

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

Submitted by:
Counsel for Petitioner

QUESTIONS PRESENTED

1. Did the Fourteenth Circuit err in refusing to admit hearsay testimony of a witness, even though Federal Rule of Evidence 804(b)(6) provides an exception to hearsay under forfeiture by wrongdoing, especially when a victim was murdered by defendant's co-conspirator for the sole reason of preventing the victim's testimony?
2. Was it proper for the Fourteenth Circuit to recognize that there existed a common law claim of reporter's privilege, even when Federal Rule of Evidence 501 makes an exception to the common law when the constitution and congressional legislation have failed to recognize such privilege; and if even if such a privilege exists, that it is absolute even though the interests of justice demand otherwise?
3. Did the Fourteenth Circuit err when it applied a rigid standard that the first-hand knowledge limitation of Federal Rule of Evidence 701(a) required a witness to participate in or contemporaneously listen to a conversation, even though the witness had first-hand knowledge of the code words from reading transcripts and formed a rational opinion based on observed facts learned from the investigation?

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OPINIONS BELOW

In the case of *United States v. William Barnes*, the pre-trial decision of the United States District Court for the Southern District of Boerum, identified as Cr. No. 11-76 and dated May 2, 2012, is unreported. The opinion of Judge Rodriguez for the Fourteenth Circuit United States Court of Appeals, identified as Cr. No. 12-647 and dated July 12, 2012, is unreported.

STATEMENT OF THE CASE

Factual History

On November 29, 2011, Alfred Anderson (“Anderson”) was apprehended by the police and confessed to murdering James Reardon (“Reardon”) to prevent him from exposing a scheme to hunt down captive circus elephants for their ivory. (Record, hereinafter “R.” 7.) Earlier that same day, at 2:00 a.m., Anderson had telephoned William Barnes (“defendant”), his co-conspirator in the scheme, and told the defendant that, “[w]e are out of time. We need him [Reardon] out of the picture.” (R. 19.) The call had been recorded by the Federal Bureau of Investigation (“FBI”) pursuant to a warrant. (R. 6.) The defendant replied, “I don’t want anything to do with this.” (R. 19.)

Some two weeks earlier, on November 15, 2011, in another recorded call, Anderson spoke with the defendant, expressing concern about Reardon, and said, “[I]et’s get rid of him.” The defendant responded “Don’t do anything, not yet.” (R. 18.)

The day before Reardon was murdered, on November 28, 2011, Reardon had called his friend, Daniel Best (“Best”), and told him about the scheme to kill the elephants for their ivory. Reardon told Best that he was scared of Anderson and that Anderson was coming to his home to discuss their plans. (R. 8.) The next day, Best observed Anderson running from Reardon’s apartment. Best entered the apartment and found Reardon dead. (R. 7.)

The scheme to kill the elephants was allegedly hatched back in July 2011, when the defendant contacted Anderson to discuss a plot to hunt circus elephants to raise money for the defendant's nearly bankrupt business, Big Top Circus ("Big Top"). To raise \$500,000 in six months, the defendant's plan was to augment his herd of twenty elephants with another twenty elephants from two other circuses. (R. 2.) To convince the other circuses to bring their elephants to Big Top, the defendant proposed "staging the 'greatest elephant show on earth.'" (R. 2.) To publicize the show, the defendant invited a reporter from the *Boerum Times*, Kara Crawley ("Crawley") to do an article. (R. 9.)

However, Crawley, who had a strong interest in animal rights, hoped to get inside information on how Big Top treated its animals. (R. 9.) While she was researching her article, Crawley was approached by an unidentified employee of Big Top who had overheard the defendant in conversation about a plot to kill the elephants for their ivory. (R. 10.) The employee was fearful for his safety should the defendant find out that he had leaked this information about the plot to Crawley. Crawley agreed not to disclose the employee's identity while the employee still worked at Big Top. (R. 10.) However, the employee agreed to have the conversation with Crawley videotaped for Crawley's use in preparing the article. (R. 10.) Her newspaper article on the plot to kill the elephants was published on December 1, 2011, in the *Boerum Times*. (R. 10.)

Two weeks after the article was published, on December 15, 2011, Agent Thomas Simandy ("Agent Simandy"), of the FBI took over the investigation of this case after Agent Narvel Blackstock ("Agent Blackstock") died during the investigation. (R. 12-13.) Between October 4, 2011, and December 1, 2011, while Agent Blackstock was still investigating this

case, he had listened contemporaneously to intercepted conversations between the defendant and his alleged co-conspirators and transcribed the conversations. (R. 13.)

When Agent Simandy took over, he read all of Agent Blackstock's transcripts. (R. 13.) Based on his review of the transcripts, Agent Simandy conducted his own investigation of certain events discussed by the defendant and his alleged co-conspirators. (R. 13.) Agent Simandy discovered that the defendant had contacted Weapons Unlimited to place an order for three fully automatic unregistered AK-47's, which he paid for in full with a credit card. (R. 2.) However, the defendant was not aware that he placed the order with undercover Agent Jason Lamberti ("Agent Lamberti") of the Bureau Of Alcohol, Tobacco and Firearms ("ATF"). (R. 2.) The transaction was conducted "under the table." (R. 2.) The AK-47's were to be delivered to the defendant on December 5, 2011. (R. 2.)

Agent Simandy interviewed Agent Lamberti and learned that the defendant had contacted him on October 2, 2011, at Weapons Unlimited and inquired about purchasing three assault rifles. (R. 13.) Agent Simandy then interviewed Alan Klestadt ("Klestadt") from Copters Corporation and learned that on October 6, 2011, the defendant had contacted him and arranged a one-day rental of a helicopter. (R. 13.)

During Agent Simandy's review of the transcripts, he noticed that the defendant and the alleged co-conspirators used "certain code words and phrases." (R. 13.) The transcripts had "repeated references to blood diamonds." (R. 13.) On October 8, 2011, just two days after the defendant had arranged a helicopter rental from Klestadt, the defendant stated, in one of the intercepted calls, "Charlie tango is ready." (R. 13.) In yet another call, on October 3, 2011, just one day after Agent Lamberti sold the defendant three assault weapons, there were repeated references to a "black cat." (R. 13.) During the call on October 3, 2011, the defendant stated,

“black cat is arranged.” (R. 13.) Agent Simandy testified that he was able to use the context of the conversations to decipher the meaning of these words and testified that everything he learned about the case, he learned through his extensive investigation. (R. 13-14.)

Procedural History

The defendant was indicted on December 4, 2011, by a grand jury. (R. 3-4.) He was charged with two counts of Conspiracy To Deal Unlawfully in Firearms in violation of 18 U.S.C.A. §§ 371 and 922(a)(1)(a) (“Counts One and Two”); two counts of Conspiracy to Commit a Crime of Violence Against an Animal Enterprise in violation of 18 U.S.C.A. §§ 43 and 371 (“Counts Three and Four”); and two counts of Conspiracy to Commit Unlawful Takings Under the Endangered Species Act in violation of 16 U.S.C.A. §§ 371 and 1538 (“Count Five”) (R. 3-4.)

