

No. 12-23

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

OCTOBER TERM, 2012

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES,

Respondent.

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

Brief for the Respondent

February 20, 2013

Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether a trial court may admit hearsay evidence under the forfeiture-by-wrongdoing exception in Federal Rule of Evidence 804(b)(6), where the declarant was killed by the defendant's alleged co-conspirator, the defendant lacked the requisite intent to procure the declarant's unavailability as a witness, and the government relies only on the foreseeability of the alleged co-conspirator's action.
- II. Whether, under Federal Rule of Evidence 501, a trial court should recognize an absolute journalistic privilege for information gathered during a journalistic investigation, where the journalist's source specifically asked to remain anonymous and whether such a privilege, if recognized, is qualified or absolute.
- III. Whether an FBI agent should be allowed to testify under Federal Rule of Evidence 701 as a lay witness to his opinion of the meaning of alleged code words and phrases in conversations, where the agent did not participate in or witness these conversations, did not hear recordings of these conversations, and based his opinion on his reading of a transcript of these conversations and his investigation.

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STATEMENT OF THE CASE

Statement of Facts

A. Big Top Circus

William Barnes (“Barnes”) was the sole proprietor of Big Top Circus (“Big Top”), located in rural southern Boerum. (R. at 1.) Big Top rests on over a hundred acres of fenced land and is home to twenty Asian elephants. (R. at 1.)

In July 2011, Big Top’s accountant informed Barnes that Big Top would have to file for bankruptcy unless Barnes was able to raise \$500,000 by December 2011. (R. at 1.) In an effort to salvage his business, Barnes invited Boerum City Circus (“Boerum City”) and Flying Feats Circus (“Flying Feats”) to join Big Top in putting on extravagant elephant performances, beginning that December. (R. at 2.) Barnes offered to quarter their respective elephants and allow the elephants to graze on his land. (R. at 2.) Boerum City and Flying Feats each agreed to bring ten Asian elephants to perform on December 2, 2011. (R. at 2.)

In August 2011, Barnes contacted Kara Crawley (“Crawley”), a reporter at the *Boerum Times*, to write an article publicizing the upcoming elephant performances. (R. at 2.) In exchange, Barnes offered Crawley unrestricted access to the circus. (R. at 2, 9.) Crawley accepted Barnes’s offer. (R. at 2, 9.) Prior to Crawley writing the article, Barnes filled out a standard release form to prevent him from exercising any legal control over the final product. (R. at 9.)

On September 15, 2011, Crawley toured Big Top and continued to do so every day for approximately two weeks. (R. at 9–10.) While touring the facilities, she visited the training ring and met several trainers and other employees. (R. at 9–10.) During her visits, Crawley developed a relationship with one particular employee, who remains anonymous. (R. at 10.)

The employee was aware of the fact that Crawley was a journalist, writing a story about Big Top. (R. at 10.) During her time at Big Top, Crawley requested that the employee bring her to the private caging area where the elephants were kept. (R. at 10.) Once there, the employee spoke in hushed tones and asked Crawley for advice on “something of a sensitive, delicate nature.” (R. at 10.) The employee revealed to Crawley a conversation he or she had overheard between Barnes and another party regarding a plan to kill the elephants for their ivory. (R. at 10.) The employee asked Crawley to keep the contents of their conversation private until the employee was no longer working at the circus. (R. at 10.) The employee explained to Crawley that he or she would fear for his or her safety should Barnes learn of their conversation while he or she was still employed at Big Top. (R. at 10.) The employee allowed Crawley to videotape their conversation without altering the employee’s identity under the condition that the video be for “[Crawley’s] eyes only.” (R. at 10.) Finally, the employee asked that Crawley use a pseudonym for the employee in the article. (R. at 10.) On December 1, 2011, Crawley published the information she obtained from the employee. (R. at 11.)

B. Boerum 4 Animals

Barnes was the co-owner of the unregistered charity, “Boerum 4 Animals.” (R. at 1.) The charity was established by Barnes and Alfred Anderson (“Anderson”) in August 2008. (R. at 1.) In July 2010, Anderson was convicted of fraud in connection with Boerum 4 Animals for soliciting donations on behalf of an unregistered charity and using the monetary donations to fund bear-hunting trips with Barnes. (R. at 1.) Barnes was not charged. (R. at 1.)

