
No. 12-23

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 2013

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES,

Respondent.

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

BRIEF FOR PETITIONER

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

- I. Whether a trial court may admit into evidence against a defendant in a criminal case the hearsay declaration of a murder victim under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), where a defendant had knowledge of his co-conspirator's intent to kill the potential witness for the purpose of silencing him, yet failed to withdraw from the conspiracy or take any action to prevent the foreseeable killing of the victim in furtherance of it.

- II. Whether Federal Rule of Evidence 501 calls for the creation of a testimonial reporter's privilege for information received from a source, and if so, whether the privilege should be absolute or qualified.

- III. Whether testimony offered by a law enforcement officer regarding the meaning of alleged code words and phrases used during the course of a conspiracy is admissible under Federal Rule of Evidence 701 where that officer used first-hand knowledge gained in the course of the investigation to formulate a perception of their meaning.

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The United States District Court for the Southern District of Boerum denied both of the government's motions in limine and granted a journalist's motion to quash her subpoena. This unreported opinion appears in pages 16 – 17 of the Record. The United States Court of Appeals for the Fourteenth Circuit upheld the decisions of the district court. This unreported opinion appears in pages 20 – 35 of the record.

STANDARD OF REVIEW

All of the issues in the case at bar are questions of law. Questions of law are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1998).

STATEMENT OF THE CASE

Statement of Facts

In May 2000, Respondent William Barnes (“Respondent”) inherited Big Top Circus from his father. (R. 1). With its renowned elephant show, Big Top Circus had been a highly profitable business enterprise for decades. (R. 21). However, the business began to suffer under the leadership of Respondent, and, by July 2011, Big Top Circus faced imminent and inevitable bankruptcy. (R. 1).

Realizing that Big Top Circus' finances were unsalvageable, Respondent concocted a scheme that would allow for him to wring what little profit he could from Big Top Circus before it collapsed. (R. 1-2). On or about July 12, 2011, Respondent contacted Boerum City Circus and Flying Feats Circus, two smaller circuses located in northern Boerum, and invited them to join Big Top Circus in staging “the greatest elephant show on earth.” (R. 1-2). Respondent then offered to house the elephants belonging to the two smaller circuses on land belonging to Big

Top Circus located in southern Boerum, an area resembling the native habitat of Asian elephants, to which they agreed. (R. 1-2).

On July 30, 2011, Respondent contacted Alfred Anderson (“Anderson”), the co-owner of his unregistered charity “Boerum 4 Animals,” and offered him the opportunity to hunt the elephants on his property and a share of the profit made from the eventual sale of any ivory removed from the elephants. (R. 2). Anderson, whom had been a close friend of Respondent since they met at a hunting convention in 2008, agreed to participate in the hunt and to find a third hunter to assist in the endeavor. (R. 1-2). The third hunter, James Reardon (“Reardon”), thereby joined the scheme on September 1, 2011. (R. 2).

In an effort to make the planned holiday spectacular look legitimate, on August 30, 2011, Respondent invited reporter Kara Crawley (“Crawley”) from the Boerum Times to visit Big Top Circus, and she accepted. (R. 22). On September 15, 2011, Crawley met with Respondent before the commencement of the tour and had Respondent sign a standard release form stating that he would not retain any control over the final product of the story. (R. 9). Respondent signed the document and began the unlimited access tour of Big Top Circus’ otherwise highly secure facilities with Crawley.

After her initial tour, Crawley returned every day for the next two weeks in order to watch the animals train. (R. 10). Over the course of these visits, Crawley developed a special rapport with one of the circus employees. (R. 10). One day, the employee requested her “advice” regarding a “sensitive, delicate” issue. (R. 10). The employee went on to inform Crawley that he or she had overheard a conversation between Respondent and another party concerning a plan to kill the elephants for their ivory. (R. 10). Despite the employee’s expressed concerns for his or her safety, the employee agreed to have his or her conversation with Crawley videotaped for

use in Crawley's notes regarding her story on the treatment of animals at Big Top Circus. (R. 10).

On October 2, 2011, Respondent contacted Weapons Unlimited to inquire as to the price of three assault rifles. (R. 2). Undercover ATF Agent Jason Lamberti ("Agent Lamberti"), posing as an employee of Weapons Unlimited, informed Respondent that he could orchestrate an under the table deal to allow Respondent to bypass the normal restrictions on the purchase of AK-47s within the state of Boerum. (R. 2). According to Agent Lamberti, Weapons Unlimited would supply Respondent with three fully automatic AK-47s immediately for \$500. (R. 2). Respondent, still unaware that he was communicating with an undercover ATF agent, accepted the offer, provided Agent Lamberti with his credit card information, and paid in full with the understanding that the weapons would be delivered on December 5, 2011. (R. 2).

Based upon the exchange between Respondent and Agent Lamberti, the FBI obtained a warrant permitting the interception of Respondent's telephone communications, which occurred from October 4, 2011 until Respondent's eventual arrest on December 1, 2011. (R. 2-3). During this time, Agent Narvel Blackstock ("Agent Blackstock") of the FBI contemporaneously listened to and transcribed numerous intercepted conversations involving Respondent, including conversations with his co-conspirator, Anderson, detailing the progress of the conspiracy. (R. 13).

The most disturbing transcriptions by Agent Blackstock took place between the dates of November 15 and November 29, 2011. (R. 7). These conversations between Respondent and Anderson revealed that Reardon had on a prior date voiced concerns to Anderson regarding the legality of the operation and had stated that he was beginning to have second thoughts on whether he would participate in the hunt. (R. 24). Concerned with the possibility of Reardon's

becoming a liability to the scheme, Anderson began to voice his desire to eliminate Reardon. On November 15, he stated that he and Respondent should “get rid of him.” (R. 18). Respondent only responded, “Yeah, well, don’t do anything. Not yet.” (R. 18). On November 29, Anderson told Respondent, “We are out of time. We need him out of the picture.” (R. 19). Again, Respondent told him, “Hold off. Just shut him up for a while,” before telling the defendant he did not want to take part in the idea. (R. 19).

