any way… will either deter sources from divulging information or deter reporters from gathering and publishing information." *Branzburg*, 408 U.S. at 728.

Rule 501 provides for new privileges to be defined. The Journalist Privilege should be defined because it meets the three part test in *Jaffee*, and because each and every Federal Circuit as well as forty states have adopted statutes and laws providing for such a privilege. When the privilege is established, it should be absolute, to prevent a possible chilling effect on the dissemination of vital information used to inform the public.

A. Federal Rule Of Evidence 501 Provides For The Law To Change To Recognize New And Different Privileges.

Branzburg, 408 U.S. 665, concluded that: "congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate." *Id.* at 706. In the original proposal of the rule, there were nine privilege rules that would be specifically defined by the court. *Id.* In recognition of a clergy-penitent privilege, the court relied on the

proposed rules. *In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990). Furthermore, this Court relied on proposed Rule 503(b)(3), which ultimately was never adopted, when it established an attorney-client privilege. *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). In *Jaffee*, 518 U.S. 1, the Court also relied on the proposed privilege rules when it defined a psychotherapist-patient privilege. However, the Court in *Jaffee* went *beyond* the proposed rule extending the privilege to statements of social workers as well, which was not included in the original proposed rule. *Jaffee*, 518 U.S. 1.

The specific proposed privileges were never adopted, and the drafters of the Federal Rules of Evidence determined that a blanket provision, Fed. R. Evid. 501, should determine privileges. "Common Law is not immutable, but flexible, and by its own principles adapts itself to varying conditions." *Id.* at 8. One major example of a privilege that did not exist in the proposed rule, but through common law, is the absolute marital privilege. *See Trammel v. United States*, 100 S. Ct. 906 (1980).

Fed. R. Evid. 501 states that "The common law—as interpreted by the United States courts in light of reason and experience—governs a claim of privilege…" Fed. R.Evid. 501. According to that language, the rule is meant to change, grow, and include new privileges when justice requires. Therefore, this rule was adopted in order to allow for other non-specified privileges, such as the Journalist's Privilege, to be adopted and followed by the courts.

B. Using The Jaffee Test, The Court Should Recognize A Reporter's Privilege

This Court in *Jaffee*, 518 U.S. 1, ruled that:

> Three considerations governing the recognition of such privilege; (1) the significant public and private interests that would be served by the privilege; (2) the relative weights of the interests to be served by the privilege and the burden on truth-seeking that might be imposed by it, and (3)'reason and experience' –that is, the extent to which the privilege is recognized by the states.

(R. 28-9 *citing Jaffee* at 9-14). A journalist's privilege can be established using these three factors.

The first test asks if there is a significant public and private interest that would be served by the privilege. *Mills v. Alabama*, 384 U.S. 214, 219 (1966), determined that the press serves an important role in the community, for it provides accountability for all of the public. In the case at hand, Crawley, who worked for the *Boerum Times*, was attempting to provide accountability for a potential crime. (R. 10.). The source of Crawley's information was dependent upon trust, just as the sources of psychotherapist information. *Jaffee*, 518 U.S. at 10.

The second test involves balancing the burden that would be imposed on the truth-seeking information against the value of that information. In the case at hand, the anonymous Big Top employee approached Crawley, whom he or she knew was working with the press, and asked her for advice on a "sensitive and delicate nature." (R. 10.) Then, the employee proceeded to tell Crawley of what he or she overheard concerning a plot with the goal of killing elephants for their ivory. He asked Crawley not to use his name in the report, and to not be identified as an employee of Big Top Circus. *Id.* The employee didn't want to reveal his name because he was "concerned for his safety". *Id.* The employee would not have approached and disclosed information to Crawley if he or she knew that a court could simply compel his or her identification. The employee came to Crawley to tip her off so that she could report, and hold Big Top and its owners accountable.

The burden that would be imposed on not protecting the journalist from revealing sources is that the information would not have come to the forefront in the first place. If the employee had not have come forward, poaching may have occurred, and not been thwarted by the journalist's exposé. Therefore, the interest being served, that of protecting the elephants and

holding the conspirators accountable, strongly outweighs the burden on truth seeking, which would be improperly restricted if a subpoena could reveal that information.