In July 2011, Barnes allegedly offered Anderson an opportunity to hunt elephants on his property. (R. at 2.) In an effort to make money, Barnes allegedly also offered to sell Anderson the elephants’s ivory. (R. at 2.)

In September 2011, Anderson recruited James Reardon (“Reardon”) in the hunt. (R. at 2.) In October 2011, Anderson allegedly agreed, on behalf of himself and Reardon, that the men would use a helicopter and assault rifles to hunt, contingent on Barnes providing the equipment. (R. at 2.)

In October 2011, Barnes allegedly purchased assault rifles for Anderson, Reardon, and himself from Jason Lamberti (“Lamberti”) at Weapons Unlimited, to be delivered on December 5, 2011. (R. at 3.) Anderson paid Barnes \$1,000 for the weapons, on behalf of himself and Reardon. (R. at 3.) Barnes also allegedly rented a helicopter from Alan Klestadt (“Klestadt”) at Copters Corporation for December 15, 2011. (R. at 3.) The hunt was allegedly scheduled for December 15, 2011. (R. at 3.)

In November 2011, Anderson called Barnes on several occasions, expressing his concerns that Reardon was having second thoughts about the scheduled hunt. (R. at 7.) Anderson urged Barnes that they “need[ed] him out of the picture” and proposed that they “get rid of him.” (R. at 18–19.) Barnes attempted to reassure Anderson, telling him that he was “worried over nothing” and urging him to “hold off” and not do anything. (R. at 18–19.) After Anderson insisted that he was going to “take care” of Reardon, Barnes stated, “I don’t want anything to do with this.” (R. at 19.)

On November 28, 2011, Reardon called Daniel Best (“Best”), relaying details of the planned hunt and expressing his fear of Anderson. (R. at 8.) On November 29, 2011, Best observed Anderson running from Reardon’s apartment. (R. at 7.) Upon entering the apartment, Best found Reardon’s dead body. (R. at 7.) Anderson was arrested and confessed to killing Reardon to prevent Reardon from revealing details of the planned hunt. (R. at 7.)

C. The FBI Investigation

In October 2011, Barnes allegedly contacted Weapons Unlimited to inquire about the price of three assault rifles. (R. at 2, 23.) Lamberti, an undercover agent from the Bureau of Alcohol, Tobacco, and Firearms (“ATF”), informed Barnes that the weapons cost \$1,000 each, plus \$300 in fees, and a three-month waiting period. (R. at 2.) Lamberti offered to provide Barnes with three fully automatic AK-47s immediately for \$500 each. (R. at 2.) Barnes, who was unaware that Lamberti was an undercover agent, allegedly accepted the offer. (R. at 2.)

Following the transaction, the Federal Bureau of Investigation (“FBI”) obtained a warrant to tap Barnes’s telephone communications. (R. at 2.) FBI Agent Narvel Blackstock (“Agent Blackstock”) listened to the conversations and transcribed them contemporaneously. (R. at 13.) Then, Agent Blackstock died in unrelated events. (R. at 23.) Following Blackstock’s death, the case was reassigned to FBI Agent Thomas Simandy (“Agent Simandy”) in December 2011. (R. at 12.) Agent Simandy had no previous experience in investigating crimes involving poaching or other crimes against animals and was not a participant in any of the conversations between Barnes, Anderson, and Reardon. (R. at 14.)

After taking over the investigation, Agent Simandy reviewed Blackstock’s transcripts of the conversations between Barnes, Anderson, and Reardon. (R. at 13, 23.) He also interviewed Lamberti and Klestadt. (R. at 13, 23.) Agent Simandy assumed that the conversations included code words and phrases because Blackstock’s transcripts contained the words: “blood diamonds,” “Charlie tango,” and “black cat.” (R. at 13.) Agent Simandy believed that “blood diamonds” referred to elephant ivory tusks, “Charlie tango” referred to a helicopter, and “black cat” referred to the three weapons. (R. at 13.)