Before trial, the United States moved *in limine* to introduce the out-of-court statements made by Reardon to Best about the elephant hunt scheme as an exception to hearsay under Federal Rule of Evidence 804(b)(6) and forfeiture by wrongdoing. (R. 6.) The United States also sought to enforce the subpoena for tapes in opposition to a motion to quash based on a reporter’s privilege asserted by Crawley pursuant to Federal Rule of Evidence 501. (R. 6.) Finally, the United States moved to introduce the lay opinion testimony of Agent Simandy pursuant to Federal Rule of Evidence 701. (R. 6-7.)

On May 1, 2012, the United States District Court for the Southern District of Boerum (“District Court”) heard oral arguments on the motions. (R. 5.) In an order and decision issued on May 2, 2012, the District Court ruled against the United States’ motion to exclude hearsay evidence under forfeiture by wrongdoing and introduce the testimony of Agent Simandy as a lay

witness. (R. 16-17.) The District Court also granted Crawley's motion to quash the subpoena. (R. 17.)

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 ("Fourteenth Circuit"). (R. 20.) On July 12, 2012, in a split decision, the Fourteenth Circuit affirmed the order and decision of the District Court and ruled against the United States on all issues, with Judge Zhu dissenting. (R. 32-35.) The United States subsequently filed a petition for writ of certiorari, and on October 2, 2012, the United States Supreme Court granted certiorari. (R. 36.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erred when it affirmed the District Court's decision to exclude testimonial evidence offered by the United States after oral arguments were presented during a motion *in limine*. The United States sought to: (1) admit the hearsay testimony of Best as an exception under the forfeiture by wrongdoing doctrine, pursuant to Rule 804(b)(6); (2) oppose a motion to quash a subpoena by Crawley; and (3) admit the lay opinion testimony of Agent Simandy under Rule 701.

First, Best's testimony should have been admitted as an exception to hearsay pursuant to Rule 804(b)(6) forfeiture by wrongdoing. The lower courts failed to recognize that co-conspirators impute liability to one another if any member commits a crime in furtherance of the conspiracy. Anderson murdered Reardon to prevent him from exposing the scheme to illegally hunt elephants for their ivory, an act that was foreseeable to the defendant. Because the defendant took no action to prevent Reardon's murder, the defendant effectively: (1) acquiesced in Reardon's murder; (2) that was intended to render Reardon unavailable as a witness; and (3) that did in fact render Reardon unavailable as a witness. This Court should find that since the

actions of the defendant meet all of the requirements of Rule 804(b)(6), forfeiture by wrongdoing, the defendant has waived his right to object to Best's testimony on hearsay grounds.

The Fourteenth Circuit erred when it affirmed the decision of the District Court to quash the subpoena and recognized an absolute reporter's privilege for Crawley. When the lower courts recognized Crawley's claim of reporter's privilege under common law and Federal Rule of Evidence 501, they failed to follow this Court's holding in *Branzburg v. Hayes*. *Branzburg* held that there is no reporter's privilege under the First Amendment or common law. Rather, this Court held that every citizen has a duty to testify and that the public has a right to every man's evidence. This Court should find that there is no absolute reporter's privilege exempting Crawley from her duty to produce evidence. She must disclose the identity of her source at Big Top and provide the videotapes of her conversations with her source, which confirm the defendant's participation in the conspiracy to kill elephants. Even if this Court finds Crawley has a qualified reporter's privilege under Rule 501, the privilege should be narrowly construed, because privileges obstruct the demand for truth in a court of law.

Finally, the Fourteenth Circuit erred when it affirmed the District's Court decision to exclude the lay opinion testimony of Agent Simandy on the probable meaning of code words used by the defendant and his co-conspirators. Both of the lower courts found that under Rule 701, Agent Simandy lacked first-hand knowledge of the facts because he only read the transcripts of recorded conversations and was not present when the recordings were made. The lower courts applied a test that was unnecessarily rigid, especially since Agent Simandy only offered his opinion on the meaning of code words that could have been equally perceived by seeing or hearing them.

Agent Simandy formed rational basis for linking the terms, “black cat” and “Charlie tango” to the purchase of illegal weapons and a helicopter rental since he conducted his own investigation. This Court should apply a less rigid standard and find Agent Simandy’s testimony admissible since his opinion was not on facts or events that would have required his presence to properly perceive them in order to satisfy Rule 701(a).

STANDARD OF REVIEW

Evidentiary questions of law are reviewed under an abuse of discretion standard. *United States v. Vaandering*, 50 F.3d 696, 704 (9th Cir. 1995) (citing *United States v. Brook*, 4 F.3d 1480, 1487 (9th Cir. 1993); *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011) (applying an abuse-of-discretion review to “ruling regarding the admissibility of the agent’s lay testimony.”)

ARGUMENT

I. THE FOURTEENTH CIRCUIT IMPROPERLY EXCLUDED THE STATEMENTS OF BEST BECAUSE UNDER *PINKERTON*, THE INTENT REQUIRED TO WAIVE A HEARSAY OBJECTION UNDER FORFEITURE BY WRONGDOING IN RULE 804(b)(6) IS IMPUTED TO THE DEFENDANT AS A CO-CONSPIRATOR, AND DEFENDANT ACQUIESCED TO THE MURDER

Best’s conversation with Reardon about the elephant hunt conspiracy is admissible under the common law doctrine of forfeiture by wrongdoing codified in Federal Rule Evidence 804(b)(6). In 1878, this Court held that “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 (1878). When the Federal Rules of Evidence were amended in 1997, Rule 804(b)(6) incorporated the holding in

Reynolds, adding the elements of acquiescence and intent. *Id.*; Fed. R. Evid. 804(b)(6) advisory committee's note.

Rule 804(b)(6) provides an exception to the Rule Against Hearsay, Rule 802, for 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 802; Fed. R. Evid. 804(b)(6).

In order for a defendant to have waived his right to a hearsay objection under forfeiture by wrongdoing, “a district court must find, by the preponderance of evidence, that (1) the defendant engaged or acquiesced in the wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.” *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). While the elements of intent and acquiescence are at issue in this case, the third element of this test is already satisfied because the defendant's co-conspirator, Anderson, confessed to murdering Reardon.

Although a defendant in a conspiracy may not actually have the intent to commit a wrongdoing that his co-conspirator carries out, under *Pinkerton*, the intent required to meet the hearsay exception of forfeiture by wrongdoing in Rule 804(b)(6) is imputed to a defendant as a member of the larger conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946). Furthermore, as long as a defendant foresees the wrongdoing and does not act to prevent it, by his acquiescence, it is “just as if he killed the witness himself.” *United States v. Thompson*, 286 F.3d 950, 963 (7th Cir. 2002).

In this case, the Fourteenth Circuit improperly excluded the statements of Best because under *Pinkerton*, the intent required to meet the hearsay exception of forfeiture by wrongdoing in Rule 804(b)(6) is imputed to the defendant as a co-conspirator. Furthermore, it was foreseeable

that the defendant's co-conspirator was going to murder Reardon. By failing to take affirmative action, the defendant acquiesced in this murder. *Pinkerton*, 328 U.S. at 646. Therefore, this Court should reverse the decision of the Fourteenth Circuit to exclude Best's statements and find the evidence admissible.