The third prong directly involves the language of FRE 501. Rule 501 states that: "The common law—as interpreted by the United States courts in the light of *reason and experience*—governs a claim of privilege…" Fed. R. Evid. 501 (emphasis added). The court in *Jaffee* determined that "reason and experience" was intended to mean the extent to which the state courts had recognized a privilege. *Jaffee,* 518 U.S. 1. Likewise, the Rule states that "…in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of the decision." Fed. R. Evid. 501. The advisory committee's note to Rule 501 dictated, "the rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason." *Id.* The judiciary, in adopting these rules, intended to defer not only to the common law, but to the actions of the states. The *Jaffe* court reasoned that all fifty states have enacted laws to allow for the privilege, and that the state promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in Federal Court. *Id*. at 12-13.

Currently, forty of fifty states have shield laws intended to protect journalists and reporters from having to reveal confidential information. Mackey, Aaron, *Number of States with Shield Law Climbs to 40,* The News Media & The *Law*, 27 (2011). In June 2011, West Virginia became the most recent state to adopt a shield law. *Id.* The West Virginia statute provides that journalists have a "nearly-absolute reporter's privilege" in order to allow them to refuse to disclose any and all sources or documents that could identify confidential sources in all cases: civil, criminal, and even grand jury proceedings. *Id.* Another example of these shield statutes is in Arkansas. Ark. Code Ann. § 16-85-510 (West 2004). Arkansas has recognized the privilege

since 1936 and has amended the privilege over time to allow for newer forms of technology to be included such as television. *Id.* Likewise, the decision of the Court of Appeals in the case at hand cites a New Jersey Statute and a Connecticut Supreme Court decision, both recognizing the privilege on each respective state. (R. 29.)

More importantly, Texas, the neighboring state to Boerum, has a shield law on record. Texas Civil Practices & Remedies Code §22.021-22.027. The law provides that the goal is to "increase the free flow of information and preserve a free and active press and, at the same time, protect the right of the public…" Tex. Civ. Prac. & Rem. Code Ann. § 22.022 (West). Specifically, this shield law prevents compelling a journalist "to testify regarding or to produce or disclose in an official proceeding: (1) any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist; or (2) the source of any information, document, or item described by subdivision (1)." Tex. Civ. Prac. & Rem. Code §22.023. In its apparent balancing function, the statute provides that the need to get this subpoena outweighs the public interest in gather and disseminating the news. Tex. Civ. Prac. & Rem. Code Ann. § 22.024(4). In the case at hand, this balancing test has not been met. The Texas statute, which is extremely similar to several other statutes, was passed as recently as 2009. Because of the "reason and experience" provision of FRE 501, the neighboring state's statute carries significance.

The protected man or woman, who actively prevented a crime by reporting to the journalist, should not be revealed. He or she did not witness a crime, instead, only knew of information that he or she overheard. His or her actions could have been called in anonymously, tipping off the journalist, and having the same result. However, the only difference in this instance is that he or she chose to tell the journalist in person, contingent upon anonymity. This

man's wishes should be respected, and he should not be exposed. The Circuit court correctly quashed the subpoena.

The *Branzburg* court held that reason and experience do not dictate that there is a journalistic privilege. The court noted when rejecting the journalistic privilege, which "A number of States have provided newsman a statutory privilege of varying breadth, but the majority has not done so." *Branzburg*, 408 U.S. at 689. The footnote of that sentence states: "Thus far, 17 states have provided some type of statutory protection to a newsman's confidential sources." *Id.* Currently, over forty states have provided statutory protection, and others have included common law protection. Therefore, one of the essential arguments in *Branzburg* that declined a reporter's privilege is nullified. Common Law currently dictates that there should be a journalist's privilege.

C. Some Form Of Privilege Exists Within All Of The Federal Circuits.

Eleven circuits as well as the DC circuit have each adopted some form of a reporter's privilege within their jurisdiction at the State, District, or Circuit level. The only circuit that has refused to adopt such a privilege on the highest level is the Eighth Circuit. This circuit, however, has determined that there should be a rule, and has used dicta in the circuit holding to determine the implication of a privilege. *See Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). Explicitly, however, the question remains open as to if there is a privilege on the circuit level. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 n.8 (8th Cir. 1997). Within the Eighth Circuit, however, the District Court of Mississippi found that there is a qualified privilege. *J.J.C. v. Fridell*, 165 F.R.D. 513 (D. Minn. 1995). The Fifth Circuit has adopted perhaps the weakest of the statutes, applying the privilege only to a confidential source in a civil case. *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998). However, they still have applied the privilege to some

degree, and many states within the circuit have adopted statutes. Likewise, as a derivative, the Eleventh Circuit has adopted pre-1980 opinions of the Fifth Circuit, and has not had an opportunity to address the Journalist's privilege issue, but includes states that have spoken to the issue. *See Loadholtz v. Fields*, 389 F. Supp. 1299, 1301-02 (M.D. Fla. 1975).