Reardon was found dead several hours later. (R. 7). Best later told police about a series of telephone conversations between him and Reardon where Reardon described to him the details of Respondent’s scheme and stated that he was in fear for his life because of Anderson. (R. 7). Reardon also indicated to Best that he had invited Anderson over to his home later that day, although he was fearful of Anderson. (R. 7). Anderson thereafter confessed to killing Reardon to prevent him from exposing the conspiracy. (R. 24).

On December 1, 2011, the information provided by the anonymous employee regarding Respondent’s true plans for the Asian elephants was published in an exposé printed by the Boerum Times, and Respondent was taken into federal custody later that day. (R. 11).

On December 15, 2011, FBI Agent Thomas Simandy (“Agent Simandy”) was assigned to the case, due to the death of Agent Blackstock; he immediately began a review of the existing transcripts of conversations occurring between Respondent and his co-conspirators. (R. 13). Agent Simandy also interviewed both Agent Lambert, the undercover agent from Weapons Unlimited, and Alan Klestadt from Copters Corporation. (R. 13). During the course of these interviews, both individuals positively reflected that they had indeed spoken with Respondent and had arranged from Respondent to acquire the items he desired. (R. 13). The information provided by the informants, coupled with his thorough review of the transcript of the intercepted

phone calls, led Agent Simandy to conclude that certain code words and phrases had been used during the course of the conspiracy. (R. 13). These codes included the use of “blood diamonds” when referring to elephant ivory tusks, “Charlie tango” when referring to the helicopter reserved by Respondent, and “black cat” when referring to the three AK-47s purchased by Respondent. (R. 13).

Procedural History

On December 4, 2011, Respondent 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, 16 U.S.C. § 1538. (R. 21). Before trial, the Government moved in limine to introduce Daniel Best’s conversation with James Reardon pursuant to Federal Rule of Evidence 804(b)(6), the forfeiture-by-wrongdoing hearsay exception. (R. 25). Journalist Kara Crawley submitted a motion to quash the government’s subpoena seeking her sources, and the government also sought to introduce the testimony of Agent Thomas Simandy as a lay witness pursuant to Federal Rule of Evidence 701. (R. 25).

On May 1 and May 2, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions, and on May 2, the District Court ruled against the government on all three issues. (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 Court of Appeals affirmed the decision of the District Court on all issues, holding that: (1) The District Court properly excluded the Reardon hearsay statements against Respondent; (2) A journalist’s privilege is absolute and may not be overcome by a showing of

need; and (3) The District Court did not err in excluding Agent Simandy's lay opinion regarding the hidden meanings of words used in the intercepted telephone conversations. (R. 28- 32). The Government subsequently filed a petition for writ of certiorari, and on October 1, 2012, the Supreme Court of the United States granted certiorari. (R. 36).

SUMMARY OF THE ARGUMENT

The judgment of the trial court in the case at bar constituted "three wrong-headed decisions on the law, gratuitously restricting the government's ability to do justice." (R. 35). These three decisions should each be reversed by this Court as a matter of law.

First, the hearsay declaration of the murder victim of Respondent's co-conspirator should be held to be admissible under Federal Rule of Evidence 804(b)(6). As early as 1910, this court settled the principle that co-conspirators act for each other as a crime continues and may be liable to each other's overt acts despite the lack of a new agreement. The seminal case of *Pinkerton* further elaborated that all agents in a conspiracy remain active and conspiratorially liable for the overt acts of the other unless there is evidence that demonstrates an affirmative action to withdraw from the unlawful scheme.

Contrary to Respondent's contention, he did not take an affirmative action to end his liability for the overt acts of his co-conspirator by merely telling him to "hold off." Bare knowledge of a plot to kill a witness and failure to give warning to the appropriate authorities is sufficient to constitute a forfeiture, because tacit assent to wrongdoing triggers the rule's applicability. Respondent was informed of his co-conspirator's intent to murder the potential witness to keep the witness from testifying against them, and his silence inevitably led to the witness being permanently silenced. The intent requirement of *Giles* does not shield Respondent from his misconduct because unlike the Defendant in *Giles*, Respondent had co-conspirators to

take action in furtherance of their common goal. For this reason, the murdered victim's hearsay testimony should be admitted.

The lower court also erred in holding that a journalists should be able to claim a testimonial privilege under Rule 501 of the Federal Rules of Evidence. The First Amendment does not require that the press be given immunity from the laws of the United States. In addition, this Court has consistently and conclusively rejected the notion that a federal testimonial privilege should be recognized for journalists. It has also acknowledged that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Simply put, a newspaper reporter shares the same obligations of all citizens to respond to a grand jury subpoena and answer questions relevant to the criminal investigation.

Furthermore, the societal dangers inherent in a reporter's privilege outweigh its benefits for the following reasons: (1) There are criminals who will not be identified should a reporter's privilege be created; (2) The media as third-party witnesses are not required to publish or indiscriminately disclose their confidential sources on request and a court's decision to reject the requested reporter's privilege involves no restraint on what newspapers may publish; and (3) The interests that the privilege in question seeks to further are not implicated in here because the reporter obtained the criminalizing information simply because the interviewee was uncomfortable with the situation and wanted to talk to someone about it. Should a reporter's privilege be recognized by this Court, the interests of the public call for its restriction to a qualified privilege.

Finally, the lower court erred by holding that under Federal Rule of Evidence 701, a law enforcement officer's testimony concerning alleged code words or phrases in a conversation is

admissible as lay opinion *only* if the officer has first-hand knowledge either as a participant in a conversation, or as a listener to a conversation who contemporaneously observes the speakers. Officer Simandy's testimony should be admitted because he is not testifying as an expert, the testimony is rationally based on the perception of the witness, and it would be helpful to a clear understanding of a fact in issue.