A. The *Giles* Test For Intent Is Satisfied Because Anderson Murdered Reardon For The Sole Purpose Of Preventing Him From Disclosing The Conspiracy And Thus Waived His Right To Object On Hearsay And Confrontation Clause Grounds

The Fourteenth Circuit's reliance on *Giles* is misplaced because the murder in that case was not committed with the intent to silence the witness. (R. 26.) *Giles v. California*, 554 U.S. 353 (2008). The defendant's co-conspirator, Anderson, had the intent to, and did in fact, kill Reardon for the sole reason of silencing him about their conspiracy to hunt elephants. (R. 24.) This Court held that the "requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" *Id.* at 367.¹ This Court reasoned that the Confrontation Clause cannot be waived when a defendant is on trial for murder where the murder was not for the *intent* of preventing testimony. *Id.* at 368 (emphasis added).

In *Giles*, the defendant was charged with the murder of his former girlfriend. The prosecution attempted to admit into evidence statements by a police officer who responded to a domestic disturbance call from the victim just weeks before the murder. *Id.* at 356-57. This Court ruled that the defendant had not waived his objection to hearsay evidence by wrongdoing because the murder was not committed solely with the intent to make the witness unavailable at the trial. *Id.* at 367. However, forfeiture by wrongdoing remains applicable when a defendant has the intent to make a witness unavailable for testimony.

¹ Citing C. Mueller & L. Kirkpatrick, *Federal Evidence* 235 (Wolters Kluwer Law & Business eds., 3d ed. 2007)

Therefore, the Fourteenth Circuit failed to apply the rule of law from *Giles* to the specific facts of this case. Unlike the defendant in *Giles*, in this case Anderson murdered Reardon with the *intent* of preventing him from talking or testifying. (R. 7.) In a recorded telephone conversation between the defendant and Anderson on November 29, 2011, Anderson clearly states that he will “take care of [Reardon]” and that Reardon needs to be “out of the picture” or else “[t]hings are gonna [sic] be messy.” (R. 19.) Furthermore, the defendant has conceded that Anderson confessed to Reardon’s murder. (R. 7.) Anderson murdered Reardon with the intent of preventing him from talking or testifying about their conspiracy to hunt elephants. (R. 7.)

Therefore, this Court should find that the Fourteenth Circuit erred when it found that the intent requirement in *Giles* precluded the defendant’s right to a hearsay objection. *Giles*, 554 U.S. at 353. Anderson murdered Reardon with the intent to silence him, and in doing so, he has waived his right to a hearsay objection under Rule 804(b)(6). Fed. R. Evid. 804(b)(6).

B. Best’s Testimony Should Have Been Admitted Pursuant To Forfeiture By Wrongdoing Because The Intent For Reardon’s Murder Was Imputed To Defendant As A Member Of A *Pinkerton* Conspiracy

The Fourteenth Circuit erred when it excluded Best’s testimony because it failed to extend the forfeiture by wrongdoing exception to the defendant, a member of the elephant hunt conspiracy. It is well-settled that an overt act of a defendant’s co-conspirator ““may be the act of all without any new agreement specifically directed to that act.”” *Pinkerton v. United States*, 328 U.S. 640, 646 (1946) (quoting *United States v. Kissel*, 218 U.S. 601, 608 (1910)). This Court also held in *Pinkerton*, that “[m]otive or intent may be proved by acts or declarations of some of the conspirators in furtherance of the common objective.” *Id.* at 647. This rule has been interpreted by several Circuits to mean that even if a defendant was not personally involved in a

wrongdoing of his co-conspirator, he is involved in this wrongdoing by being a member of a conspiracy.² See *United States v. Cherry*, 217 F.3d 811, 817 (10th Cir. 2000).³

In *Cherry*, the defendant was involved in a conspiracy to murder a key witness. Shortly before the trial, the witness was murdered by one of the defendants, presumably for the sole reason of silencing his testimony. *Id.* at 814. The United States subsequently sought to admit statements made by the victim before his death against all defendants. That court held that the defendant could not make a hearsay objection because he had waived this right under Rule 804(b)(6) and his participation in a *Pinkerton* conspiracy. Fed. R. Evid. 804(b)(6). *Cherry*, 217 F.3d at 815-17; *Pinkerton*, 328 U.S. at 646. Noting that a failure to consider a *Pinkerton* conspiracy risked the danger of witness tampering to prevent testimony, that court ruled that a defendant co-conspirator may be deemed to have “acquiesced in” forfeiture by wrongdoing and waived his right of confrontation when the United States has proven the conspiracy. *Cherry*, 217 F.3d at 820.

In this case, however, the Fourteenth Circuit erred in excluding Best’s hearsay testimony by misinterpreting the *Pinkerton* co-conspirator liability rule. While the Fourteenth Circuit ruled that the defendant did not have the intent to murder Reardon, *Pinkerton* explicitly held that both

² This Court also ruled in *Pinkerton* that “criminal intent to do the act is established by the formation of the conspiracy” and that “so long as the partnership in crime continues, the partners act for each other in carrying it forward.” *Pinkerton*, 328 U.S. at 647. The burden is also on the defendant to prove that he was not a part of the conspiracy or that he withdrew from it. *United States v. LaQuire*, 943 F.2d 1554, 1564 (11th Cir. 1991). In order to prove withdrawal, a defendant has the burden of proving that he satisfied a two-prong test: (1) that “he has taken affirmative steps to defeat the objectives of the conspiracy[;]” and (2) that he “made a reasonable effort to communicate these acts to his co-conspirators or disclosed the scheme to law enforcement authorities.” *Id.* at 1564. In this case it means that as long as the defendant and Anderson continued in their conspiracy to hunt elephants, Barnes had the intent to kill Reardon to prevent his testimony. Without proof that he withdrew from his conspiracy with Anderson, it is presumed that the defendant’s criminal intent continued throughout Reardon’s murder.

³ See also *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002) (holding that a defendant may waive his right to a hearsay objection if the wrongdoing was committed in furtherance of a conspiracy); *United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) (holding that “traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis.”)

the wrongdoing and the intent of the wrongdoing are imputed to a co-conspirator just by being a member of a conspiracy. (R. 17.) *Pinkerton*, 328 U.S. at 647. Therefore, as a member of a conspiracy with Anderson, the intent to murder Reardon to prevent his testimony was imputed to the defendant. Even though the defendant did not actually murder Reardon or want Anderson to murder him, he continued to have the intent necessary under forfeiture by wrongdoing by his involvement in the conspiracy. With this intent, the defendant waived his objection to hearsay by wrongdoing under Rule 804(b)(6). Fed. R. Evid. 804(b)(6).