The first circuit found a qualified privilege post-*Branzburg*, determined on a case by case basis, with reasoning rooted in the first amendment. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 715 (1st Cir. 1998). In the Second Circuit, there exists a qualified privilege for both confidential and non-confidential sources. *See Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999)*; see also United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983) (recognizing confidential materials as a qualified privilege). In the Second Circuit, a party wishing to subpoena the information needs to show that it is of likely relevance to a significant issue in the case not available from another source. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *Cert. denied*, 358 U.S. 910. In the case at hand, the application of this test fails, because there was no relevant showing that the information was needed. The Fourth Circuit similarly applied a balancing test that looks to relevance, alternative means, and compelling interest in releasing the information. *La Rouche v. Nat'l Broad. Co.*, 780 F.2d 1134 (4th Cir. 1986). This test most recently reinforced the privilege for confidential news sources or information in *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000). The Tenth Circuit has similarly applied a multi-part test. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

Within the Sixth Circuit, Federal Courts have held that the first amendment bars the compelled disclosure of a newspaper's confidential sources. *Southwell v. S. Poverty Law Ctr.*, 949 F. Supp. 1303 (W.D. Mich. 1996). In the case at hand, Crawley had a confidential source in her informant from Big Top. She only received the information because her source thought that

he would remain confidential (R. 10.) The Seventh Circuit has similarly noted that when there is a confidential source, a privilege exists. *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). The Ninth Circuit also has held that interest in disclosure should yield to the journalist's privilege. *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995)

The Third Circuit and the DC Circuit are perhaps the strongest proponents of a reporter's privilege. The DC Circuit has held that the privilege is strongest when the journalist or news organization is not a party. *See Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). The case at hand involves an extremely analogous situation, where the party involved is neither Crawley nor her newspaper. In the Third Circuit, the Court observed that "When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute." *United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3d Cir. 1980); *Riley v. Chester*, 612 F.2d 708, 715 (3d Cir. 1979). The courts in the Third Circuit have almost always upheld the privilege as absolute, recognizing and citing the need for the freedom of press functioning through trust with the individuals reporting to the press. *Riley*, 612 F.2d at 715. In the Third Circuit, Pennsylvania's courts have effectively held that the shield law is absolute. *In re Subpoena to Barnard*, 27 Media L. Rep. (BNA) 1500. (E.D. Pa. 1999).

Most cases, *supra*, that uphold protection are stronger when there is a confidential informant. In the case at hand, the informant, even though he was video-taped, was under the impression that his identity would remain confidential. He did not allow Crawley to give out the information with his name or occupation attached, but rather requested that it be anonymous. (R. 10.) This further strengthens the need to keep this information confidential.

Each of the Circuits that have addressed the issue, have recognized some form of Journalistic Privilege. This Court has never addressed this issue post-adoption of Fed. R. Evid.

501. Rule 501 allows for a changing atmosphere in what can be considered a privilege, and therefore, based on consistency with the Circuit Rulings, should adopt Fed. R. Evid. 501to apply to Journalists as well.

D. The Reporter's Privilege Should Be Absolute

A full and free press stems from the right to benefit for all of the people of the country. *Branzburg*, 408 U.S. 665 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)). The Freedom of the press is not unabridged. *Id.* (citing *Watkins v. United States*, 354 U.S. 178, 188 (1957)). Within the Seventh Circuit, in *Hobley v. Burge*, 223 F.R.D. 499, 505 (N.D. Ill. 2004), the court noted that "given the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents." *Id.*

In the case at hand, this privilege would sustain even a common balancing test that would be required with a qualified privilege. The government has not shown that there is a strong need for the information. (R. 30.) The information, even if it had been given anonymously, would have allowed the reporter to accomplish her goal of disseminating the information to the public; holding Big Top officials accountable. Even though this privilege would be upheld even under a balancing test, this court should adopt a rule of an absolute privilege.