The requirement of lay witness perception is met when a law enforcement officer has had the opportunity to conduct a first-hand review of the information gathered during the course of a particular investigation. Through Agent Simandy's review of investigatory documents, he became intimately familiar with the unusual communication used by these conspirators. His knowledge therefore was equivalent to direct observation or participation, satisfying the goal of Rule 701.

Because the district court incorrectly interpreted the laws governing the three issues in the case at bar, this Court is respectfully requested to reverse each of its decisions.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 804(b)(6) PERMITS THIS ADMISSION OF THE HEARSAY DECLARATION OF A CO-CONSPIRATOR'S MURDER VICTIM CONSPIRATOR IS ADMISSIBLE AGAINST A DEFENDANT BECAUSE VICARIOUS LIABILITY IS APPLICABLE WHERE THE VICTIM'S DEATH WAS REASONABLY FORESEEABLE BY THE DEFENDANT AS A CONSEQUENCE OF THE CONSPIRACY.

For over a century, the jurisprudence established by this court has confirmed that co-conspirators act for each other for as long as a crime continues, and that they may be liable for each other's overt acts despite the lack of a new agreement. *United States v. Kissel*, 218 U.S. 601, 608 (1910). Unless there is evidence that demonstrates an affirmative action to withdraw from the unlawful scheme, all conspirators remain active agents in it and are therefore liable for the overt acts of the other that are committed in furtherance of it. *Pinkerton v. United States*, 328

U.S. 640, 645 (1946). This sound doctrine protects the public by recognizing that crimes involving more than one actor present greater danger to society, and they should therefore be discouraged by its policies. Because Respondent here never withdrew from the criminal plot he had hatched together with Anderson, the criminal intent for the foreseeable murder committed by his co-conspirator should be shared by him. Any other result would irreconcilably conflict with the traditional rule governing conspirator liability: “[T]he overt act of one partner in crime is attributable to all.” *Id.* at 647. For this reason, the decision below was in error and should be reversed.

Rule 804(b)(6) of the Federal Rules of Evidence allows for the admission at trial of hearsay declarations “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). Knowledge of a plot to kill a witness, coupled with the failure to give a warning of it, is sufficient to constitute a forfeiture because tacit assent to wrongdoing triggers the rule’s applicability. *United States v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005).

“[I]t is hard to imagine a form of misconduct more extreme than the murder of a potential witness.” *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997). Indeed, so extreme is such misconduct that this Court recognized in *Crawford v. Washington* an exception to the Confrontation Clause, holding that a defendant by his own wrongdoing can forfeit those rights on essentially equitable grounds. 541 U.S. 36, 62 (2004). Once a defendant has silenced a witness through murder, admission of the victim’s prior statements at least partially offsets the perpetrator’s rewards for his misconduct. *White*, 116 F.3d at 911. For this reason, it is entirely appropriate that the statements of the executed would-be witness be admitted in the trial of the

killer's co-conspirator. The district court erred in allowing the killer's goals to be achieved: His victim's words remained in the dark.

The lower court's decision to bar the admission of statements from Reardon to Best was improper because excluding this evidence conflicts with the policy behind Rule 804(b)(6). In order for the Rule to fully serve its stated purpose as outlined in the advisory committee notes, this Court should hold Respondent conspiratorially liable for the acts of his co-conspirator. To rule otherwise would be inconsistent with the longstanding doctrine governing liability among co-conspirators. For these reasons, the government respectfully requests that the Fourteenth Circuit's decision be reversed.

A. Because Respondent never took an affirmative action to withdraw from the conspiracy, he therefore remained conspiratorially liable for the acts of his co-conspirators in furtherance of the scheme.

A conspiracy is continuous unless there is evidence that demonstrates an affirmative action to withdraw on the part of a co-conspirator. *Hyde v. United States*, 225 U.S. 347, 369 (1912). "Having joined in an unlawful scheme, having constituted agents for its performance," all conspirators are continuously active agents in the conspiracy until they disavow or defeat the purpose of the conspiracy. *Id.* A conspiracy is not terminated simply because one conspirator does not agree to commit or facilitate every part of the substantive offense. *Salinas v. United States*, 522 U.S. 52, 63 (1997). On the contrary, as a crime continues, co-conspirators act for each other to carry it forward. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946) (holding that criminal intent to commit all acts in furtherance of a conspiracy was established by the formation of the conspiracy).

It has been well-settled by this Court that an overt act of one conspirator may be the act of all, notwithstanding the lack of any new agreement specifically directed toward that act.

United States v. Kissel, 218 U.S. 601, 608 (1910). Although “partners in a criminal plan must agree to pursue the same criminal objective and may divide up the work, each [co-conspirator] is responsible for the acts of each other.” *Salinas*, 522 U.S. at 63-64. If the scheme devised requires one or more conspirators to perpetrate the crime while others provide support, those supporters are nonetheless equally guilty as the perpetrators. *Id.* at 64. “As [long] as the offense has not been terminated or accomplished, [they are] still offending.” *Hyde*, 225 U.S. at 369.

The facts of present case illustrate why the doctrine of forfeiture-by-wrongdoing should apply to Respondent under conspiratorial liability. Here, Respondent was the mastermind of a conspiracy to “hunt” elephants on his property in an attempt to reap what profit he could from his crumbling circus. The members of this conspiracy were Respondent, Anderson, and Reardon. Under the vicarious liability doctrine established in *Pinkerton*, as a member of this conspiracy, Respondent would be criminally liable for any acts taken in furtherance of it which he could reasonably foresee.