C. Best's Testimony Should Have Been Admitted Under Rule 804(b)(6) As An Exception To The Rule Against Hearsay Because The Defendant Acquiesced To The Wrongdoing That Made Reardon Unavailable As A Witness

Not only did the defendant waive his right to a hearsay objection when he engaged in a conspiracy with Anderson, but he also acquiesced in Reardon's murder. Hearsay testimony is admissible, as an exception, under the forfeiture by wrongdoing rule if a court finds, by a preponderance of the evidence, that: (1) a defendant engaged in or acquiesced in wrongdoing; (2) that was intended to render the declarant unavailable as a witness; and (3) that did, in fact, render the declarant unavailable as a witness. *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). That court recognized the forfeiture by wrongdoing doctrine and ruled that the elements must be construed broadly and without regard to the nature of the charges at trial *whenever* the defendant's wrongdoing was intended to, and did in fact, render the declarant unavailable as a witness. *Id.* at 241; *see e.g., United States v. Dhinsa*, 243 F.3d 635, 652 (2d Cir. 2001) (holding that the elements of forfeiture by wrongdoing should be broadly construed).

The defendant was forewarned by Anderson that he had plans to "take care of" Reardon and that they needed "him out of the picture." (R. 19.) In response, the defendant stated, "[y]eah, well don't do anything. Not yet." (R. 18.) By choosing to not take any affirmative action to

prevent Anderson from “taking care of” Reardon, the defendant: (1) acquiesced in Anderson’s wrongdoing; (2) that was intended to render Reardon unavailable as a witness to their conspiracy; and (3) that did, in fact, render Reardon unavailable as a witness to the elephant hunt conspiracy. (R. 19.) In fact, when Anderson indicated he intended to render Reardon unavailable by stating, “[w]e have to. I’m doing it[,]” the defendant responded, “I don’t want anything to do with this.” (R. 19.)

This Court should find that the defendant therefore waived his hearsay objection under forfeiture by wrongdoing because his action, or failure to act, combined with his involvement in a *Pinkerton* conspiracy with Anderson, implicates him in the wrongdoing. *Pinkerton*, 328 U.S. 640 at 647. This Court should find that he cannot now object to testimony on hearsay grounds when he was involved in this conspiracy and acquiesced in Reardon’s murder to prevent his testimony.

1. *The defendant engaged in a conspiracy with Anderson and therefore acquiesced in Anderson’s wrongdoing when he murdered Reardon*

Defendant waived his objection to hearsay by acquiescence when he knew that Anderson, his co-conspirator, planned to harm Reardon and he refused to take action to prevent it. Rule 804(b)(6) allows for a hearsay exception when a defendant *acquiesces* in conduct intended to procure the unavailability of the witness. Fed. R. Evid. 804(b)(6) (emphasis added). The term acquiesced has been defined as an act in and of itself that accepts or complies tacitly or passively with the wrongdoing. Acquiescing in wrongdoing is “no less valid as a means of waiver than the decision to more directly procure the unavailability of a witness by murdering a witness oneself.” *United States v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002), (citing *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000)).

In *Thompson*, the court ruled that forfeiture by wrongdoing may be imputed amongst co-conspirators if the wrongdoing was foreseeable and within the furtherance of the conspiracy. The defendant in that case was charged with drug-trafficking conspiracy and subsequent murder to silence a witness. *Thompson*, 286 F.3d at 965-66. That court held that the defendant did not waive his hearsay objection because he had no knowledge that his co-conspirators were going to commit the murder. *Id.* However, that court recognized that if the defendant had known about his co-conspirators' plans to murder the witness, he would have waived his right to a hearsay objection by acquiescence. *Id.* Following that court's holding in *Cherry*, that court noted that the act of acquiescence itself implies intent if the co-conspirator is aware of his co-conspirator's premeditated wrongdoing. *Thompson*, 286 F.3d at 964 (citing *Cherry*, 217 F.3d at 811).

Not only did the defendant engage in wrongdoing when he conspired to hunt elephants for their ivory with Anderson, but he acquiesced in Anderson's murder of Reardon. The defendant was on notice that Anderson planned to "take care of" Reardon and procure his unavailability to expose their scheme or ultimately testify against them. (R. 19.) Applying the rule of law in *Thompson*, it was foreseeable to the defendant that Anderson was intent on rendering Reardon unavailable to either expose them or later testify. *Thompson*, 286 F.3d at 964. And since the defendant was aware and took no steps to prevent Anderson from taking action, he effectively acquiesced and thus the intent to murder Reardon is imputed to him.⁴ *Thompson*, 286 F.3d at 964. This Court should find that even though the defendant did not murder Reardon, he waived his right to object to Best's hearsay testimony because Anderson's intent to murder Reardon is imputed to the defendant as a member of their conspiracy.

⁴ See *United States v. LaQuire*, 943 F.2d 1554, 1564 (11th Cir. 1991).

2. *The wrongdoing intended to render and did in fact render Reardon unavailable as a witness*

Following the *Gray* test of forfeiture by wrongdoing, the defendant waived his right to object to hearsay testimony when he acquiesced in Anderson’s wrongdoing that both intended to and did in fact render Reardon unavailable as a witness. Before his death, Reardon voiced concerns about the elephant hunt to Anderson and worried about legal troubles. (R. 18.) Reardon also called Best to relay the elephant hunt plans and to express concerns that Anderson was going to harm him. (R. 24.) Before Reardon had the opportunity to alert the authorities about his concerns, he was murdered by Anderson. (R. 7.) Anderson confessed to killing Reardon to prevent him from exposing the elephant hunt conspiracy. (R. 24.) It is therefore uncontested that Anderson’s wrongdoing did, in fact, silence Reardon to prevent him from alerting authorities or testifying about the hunting conspiracy. Reardon’s murder was for the sole reason of preventing testimony and therefore is admissible as an exception to hearsay under forfeiture by wrongdoing. This Court should therefore find that the defendant has waived his hearsay objection under forfeiture by wrongdoing and find Best’s hearsay testimony admissible.

II. A CLAIM OF COMMON LAW REPORTER’S PRIVILEGE SHOULD NOT BE RECOGNIZED UNDER RULE 501 BECAUSE, UNDER THE EXCEPTIONS TO RULE 501, THE CONSTITUTION, AS INTERPRETED BY THIS COURT, AND FEDERAL STATUTORY LAW PROVIDE OTHERWISE; AND THIS COURT HAS HELD THERE IS NO COMMON LAW REPORTER’S PRIVILEGE

Federal Rule of Evidence 501 “deals with the privilege of a witness not to testify.” H.R. Rep. No. 93-1597 (1975). Rule 501 provides that, “[t]he 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 (emphasis added). “Testimonial

exclusionary rules and privileges contravene the fundamental principle that ‘the public ... has a right to every man’s evidence.’ ‘As such, they must be strictly construed and accepted’”

Trammel v. United States, 445 U.S. 40, 50 (1980) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Elkins v. United States*, 364 U.S. 206, 234 (1960)).