The *Branzburg* Court recognized the significance of an absolute privilege when it determined that "[i]nformants will refuse or be reluctant to furnish newsworthy information in the future" if they were to be easily revealed. *Branzburg*, 408 U.S. at 682. In the case at hand, this reasoning will still hold to be true, because the information would have not been revealed if it were easy to identify the source of information. Furthermore, the court noted that:

> By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had

> declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution.

Id. at 705. Therefore, the court determined that in order to make this a fair judgment for the courts, it would need to be an absolute privilege, not merely a qualified privilege, holding that only an "absolute privilege would suffice." *Id.* at 702.

This Court has recognized absolute privileges before. In *Jaffee*, this Court recognized that there was an absolute privilege for psychotherapist-patient privilege. *Jaffee*, 518 U.S. at 17. Likewise, marital privilege was recognized by this court in *In re Grand Jury Investigation*, 918 F.2d at 380. Attorney-client privilege was held to be absolute as well. *McPartlin*, 595 F.2d at 1321. The basis for each of these arguments is that information would not be revealed to psychotherapists, marital partners, or attorneys if there was a chance that it could be revealed in the court under a subpoena. This should be further applied to the press.

The First Amendment of the Constitution provides that "Congress shall make no law… abridging the freedom… of the press." U.S. Const. Am. 1. This enables the press to be able to reveal information to hold members of society and elected officials accountable. *Mills*, 384 U.S. 214. In order for society to feel that they are free to inform the press of investigative matters, an absolute privilege protecting the informant, who has performed a public service, needs to be recognized. The only way to allow for a fully functioning free press as guaranteed by the first amendment is to allow for an absolute privilege that will protect the journalist-informant relationship.

III. FEDERAL RULE OF EVIDENCE 701 DOES NOT PERMIT THE ADMISSION OF OPINION TESTIMONY BY A LAY WITNESS WHO TESTIFIES ABOUT THE MEANING OF CODE WORDS AND PHRASES USED IN CONVERSATIONS THAT THE WITNESS HAS NEITHER PARTICIPATED IN NOR OBSERVED BECAUSE THE TESTIMONY IS NOT BASED ON PERSONAL KNOWLEDGE

Fed. R. Evid. 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 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. A court may not allow a lay witness to testify unless it is "based upon his or her personal observation and recollection of concrete facts." *United States v. Peoples*, 250 F.3d 630, 639 (8th Cir. 2001) (quoting *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 350 (8th Cir. 1994)). Therefore under Rule 701, a lay witness may only testify if the witness has firsthand knowledge, the testimony is helpful to the tier of fact, and is not be based on any specialized knowledge, governed under Rule 702. Fed. R. Evid. 701.

In 2000, Rule 701 was changed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 advisory committee's note. Rule 702 views an expert, "not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training or education.'" Fed. R. Evid. 702 advisory committee's notes. Therefore if Agent Simandy's knowledge, skill, experience, training or education were used to determine the meaning of the code words, the testimony would be governed by Rule 702 and therefore inadmissible as lay witness testimony under Rule 701.

In order for Rule 701 to serve its purpose of presenting the trier of fact with an accurate reproduction of the facts, Rule 701 should not be construed to allow expert testimony to be presented in the guise of a lay opinion. This would distort the event in the eyes of the trier of fact, and break traditional evidence rules that a witness must have personal knowledge.

A. *Jayyousi Is Bad Law And Based Of Erroneous Reasoning, And Even If Jayyousi Was A Proper Interpretation Of Rule 701 The Court's Holding Distinguished Itself From The Present Case*

The Eleventh Circuit in *United States v. Jayyousi* found that when a government agent provided testimony based on the review and analysis of five years of documents, and the agent's testimony did not involve outside knowledge, the testimony was admissible under Rule 701. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). However, the Eleventh Circuit's interpretation is erroneous because Rule 701 states that lay witness testimony shall not be based on any specialized knowledge. The court further ignored the 2000 Amendments to Rule 701, which narrowed admissible testimony under 701 "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *Rule 701* advisory committee's note.