Notwithstanding Respondent’s awareness that his co-conspirator Anderson was considering killing the victim in order to ensure his silence, he never took an affirmative action to withdraw from the conspiracy from the time of its inception on July 30, 2011 to the day James Reardon was murdered on November 28, 2011. On two occasions, Anderson voiced his concerns that Reardon would betray them, expressing an increasingly urgent desire to “get rid of him” and “get him out of the picture”. (R. at 6). Respondent’s knowledge of the killer’s intentions is evinced by his suggestion that Anderson “hold off” on silencing Reardon. (R. at 8). Nonetheless, he chose not to warn the victim or take any action to prevent the murder: This constituted his acquiescence to it.

Having concocted a scheme to unlawfully deal in firearms, carry out violence against an

animal enterprise, and commit unlawful takings under the Endangered Species Act, the Respondent should be held liable for the acts of his co-conspirators. Anderson's confessing to the murder of Reardon for the purpose of ensuring his silence effected a forfeiture of Respondent's own his right to exclude Reardon's statements to Daniel Best for three reasons. First, he never took an affirmative action to withdraw from the conspiracy. Moreover, under this Court's settled precedent on conspiracy liability, Anderson's intent to silence the declarant may be considered the intent of the Respondent despite the lack any specific new agreement in that regard; his acquiescence alone suffices. Finally, at the time that Anderson took action to silence Reardon with the goal of carrying the conspiracy forward, the Respondent remained loyal to it. As the mastermind of a scheme he never withdrew from, the Respondent should be subject to the doctrine of forfeiture-by-wrongdoing, and the lower court's holding to the contrary should therefore be reversed.

B. Rule 804(b)(6) is founded on the maxim that no one shall be permitted to take advantage of his own wrong.

Federal Rule of Evidence 804(b)(6) was approved by this court in 1997. *See Giles v. California*, 554 U.S. 353 (2008). The advisory committee's note to the rule sheds light on the policy behind it: that the deliberate silencing of a potential witness through murder is so despicable an act, a strong rule is necessary in order to deter it. In barring the admission of Reardon's declarations, the holding of the lower court failed to carry out the purpose of the rule.

The note to rule 804(b)(6) states that it was promulgated in order to meet 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. It also cites *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir.1982), cert. denied, 467 U.S. 1204 (1984), where the sole witness to drug conspiracy was murdered two days after the trial began. *Id.* at 271. In

Mastrangelo, the witness, prior to his death, had testified before a grand jury that he sold the defendant trucks under suspicious circumstances. *Id.* The witness further identified a tape recording of a conversation he had with the defendant that was made in cooperation with the police. *Id.* Mastrangelo's statements in the transcript of the taped conversation could reasonably be interpreted as threats intended to deter the witness, who was subsequently murdered, from testifying against the defendant. *Id.*

The Second Circuit held that if Mastrangelo was involved in the death of the witness through "knowledge, complicity, planning or in any other way," the lower court is to hold that then he had forfeited his right under the Confrontation Clause. *Id.* at 274. "Bare knowledge of a plot to kill a witness and a failure to give warning to appropriate authorities is a sufficient to constitute a [forfeiture]". *Id.* Here, Respondent had knowledge of such a plot and similarly failed to warn the would-be victim or the authorities. The statements of the victim in his case should be also admitted.

In order to admit evidence under a Rule 804(b)(6) motion in limine, the government need only prove by a preponderance of the evidence that the defendant engaged or acquiesced in the wrongdoing that led to the unavailability of the witness.¹ *U.S. v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005). In *Rivera*, the defendant was incarcerated at the time the declarant was murdered. *Id.* at 565. To admit the witness's testimony, the government presented transcripts of telephone calls that the defendant made from prison indicating that he ordered his gang to kill the declarant and later bragged about the murder. *Id.* The defendant argued that the statements he made in reference to the declarant were made only to bolster his "tough gang persona." *Id.* at 566.

¹ This accommodating standard was adopted in light of the abhorrent behavior that Rule 804(b)(6) seeks to discourage. Fed. R. Evid. 804(b)(6) advisory committee's note.

The Fourth Circuit held that plain language of Rule 804(b)(6) supports a finding that a defendant need only tacitly assent to wrongdoing in order to trigger the rules applicability. *Id.* at 567. The rule permits the admission of statements offered against a defendant who “wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending the result.” Fed. R. Evid. 804(b)(6). “Acquiescence” is defined as a person’s tacit or passive acceptance. *Black’s Law Dictionary* 11 (9th ed. 2009). The defendant’s “active participation, engagement, or personal commission of the crime is not required.” *Rivera*, 412 F.3d at 567.

Here, the government’s sole burden is to show that the Respondent forfeited his rights under evidence rule 804(b)(6) by a preponderance of the evidence. Moreover, the Respondent’s active participation in the murder of the witness is not required for the rule to apply, under its plain language. Respondent was put on notice of his co-conspirator’s admitted desire to murder Reardon in order to permanently silence him. Ignoring such notice is precisely the type of conduct that the rule 804(b)(6) was designed to deter. The Respondent’s failure to notify the authorities of the plan or take any action to prevent it from being carried out demonstrated his tacit assent to it, thereby triggering the rule’s applicability.

For this reason, the Court should follow the holding in *Mastrangelo* and rule that the Respondent’s acquiescence in his co-conspirator’s plot to kill Anderson constituted a forfeiture.

C. The *Giles* decision does not require that a defendant specifically intend to prevent the witness from testifying.

Rule 804(b)(6) requires that a defendant “intend” to prevent a witness from testifying in order for the forfeiture doctrine to apply. *Giles*, 554 U.S. at 361. However, the decision in *Giles* does not foreclose the possibility of rule 804(b)(6) being used against a defendant who himself did not specifically intend to kill. In *Giles*, the defendant argued that he murdered his girlfriend

in self-defense. *Id.* at 356. The defendant did not have any co-conspirators. *Id.*

This Court held that the defendant's act of killing his girlfriend was not enough to permit the admission of hearsay under rule 804(b)(6). *Id.* at 361. In order for the forfeiture doctrine to apply, intent must also be considered: The defendant would have had to murder the witness with the intent to keep her from testifying. *Id.* at 361. The decision of the lower court was vacated because it only considered the defendant's own overt acts in its application of the forfeiture doctrine instead of his intent. *Id.* at 377. However, it was instructed that it could consider the defendant's intent on remand. *Id.*

Giles did not concern conspirators, but the *Pinkerton* doctrine of liability should still apply to its holding regarding intent. The opinion does not address the issue specifically, but to rule otherwise would create a conflict in the treatment of crimes of conspiracy. Because the absence of specific intent is enough to render a defendant criminally liable for an act he did not personally commit, it strains credulity that it should not be sufficient to allow for the admission of evidence.