In this case, this Court should strictly construe Rule 501 and begin its textual analysis with the first two exceptions in the Rule: the Constitution and a federal statute. Fed. R. Evid. 501. A claim of privilege which meets those exceptions precludes application of the general rule in Rule 501 for a common law privilege as interpreted by the federal courts. Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* §§ 5436, 5437 (2013). A claim of federal common law reporter’s privilege should not be recognized under the exceptions to Rule 501 because the Constitution, as interpreted by this Court, and federal statutory law provide “otherwise.” Furthermore, this Court has held that there is no common law reporter’s privilege. *Branzburg v. Hayes*, 408 U.S. 665, 689-90, 698 (1972). To the contrary, this Court has held that common law has recognized that it is every person’s duty to report evidence of a crime to the authorities. *Id.* at 696.

This Court’s holding in *Branzburg* provides the “otherwise” in the text of Rule 501. Fed. R. Evid. 501. In that case, this Court held that there is no reporter’s privilege under the First Amendment or common law, and that it is Congress’s role to decide whether or not to create a reporter’s privilege. *Id.* at 689-90, 698, 706. U.S. Const. Amend. I. Since *Branzburg*, this Court

has reaffirmed its holding in other cases.⁵ Moreover, in the forty one years since *Branzburg* was decided, Congress has repeatedly declined to create a statutory reporter's privilege.⁶

In this case, Crawley's taped conversations and the identity of the circus employee demanded in the subpoena should be disclosed. Although Crawley claims that she does not have to disclose the tapes because of reporter's privilege, her claim is invalid under *Branzburg* and precluded by statute and common law. U.S. Const. Amend. I. (R.11.) Further, Crawley is not exempt from the normal duty of every citizen to testify and answer questions relevant to a criminal investigation. Therefore, this Court should reverse the decision of the Fourteenth Circuit and deny Crawley's motion to quash the subpoena. (R. 8, 28-30.)

Even if this Court recognizes a reporter's privilege under Rule 501, the privilege should be qualified. "Whatever their origins, these exceptions to the demand for every man's evidence 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 n.18 (1974).

A. This Court Has Expressly Held That There Is No Reporter's Privilege Under The First Amendment, Common Law, Or A Federal Statute

This Court should not recognize or create a reporter's privilege under Rule 501 because "[n]o pledge of privacy nor oath of secrecy can avail against a demand for the truth in a court of justice." J. Wigmore, Evidence § 2286 (McNaughton rev. 1961) *quoted in Branzburg* at 682 n.21. "For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

Furthermore, the "right to the production of all evidence at a criminal trial ... has constitutional

⁵ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 188-89 (1990); *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978); *superseded by statute on other grounds.*

⁶ Privacy Protection Act of 1980, 42 U.S.C. 2000aa, Pub. L. No. 96-440, 94 Stat. 1879; Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 Ohio St. L.J. 469, 507-511 (2006).

dimensions ... the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of the law and gravely impair the basic function of the courts.” *Nixon*, 418 U.S. at 711-12 (1974).

In *Branzburg*, the landmark case addressing reporter’s privilege, this Court applied the principle that the public has a right to every man’s evidence. *Branzburg*, 408 U.S. at 668. In that case, three reporters had refused to disclose their confidential sources or information to grand juries. *Branzburg*, 408 U.S. at 668-73. This Court reviewed the reporters’ claims of privilege under two sources of law. One source was the Constitution’s First Amendment guarantee of freedom of speech and freedom of the press. *Id.* at 682. The second source was common law. *Id.* at 698.

Under the first source of law, the First Amendment, the reporters argued that if they were compelled to reveal their confidences, their sources would be “measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.” *Id.* at 679-80.

Branzburg and its progeny are a reflection of this Court’s consistently narrow construction of privileges.⁷ “[T]he Supreme Court has not shown enthusiasm for the creation of constitutional privileges” *Titan Broad. Sys. Inc. v. Turner Broad. Sys. Inc.*, (*In re Madden*) 151 F.3d 125, 128 (3d Cir. 1998). Before the Federal Rules of Evidence were enacted by Congress, the Advisory Committee of the Judicial Conference of the United States drafted rules

⁷Three later cases of this Court reaffirmed *Branzburg*’s holding. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 674 (1991) (citing *Branzburg*, “this Court found it significant that ‘these cases involve no intrusions upon speech or assembly, no...restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold’”); *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 201 (1990) (citing *Branzburg*, “the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 597 (1978) (holding that the First Amendment did not relieve a reporter of the obligation of all citizens to answer a grand jury subpoena and questions about a criminal investigation).

of privilege for Article V. *United States v. Gillock*, 445 U.S. 360, 367 (1980). All nine privileges in the draft were non-constitutional privileges.⁸ H.R. No. 93-1597 (1974). A privilege for reporters was not one of the nine proposed rules.⁹ “Although that fact standing alone would not compel the federal courts to refuse to recognize a privilege omitted from the proposal, it does suggest that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism.” *Gillock*, 445 U.S. at 367-68.

As for the second source of law in *Branzburg*, the common law, this Court held that “the common law recognized no such privilege.” *Branzburg*, 408 U.S. at 698. To the contrary, “at common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury.” *Id.* at 685. Instead of a historical privilege, this Court held that there was a historical “common law ... duty to raise the ‘hue and cry’ and report felonies to the authorities.” *Id.* at 696. This Court cited the modern version of raising the hue and cry, the federal statute for misprision of a felony, 18 U.S.C. § 4. *Id.* “Whoever, having knowledge of the actual commission of a felony...conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be guilty of misprision.” *Id.*

In this case, reporter Crawley has a statutory duty to report the defendant’s conspiracies to the United States and a citizen’s duty of “constitutional magnitude” to testify about her

⁸“Article V, as submitted to Congress, contained 13 Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer).” H.R. 93-650 (1973).

⁹ “[S]ince the enactment of the Federal Rules of Evidence, federal courts have used their Rule 501 power sparingly, and have, for the most part, limited their recognition of privileges to those either accepted at common law, among the nine that the Supreme Court originally proposed ... or otherwise blessed by Congress.” Jeffrey J. Lauderdale, *A New Trend In The Law Of Privilege: The Federal Settlement Privilege And The Proper Use Of Federal Rule Of Evidence 501 For The Recognition Of New Privileges*, 35 U. Mem. L. Rev. 255, 276 (Winter 2005).

confidential source at Big Top and the videotaped conversations. *See generally Nixon*, 418 U.S. 683 (1974). Crawley has no immunity from disclosure under the First Amendment’s protections of freedom of speech or “free flow of information.” *See generally Branzburg*, 408 U.S. 665 (1972). Under the exceptions to Rule 501, neither the Constitution, as interpreted by this Court, nor a federal statute, recognize Crawley’s claim of reporter’s privilege; they provide otherwise. Fed. R. Evid. 501.

Therefore, because two exceptions of Rule 501 are met, the general rule for a common law privilege, as interpreted or developed by the federal courts, does not govern. Accordingly, the Fourteenth Circuit’s recognition of Crawley’s claim of reporter’s privilege under the general rule in Rule 501 for common law was erroneous. Even if the exceptions for the Constitution and federal statute were not met, historically, the common law has opposed a reporter’s privilege that would apply to Crawley.