However, even if the *Jayyousi* court properly interpreted Rule 701, the court made it clear that its holding was narrow. The court opined that there is a spectrum of cases in which lay witness testimony would be allowed. *Jayyousi* at 1103. The court looked at three separate cases:. *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006), *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984), *United States v. Cano*, 289 F.3d 1354 (11th Cir. 2002). The court found that in cases like *Hamaker,* when the witness merely added and subtracted numbers, the testimony was rationally based on his perception and therefore admissible as lay witness testimony. *Jayyousi* at 1103. This was distinguished from *Gold* where the court found that an expert witness can testify to their own opinions regarding Medicare claims, without providing legal implications. *Gold* at 817. Finally, the *Jayyousi* court distinguished its holding from that in *Cano.* In *Cano,* the court found that "the agent was prohibited from testifying about the meaning of a simple code that the jury could have deciphered easily based on evidence admitted at the trial." *Cano,* 289 F.3d 1354.

The court found that the testimony in question was "more similar to the lay testimony held admissible in *Hamaker* and *Gold* than the testimony held inadmissible in *Cano.*" *Id.* The court reasoned that the agent in *Cano* "deciphered only a simple code, but Agent Kavanaugh's familiarity with the investigation allowed him to perceive the meaning of coded language that the jury could not have readily discerned." The court determined that because Agent Kavanaugh had been so involved with the case and "had examined thousands of documents, many of which were not admitted into evidence" his rationally based perception of the events was helpful to the jury. *Id.* The court found that this was a rare situation for the jury "because they 'would likely be unfamiliar with the complexities' of terrorist activities" and therefore the agent's own perceptions were helpful. *Id.* The court opined, "Agent Kavanaugh's knowledge of the investigation enabled him to draw inferences about the meanings of code words that the jury could not have readily drawn." *Id.*

Agent Simandy's testimony can be meaningfully distinguished from Agent Kavanaugh's testimony in *Jayyousi*. In *Jayyousi*, the agent's familiarity with the investigation, having been the officer assigned to the case for the entirety of the investigation, allowed him to understand the meaning of code words by using information that was not readily available to the jury. *Id.* at 1103. Unlike the agent in *Jayyousi* who had been working on the investigation for five years, Agent Simandy admitted that his investigation involved looking at transcripts from previous agents of conversations that occurred from October 4, 2011 until December 1, 2011 (R.13). Further, the complaint was filed on December 4, 2011 and Agent Simandy was not even assigned to the case until December 15, 2011. (R. 4, 12.) In addition, in our case the defendant has conceded that the transcripts of the phone calls that Agent Simandy studied involved a

conversation between Barnes and Anderson, and the transcript of these phone calls was admitted into evidence as Exhibit A for the jury to see. (R. 6.)

Agent Simandy's only other part of the investigation was when he interviewed Agent Jason Lamberti and Alan Klestadt, who are both available to be called before the jury. (R.13). Agent Simandy offered his opinion of what all of this evidence meant instead of allowing the jury to hear the facts and make their own decision. Unlike the agent in *Jayyousi*, Agent Simandy conceded that the evidence made it apparent what the defendant and his co-conspirators were discussing. (R. 14.) In addition, the government conceded that it "will separately prove that those materials accurately represent the content of the defendant's conversations." (R. 15.) Therefore Agent Simandy's lay opinion testimony differed from the testimony in *Jayyousi* which involved "meanings of code words that the jury could not have readily drawn" and was rather mere "jury argument from the witness stand" because he drew "inferences ... based on facts already in evidence." *Id*. at 1103. (*quoting United States v. Cano*, 289 F.3d at 1363 (11th Cir. 2002)). Therefore, since Agent Simandy is not providing the jury with any facts that they did not already have, and was rather offering his expert opinion on what he wanted the jury to conclude that the conversations were about in the guise of lay witness testimony, his testimony is inadmissible as lay witness testimony under Rule 701, even under the *Jayyousi* rule.

B. *The Testimony By Agent Simandy Was Properly Excluded Because Agent Simandy Had No Personal Knowledge Either As A Participant In The Conversation Or As A Listener To The Conversation Who Contemporaneously Observed The Speakers*

In *United States v. Peoples* the government introduced lay testimony from a government agent under Rule 701. *Peoples*, 250 F.3d at 640. The government agent testified that, "she had uncovered hidden meanings for apparently neutral words; for example, she testified that when

one of the [D]efendants referred to buying a plane ticket for [victim], [Defendant] in fact meant killing [victim]." *Id.*

The court in *Peoples* opined that "testimony in the form of lay opinions must be rationally based on the perception of the witness" and that lay testimony is "not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Id.* Further, the government agent's "testimony is admissible as lay opinion only when the [Agent] is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *Id.* Therefore the Eighth Circuit found that because the agent offered alternative meanings to words and phrases based on recorded conversations in which the agent was neither a participant nor an observant, the district court erred by allowing the government agent to offer his opinions on the meanings of those words and phrases. *Id.* at 641-42.