Giles does not protect the Respondent from liability for the overt acts of his co-conspirators. This Court should hold that the Respondent's intent to procure the witness's unavailability can be proven by his ongoing participation in the conspiracy, his knowledge of his co-conspirator's plot to kill the witness in furtherance of their plan, and his tacit assent to the murder by failing to notify the authorities.

D. The Constitution does not shield an accused against the legitimate consequences of his own wrongful acts.

"Common sense and simple equity support a forfeiture principle." *White*, 116 F.3d at 911. In 2004, this Court held that un-crossed testimonial statements previously made out of court by an unavailable witness are barred by the Sixth Amendment's Confrontation Clause.

Crawford, 541 U.S. at 68. However, an exception was simultaneously recognized: A defendant by his own wrongdoing can forfeit his Confrontation Clause right. *Id.* at 62. Two years later, this Court again recognized the principle of forfeiture, declaring that “one who obtains the absence of a witness by wrongdoing forfeits [his] constitutional right to confrontation. *Giles*, 554 U.S. at 381.

The history of the forfeiture doctrine starts with *Lord Morley's Case*, 6 How. St. Tr. 769 (H.L.1666). There, the Judges of the House of Lords “wrote that the coroner’s out of court examinations of witnesses might be read in court if the witnesses . . . were dead or unable to travel.” *Giles*, 554 U.S. at 382. The Judges agreed that when a witness was detained by means or procurement of the prisoner the examination might be read, and the doctrine was later upheld in cases where a prisoner contravened to keep the witnesses away. *Id.*

The seminal case on forfeiture of the confrontation right by wrongful procurement, *Reynolds v. United States*, recognized that a defendant has a constitutional right to be confronted with the witnesses against him so long as the witness is not absent due to the defendant’s own wrongdoing. 98 U.S. 145, 145 (1878). In *Reynolds*, this Court held that a defendant is in no condition to assert that his constitutional right has been violated if a witness is absent by the defendant’s procurement, “or when enough has been proved to cast upon him the burden of showing, and having full opportunity therefore, fails to show, that he has not been instrumental in concealing them or in keeping them away.” *Id.* Here, the Respondent was instrumental in keeping Reardon out of court because in addition to formulating the scheme that the murder was committed to further, Respondent was consciously aware that Reardon’s life might be taken for this very reason, yet did nothing. Under the holding of *Reynolds*, Respondent should not be allowed to hide behind the Confrontation Clause; the lower court’s holding to the contrary was

therefore in error.

Furthermore, motive or intent may be proved by the acts or declarations of other conspirators that were committed in furtherance of the common objective. *Pinkerton*, 328 U.S. at 647. Although criminal intent is generally an element of a crime, every conspirator is presumed to intend the necessary and legitimate consequences of what he knowingly does. *Reynolds*, 98 U.S. at 167. By showing that a declarant knew something, a self-inculpatory statement can help the jury infer that his co-conspirators knew it as well. *Williamson v. United States*, 512 U.S. 594, 603 (1994). A self-inculpatory statement by an accomplice, coupled with other evidence, can inculcate the defendant directly. *Williamson*, 512 U.S. at 594. Here, the co-conspirator's self-inculpatory statement, coupled with Respondent's knowledge of his desire to kill and failure to do anything about it, means that his liability should be shared.

The Constitution does not shield an accused person against the legitimate consequences of his own wrongful acts. *Reynolds*, 98 U.S. at 158. “[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 122 (1934). We are to keep the balance true.” *Id.*

The Fourteenth Circuit was in error when it held that Reardon's statements could not be admitted due to a lack of intent on Respondent's part. Because of his unwavering loyalty to their shared criminal scheme, the self-inculpatory statements of the Respondent's co-conspirator are sufficient to inculcate the Respondent himself. His conscious understanding that he was committing a crime and intent to make Reardon unavailable are proven by his actions in furtherance of the common goal shared with the murderer. This Court has long adhered to the common law principle that a defendant remains liable for the foreseeable actions taken by his co-

conspirator in furtherance of their criminal goals. For these reasons, the lower court's decision should be reversed.

II. THE CREATION OF A JOURNALIST'S PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501 WOULD BE CONTRARY TO LONGSTANDING SUPREME COURT JURISPRUDENCE AND PUBLIC POLICY.

The Fourteenth Circuit erred in holding that a testimonial privilege for journalists should be recognized under Rule 501 of the Federal Rules of Evidence. It has long been recognized that the First Amendment does not require that the press be given immunity from the laws of the United States. "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). The conclusion of the Fourteenth Circuit in the case at bar granted more protection than this Court's clear and well-established precedents permit, and it created a policy that could prove to be very harmful to society as a whole. It should therefore be reversed.

A. There is no basis in federal jurisprudence for the establishment of a journalist privilege.

Testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). This Court has consistently and conclusively rejected the notion that a federal testimonial privilege should be recognized for journalists. It has held that it is "beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws," " notwithstanding any incidental burden on newsgathering activities caused by generally applicable civil or criminal laws. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-670 (1991) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937)). The enduring principles that guided those decisions still apply today, and this Court should turn to them once more in reversing the decision of the Fourteenth Circuit.