In addition, a reporter’s privilege developed by modern federal courts, or federal common law, is generally grounded in the First Amendment, making the privilege invalid under *Branzburg* and the exceptions to Rule 501. This Court has held that there is no reporter’s privilege “rooted” in the Constitution. *Id.* at 689. Yet “[r]ather surprisingly in light of *Branzburg*,” as Judge Posner held in his opinion in *McKevitt v. Pallasch*, “[a] large number of cases conclude ... that there is a reporter’s privilege” *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). Some of the cases essentially ignored *Branzburg*. *Id.* Identifying cases in eight Circuits, Judge Posner held that “[t]he cases we cite do not cite other possible sources of

privilege besides the First Amendment.” *Id.* Significantly, he held that “[t]he approaches these cases take to the issue of privilege can certainly be questioned.” *Id.*¹⁰

In this case, the Fourteenth Circuit acknowledged that there is no First Amendment basis for reporter’s privilege. (R. 28.) That court ruled that the privilege is recognized under common law. (R. 28-29.) However, as demonstrated, the claimed common law privilege is grounded in the First Amendment, and under *Branzburg*, there is no First Amendment reporter’s privilege. Therefore, this Court should not recognize a reporter’s privilege in this case. *See generally Branzburg*, 408 U.S. 665 (1972).

Whether the Court should create a new privilege for reporters under Rule 501 is a question that was, in effect, answered by this Court in *Branzburg*: “We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.” *Id.* at 690.

Legislative policy weighs heavily against creating an evidentiary privilege for reporters under Rule 501. This Court in *Branzburg* left it to Congress to create a statutory reporter’s privilege. *Branzburg*, 408 U.S. at 706. “At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable” *Id.* This Court later restated the point that “[w]e are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.” *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 188-89 (1990).

However, Congress has repeatedly declined to create a statutory reporter’s privilege. Numerous bills have been introduced in Congress in more than sixty legislative sessions between

¹⁰Posner cited only one case held there was a federal common law claim not based on the First Amendment, although no other source was given. *McKevitt*, 339 F.3d 530, 532 .

1929 and 2011¹¹, proposing a “reporter’s shield law.”¹² In the year after *Branzburg* was decided, sixty-five bills were introduced in Congress.¹³ Siegel, *supra*, at 508-509. None have been enacted. *Id.* at 507.

Since this Court has consistently held that it is the role of Congress to decide whether or not to create a statutory reporter’s privilege, and Congress has not done so, this Court should not act in Congress’s stead to create a reporter’s privilege under Rule 501.

Therefore, in accordance with this Court’s jurisprudence, enduring legal principles, and Congressional statutes, this Court should not recognize a reporter’s privilege under Rule 501.

B. Even If A Reporter’s Privilege Is Recognized Under Rule 501, It Should Only Be Qualified, Because Privileges Obstruct The Demand For Truth In A Court Of Law And Are Strictly Construed Under Rule 501

The first clause of Rule 501 provides that “privileges shall continue to be developed by the courts of the United States ... in the light of reason and experience.” Fed. R. Evid. 501. However, “[t]he creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth.” *Branzburg v. Hayes*, 408 U.S. 665, 621, n.29 (1972). Testimonial exclusionary rules and privileges contravene the fundamental principle that “the public ... has a right to every man's evidence. As such, they must be strictly construed and accepted” *Trammel*, 445 U.S. 40, 47 (1980). Therefore, if this Court in this case recognizes a reporter’s privilege under Rule 501, it should be qualified, because testimonial

¹¹The Short Title of H.R. 2932 was the “Free Flow of Information Act of 2011.” Its purpose, as stated in Section 1, was to “maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.”

¹² Siegel, *supra*, at 508-509 (2006); discussing bills 1929-2005; H.R. 2932, 112 Cong. (2011) (the most recent bill introduced to Congress).

¹³ One legal scholar states that in the aftermath of Wikileaks, “current prospects for a federal shield law are nil.”

privileges obstruct the demand for truth in a court of law, and are strictly construed under Rule 501.

This Court has ruled on two cases that address the scope of testimonial privilege. Each case used similar criteria to decide if the privilege was qualified or absolute. In *Jaffe*, this Court recognized that an absolute privilege existed under Rule 501 for a social worker's confidential notes. *Jaffe v. Redmond*, 518 U.S. 1, 3 (1996). This Court rejected the criteria for qualified privilege that had been recognized by the Seventh Circuit, which were based on balancing the patient's interest in privacy and the evidentiary need for disclosure. *Id.* at 17-18. Qualified privilege would make the promise of confidentiality contingent on a trial judge's later evaluation, causing uncertainty for the patient. *Id.* This Court held that "an uncertain privilege ... is little better than no privilege at all." *Id.* at 18.

In *Trammel*, the defendant had been indicted for importing heroin, and he sought to invoke the privilege against adverse spousal testimony of his wife, who had agreed to cooperate with the government. *Trammel*, 445 U.S. at 41. This Court held that the absolute spousal privilege swept too broadly, since "[i]ts protection [was] not limited to confidential communications; rather it permit[ted] an accused to exclude all adverse spousal testimony[.]" enabling the defendant to "convert his house into 'a den of thieves.'" *Id.* at 51-52.

Furthermore, this Court ruled that under Rule 501, spousal privilege should be qualified, because "reason and experience no longer justify so sweeping a rule." *Id.* at 53. This Court concluded that the existing rule should be limited so that the spouse who was the witness was "neither compelled to testify nor foreclosed from testifying." *Id.* This would promote "the public interest in marital harmony without unduly burdening legitimate law enforcement needs." *Id.*

Although this Court held in *Jaffe* that no balancing was needed, in effect both *Jaffe* and *Trammel* weighed public interest against private need in determining whether a privilege is absolute or qualified. *Jaffe*, 518 U.S. at 18; *Trammel*, 445 U.S. at 53. In *Jaffe*, this Court reasoned that the public interest is served by giving the patient certainty in confidentiality, which in turn, eliminates patients' concern of disclosure. *Jaffe*, 518 U.S. at 11, 17-18. In *Trammel*, this Court similarly reasoned that qualified privilege promotes marital harmony and burdens law enforcement less than the previous rule, which fostered crime. *Trammel*, 445 U.S. at 51-53. In both cases, the scales are tipped toward public good.

In this case, this Court should use the criteria set out in *Jaffe* and *Trammel* to determine if a reporter's privilege is absolute or qualified. *Jaffe*, 518 U.S. at 18; *Trammel*, 445 U.S. at 53. The balance should tip towards favoring the United States' interest in prosecuting a conspiracy to commit crimes of violence against endangered elephants and dealing in unlawful firearms. (R. 3-4, 11.) Crawley's private interests are already diminished because the information from the source has been published. (R. 10-11.) Reporter's privilege would not protect a source who feared disclosure.¹⁴

An absolute reporter's privilege for Crawley would leave the United States unable to verify the truthfulness of her source, effectively obstructing the demand for the truth. The information is essential to this case, as there is only scant evidence in the transcripts of conversations using ambiguous code words and one witness's hearsay testimony. (R. 8, 13.) Therefore, a reporter's privilege for Crawley should be qualified and strictly construed, so as not to obstruct the demand for truth in a court of law. This is consistent with the purpose Rule 102,

¹⁴ See *Branzburg*, 408 U.S. at 695.

which states, “[t]hese rules should be construed ... to the end of ascertaining the truth.” Fed. R. Evid. 102.