The Ninth Circuit applied similar reasoning in *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997). The court in *Figueroa-Lopez* found that because the government offered the testimony as lay opinion testimony rather than as expert testimony, pursuant to Rule 701 the testimony was inadmissible. *Id.* at 1245. In *Figueroa-Lopez*, a government agent testified against the defendant after acting as an undercover agent and having multiple previous interactions with the defendant while investigating a drug conspiracy. *Id.* at 1242. Even considering the agent's previous interactions with the defendant, the court found that the agent's opinions on the defendant's activities were inadmissible as lay witness testimony. *Id.* at 1246. The court noted that "the testimony in the instant case could have been admitted as *expert opinion* testimony to inform the jury about the methods and techniques used by experienced drug dealers, *if* the law-enforcement agents had been called as experts…." *Id.* at 1245. The court stated, "[l]ay witness

testimony is governed by Rule 701, which limits opinions to those 'rationally based on the perception of the witness.' Rule 702, on the other hand, governs admission of expert opinion testimony concerning 'specialized knowledge.' The testimony in this case is precisely [this] type of 'specialized knowledge' …" *Id.* at 1246. The court reasoned that the observations offered by the agent required expertise and training received from the agent's job, working for the DEA. *Id.* Therefore the court held that the testimony is inadmissible as lay witness testimony because a "holding to the contrary would encourage the Government to offer all kinds of specialized opinions without pausing first properly to establish the required qualifications of their witnesses. The mere percipience of a witness to the facts on which he wishes to tender an opinion does not trump Rule 702." *Id.*

Unlike the court in *Jayyousi,* the Eighth Circuit in *Peoples* followed the guidelines set out in the advisory committee's notes to the 2000 Amendments to Rule 701. The Eighth Circuit found that to allow a witness to testify as to the secret meaning of words or phrases under the guise of lay opinion is to create a loophole around the more exacting requirements for expert testimony. *Peoples,* 250 F.3d at 640. The court reasoned that because Rule 602 "requires that a witness have personal knowledge of the matters about which she testifies, except in the case of expert opinions" and because Rule 701 adds "that testimony in the form of lay opinions must be rationally based on the perception of the witness" and therefore can only be admitted "when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *Id.* at 641. The court reasoned that lay opinion testimony is only allowed to help the jury understand the facts and "not to provide specialized explanations or interpretations." *Id.*

Just like the agent in *Peoples*, Agent Simandy did not have first-hand knowledge of the conversation to which he was testifying and relied merely on "investigation after the fact", not on his "perception of the facts." *Id.* Therefore the proper interpretation of Rule 701 is that a witness testifying to a conversation must be a participant in a conversation, have personal knowledge of the facts, or observe the conversation as it occurred. Even if this Court were to accept the court's reasoning in *Jayyousi*, Agent Simandy's testimony would be more similar to that of the agent in *Cano* and therefore inadmissible under either rule.

C. *It Would Violate Congress's Will To Go Against The 2000 Amendments To Rule 701 To Narrow The Rule To Allow Expert Witness Testimony To Be Admitted Under The Guise Of Lay Witness Testimony*

In 2000, Congress amended Rule 701 to ensure that "a witness's testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701 advisory committee's note (2000 Amendments). Additionally, the advisory committee's note states, "the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson." *Id.* The advisory committee's note clarified that the purpose of Rule of 701 and 702 is to guarantee that if testimony is based on specialized knowledge, then that testimony must be governed by Rule 702, and therefore Agent Simandy's testimony was properly excluded because it was not qualified as expert testimony.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court AFFIRM the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) Daniel Best's conversation with James Reardon is not admissible under Fed. R. Evid.

804(b)(6); (2) an absolute journalist's privilege is federally recognized; and (3) the lay witness opinion testimony of Agent Simandy is not admissible under Rule 701

Respectfully Submitted,

35R, Counsel for Respondent

Date: February 20, 2013