While there is a certain amount of protection enjoyed by the press, to argue that it is an entity that by definition receives special treatment would be far from the truth. When this Court first decided the issue of a reporter's privilege, it acknowledged that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Neither does it "relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

In *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990), the Court revisited *Branzburg* and demonstrated once more its "reluctance to recognize a constitutional privilege where it was 'unclear how often and to what extent informers are actually deterred from furnishing information'" to journalists where the possibility of their testifying in court cannot be ruled out. *Id.* at 201 (quoting *Branzburg*, 408 U.S. at 693). It was reiterated that the reasoning for the Court's unwillingness to form such postulations had not changed in the years since *Branzburg*. *Id.* at 201. Consequently, a conclusion by any federal court that there is a reporter's privilege under the First Amendment is, as Judge Posner has observed, "rather surprising" in light of this Court's repeated affirmations that no reporter's privilege exists. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). Those opinions, like the one issued by the lower court in this case, "essentially ignore *Branzburg*". *Id.*

The extensive analysis applied in *Branzburg* to the central issue here remains perfectly relevant and applicable to the state of newsgathering today. The press is still "regularly excluded from grand jury proceedings" and other judicial conferences, various executive sessions, and private meetings; it is still "prohibited from attending or publishing information about trials

where necessary to assure a defendant a fair trial before an impartial tribunal.” 408 U.S. at 685. There are no material differences in the nature of reporter-source relationships today that would render any of this Court’s precedents any less relevant than the day they were decided. It follows that because the Fourteenth Circuit's decision is undeniably inconsistent with well-established holdings of this Court, it should be reversed.

B. The societal dangers inherent in a reporter’s privilege outweigh its benefits.

The country has enjoyed a robust and thriving press throughout its history despite the absence of a federal reporter’s privilege. The cases of journalists serving jail time for refusing to identify a source have not proved to be epidemic. In fact, from 1973 to 1999, the United States Courts of Appeals reported only two cases in which federal prosecutors subpoenaed journalists. *See United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Shain*, 978 F.2d 850 (4th Cir. 1992). Because there is no significant need for the creation of a new privilege, it would not be prudent to allow for such a drastic change where the consequences are not guaranteed to be favorable to the public as a whole.

A journalist’s privilege would simply present too many difficult policy questions to courts. For instance, the creation of a new privilege brings with it the need to define who may use it. In this case, it would necessarily require a succinct definition of who exactly is a “journalist”, which would further complicate the judicial proceedings where they are called upon to testify. Even more than forty years ago in *Branzburg*, the Supreme Court recognized that trying to define who is a “newsman” deserving of the privilege “would present practical and conceptual difficulties of a high order.” *Branzburg*, 408 U.S. at 703-04. Notably, three Circuit Courts of Appeals have held that the medium that an individual uses to disseminate the news does not make a difference in the degree of protection accorded to the work. *See In re Madden*,

151 F.3d 125 (3rd Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136 (2nd Cir. 1987). Even the possibility of licensing journalists has been suggested as the means to certify who may assert the privilege, in order to avoid any confusion; it would make sense, being that unlike law or medicine, no course of study, examination, or license is required to practice journalism in the United States. One need not major in journalism or even attend college. But if this were to occur, the free flow and dissemination of information would be greatly hindered in a far worse manner than if the privilege had never been recognized.

Another commonly mentioned solution is to recognize format-based distinctions in determining who can claim such a privilege. The problem with a rule that purports to apply only to certain media formats is that it would automatically create two classes of journalists: those whom the judiciary deems important enough to have their communications protected, and those it does not. Such a result would fly in the face of this Court's admonition that freedom of the press is a personal right, belonging equally to the lone pamphlet-writer and to the large institutional media. *Branzburg*, 408 U.S. at 704.

This Court recognized in *Branzburg* that the desire for anonymity of criminal informants is "presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." 408 U.S. at 691.

The media as third-party witnesses are not required to publish their confidential sources or to indiscriminately disclose them on request. *Branzburg*, 408 U.S. at 690-91. Reporters remain free to seek news from any source by means within the law, and the Court's decision to reject the requested reporter's privilege would "[involve] no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources." *Id.*

Journalists are not completely vulnerable to a grand jury or prosecutor's demands; they may still challenge subpoenas by claiming that they were not issued in good faith. *McKevitt*, 339 F.3d at 533. The fact remains that the press enjoys substantial freedom to gather news and report it, notwithstanding its obligation to obey the law like any other citizens would. There is no apparent need to increase this enjoyment, and the possibility of unforeseen consequences are inescapable, as pointed out by this Court in *Zemel*:

There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.

381 U.S. at 16-17. In the same vein, the use of confidential sources is not a right guaranteed by the First Amendment, because it is outweighed by the paramount need to protect the public by ensuring that justice carried is out in our courts. The freedom of the press and source confidentiality are very important, to be sure. But they do not eclipse the even greater importance of national and local security. It is not unreasonable or unheard of for a constitutional right to be limited where the peoples' security is concerned. This is evident in the ability of the executive branch to suspend the writ of habeas corpus, which, the vast majority of the time, is guaranteed by the Fifth Amendment. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

Moreover, the interests that the privilege in question seeks to further are not even implicated in the case at bar. The reporter obtained the criminalizing information simply because the interviewee was uncomfortable with the situation and wanted advice from a person with whom he or she had become acquainted. The interview was not obtained at its outset in exchange for an assurance of confidentiality. Only after the employee began speaking with Ms. Crawley did the matter of confidentiality come up. He or she even agreed to be videotaped. This case does

not present a good fact pattern through which to analyze the granting of news stories as triggered by promises of confidentiality.

Should a reporter's privilege nonetheless be recognized by this Court, the interests of the public call for its restriction to a qualified privilege. An absolute privilege, even one that applied only to source identities, would render virtually impossible any investigation where the conversation with the reporter itself is a potential crime. *See In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2nd Cir. 2006).