III. THE RIGID REQUIREMENT THAT A LAY WITNESS MUST PARTICIPATE IN OR CONTEMPORANEOUSLY LISTEN TO A CONVERSATION IN ORDER TO SATISFY THE REQUIREMENTS OF RULE 701(a) IS INAPPROPRIATE BECAUSE AGENT SIMANDY IS ONLY OFFERING HIS OPINION ON THE MEANING OF CODE WORDS

This first element of Rule 701(a) “is the familiar requirement of first-hand knowledge or observation.” Fed. R. Evid. 701 Advisory Committee Note on 1972 Proposed Rules. Rule 701(a) should be viewed as having “two distinct limitations”: (1) that the witness must have personal knowledge of the matter; and (2) that the witness’s opinion is rational and based on observed facts. Glen Weissenberger & James J. Dunne, *Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority* §701.3 (7th ed. 2011). Both limitations must be overcome before any lay opinion is admissible. *Id.*

The requirement that a lay opinion witness must have participated in or contemporaneously listened to a conversation is an unnecessarily rigid test, especially when a witness is only offering opinion testimony on the probable meaning of certain code words or phrases. This Court addressed the issue of lay witness opinion testimony nearly 100 years before the Federal Rules of Evidence were enacted. *See Hopt v. People*, 120 U.S. 430, 436 (1887). That case involved a murder victim who had been killed by a blow to the head and a physician offered his lay opinion as to the direction of the lethal blow. *Id.* In finding the testimony admissible, this Court held, in language that was later codified in Rule 701, that:

[t]he opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. *All* that is required in such cases is that the witness should be able to *properly make the observations*, the result of which they give; and the confidence bestowed on their conclusions will depend upon the extent and completeness of their examination, and the ability with which it is made.

Id. at 437 (emphasis added).

In this case, because Agent Simandy's opinion is on the probable meaning of code words, elements such as inflection, tone, volume and demeanor are irrelevant and thus nothing is lost in the translation by only seeing them written on paper. (R. 13.)

Pursuant to Rule 701, to be admissible, opinion testimony offered by a lay witness must first be "rationally based on the witness's perception." Fed. R. Evid. 701(a). According to one court, "[t]he rule is a sensible elaboration of Rule 602 All knowledge is inferential, and the combined effect of Rules 602 and 701 is to recognize this ... [is] to prevent the piling of inference upon inference ... where the testimony ceases to be reliable." *United States v. Giovanetti*, 919 F.2d 1223, 1226 (7th Cir. 1990) (Posner, J.) (citation omitted). In Agent Simandy's testimony, there is only one inference being drawn: that the code words used by the defendant refer to the purchase of weapons and the rental of a helicopter.

The threshold for admissibility is low, "and a judge should admit witness testimony if the jury could reasonably find that the witness perceived the event." *United States v. Gerard*, No. 11-4581, 2012 WL 6604615, at *3 (3d Cir. Dec. 19, 2012). A witness must have perceived the subject of the testimony, and, "[t]he Advisory Committee Note explains that this requires a witness to 'be a percipient witness whose testimony is grounded in first-hand information obtained through one of his or her five senses'" *405 Condo Assocs. LLC v. Greenwich Ins. Co.*, No. 11 Civ. 9662(SAS), 2012 WL 6700225, at *4 (S.D.N.Y Dec. 26, 2012).

Courts that rigidly apply the element of first-hand knowledge under Rule 602¹⁵ exclude lay opinion testimony about the meaning of code words when the witness, "did not personally

¹⁵ Fed. R. Evid. 602.

observe the events and activities discussed in the recordings [or] hear or observe the conversations as they occurred.” *United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001); see *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (holding that an agent’s lay testimony was inadmissible since he was not involved in the surveillance and had not listened to tapes of recorded conversations).

However, courts that apply a less rigid approach to a finding of first-hand knowledge allow witnesses to offer lay opinion testimony on the meaning of code words when their basis of knowledge is obtained from reviewing transcripts of recorded phone calls. *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011) (holding, “[w]e have never held that a lay witness must be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation.”); see *United States v. Lemire*, 720 F.2d 1327, 1347 (D.C. Cir. 1983) (holding that an FBI agent had the first-hand knowledge necessary to offer lay opinion testimony based on review of transcripts and exhibits).

The appropriate test for first-hand knowledge, where lay opinion testimony only addresses the probable meaning of words or phrases, is a less rigid standard that considers all of the circumstances leading to the witness’s basis of that first-hand knowledge. When this Court addressed the basis of knowledge for an informant’s tip in an anonymous letter, it held that, “[we] agree ... that an informant's ‘veracity,’ ‘reliability’ and ‘basis of knowledge’ are all highly relevant We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case” *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

In *Gates*, the issue concerned whether or not probable cause existed, not the admissibility of evidence. See *id.* However, the rationale applied in that case is applicable here, where the

issue is the basis of knowledge to offer an opinion on the probable meaning of code words and not the culpability of the defendant. (R. 17.) In *Gates*, this Court reasoned, in reference to obtaining a warrant, that, “[t]he process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers.” *Gates*, 462 U.S. at 231-32.

That is exactly what Agent Simandy did in this case. He used his common sense to form an opinion of the meaning of the code words “black cat” and “Charlie tango” by correlating them with the dates of the purchase of the AK-47s and the helicopter rental. (R. 13.) This Court should apply a test that considers all of the circumstances surrounding a witness’s basis for first-hand knowledge and not one that rigidly requires a witness to have participated in or contemporaneously listened to a conversation. After applying this test, this Court should therefore find that Agent Simandy acquired the requisite first-hand knowledge by reading the words in the transcripts.

A. By Reading The Transcripts, Agent Simandy Acquired The First-Hand Knowledge Necessary To Offer His Lay Opinion On The Meaning Of The Code Words “Black Cat” And “Charlie Tango”

The first limitation to Rule 701(a), derived from Rule 602, requires that “evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid. 701(a). Fed. R. Evid. 602. The testimony of a lay witness “should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about.” *United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990). The Advisory Committee Note also states that, “personal

knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.” Fed. R. Evid. 602 advisory committee’s note.

Agent Simandy testified during the District’s Court motion *in limine* hearing that his basis for first-hand knowledge was his reading of the transcripts of intercepted phone calls. By reading the transcripts he had the opportunity to observe the words used by the defendant and his co-conspirators.¹⁶ (R. 13.) This Court should find that reading words in a transcript is a reasonable form of perceiving words. Furthermore, if this testimony is offered at trial, a reasonable juror could believe that Agent Simandy had a sufficient basis for his first-hand knowledge to opine as to the probable meaning of those words.