Furthermore, it is not the duty of the press to scrutinize or prevent potentially criminal activity; that is an occupation reserved for law enforcement and investigatory governmental bodies. The interests of public protection are best served if sources who wish to remain anonymous are encouraged by policy to send a tip to these entities, as opposed to a newspaper. The case at bar provides an example. Here, the circus employee who spoke with the journalist in this case admitted fearing for his or her safety. This was a situation where he or she should have contacted the police, if that was so. A policy that tells informants there is zero risk of being identified when speaking with a journalist would improperly shift the incentive to contact authorities and thus endanger society by keeping police in the dark.

The dangers of an absolute reporter's privilege are not limited to the possibility of guilty criminals escaping punishment. Protecting confidential sources may also jeopardize a defendant's Sixth Amendment right to compulsory process by depriving the defendant of information that might help to prove his innocence.

Under the current law of privilege, which this Court is respectfully urged to reaffirm, a reporter is free to guarantee confidentiality to the vast majority of his or her sources. But in the rare event that the identity of one of those sources becomes detrimental to guaranteeing the

safety of the public, the maintenance of candid relationships between journalist and source becomes a luxury that justice cannot afford. While this Court should firmly reiterate that subpoenas should only be served on reporters when absolutely necessary, to hold that a privilege should be recognized goes too far in stunting the truth-finding function of the courts for the sake of accommodating the press. For the foregoing reasons, the decision of the trial court with regard to a purported privilege on behalf of journalists should be reversed.

III. FEDERAL RULE OF EVIDENCE 701 PERMITS THE LAY OPINION TESTIMONY OF A LAW ENFORCEMENT OFFICER AS TO THE MEANING OF CODE WORDS USED IN THE COURSE OF CRIMINAL ACTIVITIES WHERE THE OFFICER USES FIRST-HAND KNOWLEDGE GAINED IN THE COURSE OF THE SPECIFIC INVESTIGATION.

The Fourteenth Circuit Court of Appeals erred improperly held that a law enforcement officer's testimony concerning alleged code words or phrases in a conversation is admissible as lay opinion only if the officer has first-hand knowledge either as a participant in a conversation, or as a listener to a conversation who contemporaneously observes the speakers. This erroneous decision constitutes a misapplication of the requirements of Rule 701 of the Federal Rules of Evidence and creates a rule too narrow for practical use.

Rule 701 provides that if a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702, the expert-testimony rule. Fed. R. Evid. 701(a)-(c). The rule thus carves out an exception to the doctrine excluding opinion testimony at trial in order to retain the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event. *See* Fed. R. Evid. 701 advisory committee's note (1972 Proposed

Rules). Consequently, it is the job of the court when ruling on the admissibility of lay opinion to ensure that the opinion rests on personal knowledge and experience and is fairly derived from a base of everyday, rational reasoning. For the foregoing reasons, lower court's decision should be reversed.

A. Information obtained through the thorough investigation conducted by law enforcement officers satisfies the personal perception requirement of Rule 701.

Though a great amount of deference is afforded to trial courts when determining the admissibility of evidence, the present case highlights an inconsistency in the application of the lay opinion witness rule in the lower courts that is greatly in need of rectification. In this case, the Fourteenth Circuit Court of Appeals incorrectly upheld the decision of the United States District Court of the Southern District of Boerum denying the admission of lay opinion testimony provided by FBI Agent Thomas Simandy regarding the meaning of code words used during the course of a conspiracy. In its analysis, the Fourteenth Circuit justified its decision by stating that Agent Simandy, who had conducted a thorough investigation into the phone calls made during the course of the conspiracy, lacked first-hand knowledge on the matters of which the government wished him to testify *solely* because he did not personally observe or participate in the conversations of the co-conspirators. This constituted an inaccurate interpretation of the applicable rule.

The opinion expressed by the Fourteenth Circuit in the present case is problematic in that it accepts an analysis advanced by only a handful of lower courts, which adopt too narrow a view of the limitation of rule 701(a). *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *United States v. Peoples*, 250 F.3d 640, 641 (8th Cir. 2001). According to the rationale proffered by this line of analysis, the witness perception limitation of Rule 701(a) stands for the simple proposition that “you had to be there,”

and allows opinion testimony only when it “affords the jury an insight into an event that was uniquely available to an eyewitness.” *United States v. Garcia*, 413 F.3d 201, 212 (2nd Cir. 2005). This reading of the familiar requirement of first-hand knowledge or observation in regard to witness perception is neither familiar nor rational. Defining first-hand knowledge requires reference to personal knowledge, which is defined in turn as knowledge gained through either first-hand observation *or* experience, as distinguished from a belief based on what someone else said. *Black’s Law Dictionary* 951 (9th ed. 2009) (emphasis added). Notably, personal knowledge is *not* defined as first-hand knowledge gained only through observation.

A number of circuit courts have recognized the proper definition of personal knowledge when applying the limitation of Rule 701(a) to the lay opinion testimony of law enforcement officers regarding information learned during the course of a particular investigation. *United States v. El-Mezain*, 664 F.3d 467, 511-15 (5th Cir. 2011); *United States v. Rollins*, 544 F.3d 820, 831-32 (7th Cir. 2008), cert. denied, 130 S. Ct. 3343 (2010); *United States v. Garcia*, 994 F.2d 1499, 1507 (10th Cir. 1993); *United States v. Janyousi*, 657 F.3d 1085, 1101-06 (11th Cir. 2011), cert. denied, 133 S. Ct. 133 (2012). Specifically, these courts have appropriately recognized that the requirement of lay witness perception is met when a law enforcement officer has had the opportunity to conduct a first-hand review of the information gathered during the course of a particular investigation. *Rollins*, 544 F.3d at 831-32 (“We find that the trial judge did not err in concluding that Agent McGarry’s [testimony about code words] was rationally based on his first-hand perception of the intercepted phone calls about which he testified as well as his personal, extensive experience with this particular drug investigation.”).