B. By Correlating The Dates Of Defendant’s Purchase Of Illegal Weapons And Rental Of A Helicopter With The Dates Of The Recorded Conversations, Agent Simandy Formed A Rational Basis For His Opinion On The Meaning Of Code Words Used By The Defendant

Agent Simandy’s opinion testimony is based on his first-hand knowledge and is rationally related to facts he learned through his investigation of the defendant’s case. (R. 13.) The second limitation of Rule 701(a) requires that, “the opinion ... advanced by the witness must be one that a rational person would form on the basis of observed facts” and that opinion must not be contrived, strained or speculative. Weissenberger, *supra*, at §701.3.

In a case that involved an FBI agent’s interpretation of code words, that court ruled that even though the agent had not participated in the conversations he interpreted, “his understanding of ambiguous phrases was based on his direct perception of several hours of

¹⁶ The record is not clear as to why the original recordings were not available. (R. 6.) However, portions of the transcripts have already been admitted and the defendant conceded that the transcripts were accurate. (R. 6.) The defendant also conceded that the parties identified were the defendant and a co-conspirator. (R. 6.) Therefore, it is foreseeable that the portions that Agent Simandy will testify about will also be admitted.

intercepted conversations ... and other facts he learned during the investigation.” *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007).¹⁷

That is exactly what Agent Simandy did when he correlated the words and phrases “black cat is arranged” and “Charlie tango.” (R. 13.) After reviewing transcripts of recorded conversations, Agent Simandy was able to use facts that he learned through his personal investigation of this case to determine that the phrases “black cat is arranged” and “Charlie tango” referred to the defendant’s purchase of weapons and the rental of a helicopter. (R. 13.)

Agent Simandy’s testimony is admissible because he is only offering his lay opinion on the probable meaning of words and not an event or action that would require his presence at the scene. In a case that also addressed the interpretation of code words, an FBI agent’s lay opinion testimony about conversations she neither participated in, nor personally observed, was found inadmissible. *United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001). However, her testimony included her “narrative gloss” and personal opinion about the meaning of the defendant’s conversation. *Id.* at 640. That court found the agent’s testimony inadmissible and reasoned that, “[r]ather than offering evidence of which she had personal knowledge, such as the details of her investigation, she was allowed to assert the defendants were discussing not everyday events, but a complicated murder plot.” *Id.* at 642.

Unlike the inadmissible testimony of the agent in *Peoples*, Agent Simandy’s testimony is limited to facts he learned in his investigation. (R. 13.) Furthermore, he does not offer any opinion on the defendant’s complicity in the conspiracy. (R. 13.) Agent Simandy is only offering his opinion on the probable meaning of code words, and leaving the jury to determine

¹⁷ See *United States v. Beck*, 393 F.3d 1088, 1094 (9th Cir. 2005) (holding that a lay witness's testimony is rationally based on the witness's perceptions if it is “based upon personal observation and recollection of concrete facts”), *vacated on other grounds*, 544 U.S. 1016 (2005).

the defendant's role in the conspiracy. Therefore, this Court should find that his testimony is admissible.

In another case, that court ruled that an FBI agent's lay opinion testimony on the identity of a suspect charged with online child pornography was inadmissible. *United States v. Vazquez-Rivera*, 655 F.3d 351, 358 (1st Cir. 2011) (citation omitted). That court reasoned that because the FBI agent never personally observed the defendant, the testimony was not, "rationally based on the witness's perception as the evidentiary rules command." *Id.* The court in *Vazquez-Rivera* found that, "[the agent] addressed the ultimate issue before the jury: whether the conduct the United States observed on its end of the computer screen could be imputed to Vazquez." *Id.* at 357. That court reasoned that because the agent never saw the defendant's face or heard him speak, the agent's testimony was "based in large part on the overall investigation rather than her personal observations[,] and her identification testimony was therefore improper. *Id.* at 358.

The only instances where courts have held that a more rigorous standard of a rational basis analysis is appropriate are in situations where a witness attempts to offer lay opinion testimony that encompasses more than just simple interpretation of code words or ambiguous language. *See Peoples*, 250 F.3d 630; *Vazquez-Rivera*, 655 F.3d 351. A lay witness who offers an opinion on the ultimate issue of guilt, plain language, or identification, should only testify if that testimony is rationally based on either his participation or direct observations.

In a similar case, ruling on the issue of the meaning of certain coded language in recorded conversations, that court found that an FBI agent's testimony was rationally based on his perception when he had reviewed transcripts of recorded conversations. *See United States v.*

Jayyousi, 657 F.3d 1085 (11th Cir. 2011).¹⁸ In *Jayyousi* and similar cases, the court held that the witness need not actually observe the making of the recordings or take part in the conversation in order to satisfy the requirement that the testimony be rationally based on the witness's perception. Fed. R. Evid. 701(a).

In *Jayyousi*, the lay opinion testimony was narrowly tailored to what was contained in the documents and did not address issues or events such as an identification of the defendant or the ultimate issue of guilt. *See Jayyousi*, 657 F.3d 1085. In *Jayyousi*, the agent only offered his opinion as to the meaning of code words used by the defendants. *Id.* That court held that, “[the agent’s] familiarity with the investigation allowed him to perceive the meaning of coded language that the jury could not have readily discerned.” *Id.*

Where the facts of *Jayyousi* are analogous to this case, the facts of *Peoples* and *Vazquez-Rivera* are easily distinguishable from this case. In this case, Agent Simandy only offered testimony about the meaning of code words based on a review of transcripts of recorded conversations and subsequent facts he learned from his own investigation. He did not offer his opinion as to the intent, identification or culpability of the defendant. (R. 13.) Further, his testimony will be subject to cross-examination, where the defense can offer their own version of the probable meaning of “black cat” and “Charlie tango.”

This Court should allow Agent Simandy’s testimony under a less rigid standard that only requires that he read the words before offering an opinion as to their probable meaning. After applying this less rigid standard, this Court should find that Agent Simandy had a rational basis

¹⁸ *See also United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006) (holding that the testimony of an FBI financial allowed regarding review and summary of financial documents was lay witness testimony); *United States v. Gold*, 743 F.2d 800 (11th Cir.1984) (holding that a witness’s testimony was admissible based on the witness’s own examination of store records in Medicare fraud case).

to offer his lay opinion as to the meaning of “black cat” and “Charlie tango.” His testimony is therefore admissible because it overcomes the second limitation of Rule 701(a).

This Court should weigh all the circumstances in this case. Agent Simandy was brought in to the investigation due to the death of his predecessor. He acquired first-hand knowledge when he reviewed the transcripts and perceived the code words through his sense of sight. He conducted his own investigation and formed a rational connection between the defendant’s actions and the code words “black cat” and “Charlie tango.” Since Agent Simandy’s testimony satisfies the requirements of Rule 701(a) this Court should find, that when all of the circumstances are considered, his testimony is admissible.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the decision of the Fourteenth Circuit Court of Appeals be reversed.

Dated: February 20, 2013

Respectfully submitted,

Team 14

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