When an officer, such as Agent Simandy in the present case, has had the opportunity to review the contents of a particular investigation, he or she gains a perspective on the case that

goes well beyond the requirement of direct personal observation or participation advanced by the Fourteenth Circuit. By engaging in a review of typical investigatory documents, such as transcripts of recorded co-conspirator phone conversations, and in conducting interviews with undercover ATF Agent Jason Lamberti and helicopter supplier Alan Klestadt, Agent Simandy had become intimately familiar with the unusual communication used by these conspirators. (R. 23). His knowledge effectively became the equivalent of direct observation or participation, with the added benefit of possessing a perspective on the bigger picture of the crime, thus placing in him the position of being able to effectively reproduce an accurate depiction of the event for the trier of fact-- the very goal at the heart of rule 701. *See* Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules). Consequently, his valuable testimony should be admissible at Respondent's trial.

B. The testimony provided by Agent Simandy regarding the meaning of the code words during the course of the conspiracy is helpful to the jury and does not constitute argument from the witness stand.

As an additional limitation, Rule 701(b) of the Federal Rules of Evidence requires that lay opinion testimony be helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Fed. R. Evid. Rule 701(b). In order for lay opinion testimony to be considered helpful to the jury, it need only help the jury or the court to understand the facts about which the witness is testifying. *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). The opinions or inferences provided by lay opinion witnesses, however, cannot be so broad as to summarize evidence that has not yet been presented to the jury or result in supporting argument being delivered from the witness stand. *United States v. Garcia*, 413 F.3d 201, 213-14 (2nd Cir. 2005).

In the present case, code words were used with the intent to confuse an outside listener and hide the culpability of the co-conspirators. These code words and phrases, such as the use of the term “blood diamonds” when referring to elephant tusks, are not intended to be easily discernible, and the finder of fact will need more than a mere statement rendering their position in a conversation to be able to decipher their meaning. Agent Simandy’s established familiarity with the investigation would allow for him to perceive the meaning of coded language that the jury would most likely be unable to readily discern, and it would allow for him to be able to adequately relay the meaning of the terms. *United States v. Rollins*, 544 F.3d 820, 833 (7th Cir. 2008) (stating that a law enforcement officer’s testimony regarding the use of code words unique to a particular intercepted telephone conversation provided needed assistance to the jury in determining a fact in issue); *United States v. Jayyousi*, 657 F.3d 1085, 1104 (recognizing that a law enforcement officer’s knowledge of an investigation allowed for him to draw inferences about the meanings of code words that a jury could not have readily drawn). Because his testimony would be substantially helpful to the jury in understanding a fact at issue, it should be allowed to be presented at trial.

C. Testimony provided by a law enforcement agent concerning facts learned during the course of a particular investigation does not constitute expert witness testimony.

The last limitation of Rule 701 of the Federal Rules of Evidence requires that testimony cannot be received as lay opinion if it is based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Fed. R. Evid. 701(c). The limitation provided in Rule 701(c) specifically requires that a lay opinion must be the product of reasoning processes familiar to the average person in everyday life. *United States v. Garcia*, 413 F.3d 201, 215 (2nd Cir. 2005). The goal of this requirement is to prevent a party from conflating expert and lay opinion testimony, thereby conferring an aura of expertise on a witness without satisfying the

reliability standard set forth in Rule 702 and pre-trial disclosure requirements set forth in the Federal Rules of Criminal Procedure Rule 16 and the Federal Rules of Civil Procedure Rule 26.

Id. The testimony of Agent Simandy is also admissible with regard to this final factor.

In order for the testimony of a law enforcement officer to fall under the parameters of rule 702, the officer must have specialized knowledge that will assist the trier of fact, and the knowledge, skill, experience, training and education that will qualify him or her on the subject of his or her testimony. *United States v. Johnson*, 617 F.3d 286, 294 (4th Cir. 2010). It is well-established that some law enforcement officers can be appropriately designated as experts, but these officers are typically narcotics officers specializing in testimony regarding the drug market and drug jargon. *Id.* In those instances, the law enforcement officer relies heavily on his experience observing narcotics trafficking practices from various cases and his or her knowledge gained from law enforcement training. *United States v. Rollins*, 544 F.3d 820, 832-33 (7th Cir. 2008).

Although the law enforcement officer in the present case has five years of experience in narcotics investigations with the FBI, his expertise in this area will not be used in testifying regarding the coded language used by Respondent and his co-conspirators, because of the nature of the crime of which Respondent is accused. The current case involves the use of unique coded language during the course of a unique crime, thus any impressions of Agent Simandy regarding the meaning of the coded language in the context of intercepted telephone conversations were based solely on his own personal observations and perceptions derived from this particular case. *Id.* The particularity of the investigation means that no specific methodology could have been developed for which the law enforcement officer could base his opinion, and, more importantly, there existed no specialized knowledge of which he could have based his opinion or inferences.

Instead, his familiarity with investigation will allow for an analytical process to be involved that is more akin to the product of reasoning familiar to the average person during the course of everyday life, the primary goal of the limitation of Rule 701(c). *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005).

The Fourteenth Circuit improperly excluded the lay opinion testimony of Officer Simandy in Respondent's trial. Officer Simandy's testimony did not have to necessarily be derived from first-hand observation in order to form an adequate perception for the purpose of giving a lay opinion at trial, and his unique information regarding the meaning of the coded phrases used by Respondent would be highly useful to a jury. Furthermore, his testimony would not constitute an expert opinion because it would be based on his own perception as a lay person, not specialized training or outside knowledge. Therefore, the ruling of the lower court barring his testimony was in error.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

29P
Counsel for Petitioner

APPENDIX I

United States Constitution

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX II

Federal Rules of Evidence

FED. R. EVID. 804(b)(6): Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.

A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

FED. R. EVID. 501: Privilege in General

The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

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

FED. R. EVID. 701: Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.