Procedural History

On December 4, 2011, Barnes was indicted and charged with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. §§ 371 and 99(a)(1)(a), two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. §§ 43 and 371, and one count of conspiracy to commit unlawful takings pursuant to the Endangered Species Act, 16 U.S.C. §§ 371 and 1538. (R. at 3–4.) Before trial, the government moved to introduce hearsay statements made by Reardon to Best as a hearsay exception under Federal Rule of Evidence 804(b)(6) (“Rule 804(b)(6)”) and to introduce Agent Simandy’s testimony as a lay witness under Federal Rule of Evidence 701 (“Rule 701”). (R. at 6.) Crawley moved to quash the government’s subpoena to testify, invoking the journalist’s privilege under Federal Rule of Evidence 501 (“Rule 501”). (R. at 6.)

On May 1, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions, and on May 2, 2012, the District Court denied both of the government’s motions and ruled in favor of Crawley on her motion. (R. at 16–17.) Pursuant to 18 U.S.C. § 3731, the government filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. at 20.) On July 12, 2012, the Circuit Court affirmed the District Court’s decision on all issues, holding that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis under Rule 804(b)(6); (2) there exists an absolute journalistic privilege under Rule 501, which protects the identification of Crawley’s source; and (3) where an agent neither participated in nor observed the conversation, the agent may not provide lay opinion testimony under Rule 701 concerning the meaning of code words or phrases based on a review of intercepted and transcribed telephone conversations during his investigation. (R. at

20.) The government subsequently filed a petition for writ of certiorari, and on October 1, 2012, this Court granted certiorari. (R. at 36.)

SUMMARY OF THE ARGUMENT

Both lower courts correctly ruled that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis under Rule 804(b)(6); (2) there exists an absolute journalistic privilege under Rule 501, which protects the identity of Crawley's source; and (3) where an agent neither participated in nor observed the conversation, the agent may not provide lay opinion testimony under Rule 701 concerning the meaning of code words or phrases based on a review of intercepted and transcribed telephone conversations during his investigation.

First, the lower courts properly rejected an extension of the Rule 804(b)(6) hearsay exception to include conspiratorial liability, thereby, excluding Best's testimony. To qualify for the forfeiture-by-wrongdoing exception, the defendant must meet both requirements under the Rule. First, the defendant must have "wrongfully caused" or "acquiesced in wrongfully causing" the declarant's unavailability. Second, the defendant must have intended to keep the declarant from testifying. The government concedes that Anderson killed Reardon, not Barnes. Moreover, the murder was not within the scope of the alleged conspiracy, which was to hunt animals, not harm humans. Finally, Barnes told Anderson to "[not] do anything" and "hold off" when Anderson suggested killing Reardon. He even told Anderson that he "[didn't] want anything to do with this." (R. at 19.) These statements demonstrate that Barnes lacked the requisite intent for the government to invoke Rule 804(b)(6).

Second, the lower courts correctly recognized an absolute journalistic privilege under Rule 501, which protects the identity of Crawley's source. The journalistic privilege serves both public and private interests by encouraging sources to cooperate with the press so that the press

may educate the public. Sources would not come forward without this protection; therefore the evidentiary benefits of denying this privilege would never be realized. Finally, the privilege is recognized by a majority of the states. Because Crawley's source spoke to her during her journalistic investigation of Big Top, and under the promise of confidentiality, the source's identity should be protected by this privilege.

Finally, the lower courts correctly rejected Agent Simandy's testimony regarding the alleged meaning of code words interpreted from a wiretap transcript under Rule 701. The government sought to have Agent Simandy testify to his interpretation of alleged code words based upon his reading a transcript of wiretapped conversations. Agent Simandy's testimony was not based upon personal experience or first hand knowledge. His testimony would not have aided the jury in its understanding of the alleged code words because Agent Simandy was imparting his specialized interpretation of the alleged code words. Agent Simandy's testimony was based on scientific and technical knowledge that he accrued during his five years of experience with the FBI. Therefore, for the government to properly admit this testimony, it must first meet the requirements of Rule 701. Accordingly this Court should affirm the Fourteenth Circuit's rulings on all three issues.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 804(b)(6) SHOULD NOT BE EXTENDED TO INCLUDE *PINKERTON* CONSPIRATORIAL LIABILITY BECAUSE THE FORFITURE-BY-WRONGDOING EXCEPTION REQUIRES THAT THE DEFENDANT INTEND TO PROCURE THE DECLARANT'S UNAVAILABILITY AS A WITNESS.

The Sixth Amendment's Confrontation Clause encompasses the common law right to confrontation, which protects a criminal defendant's fundamental right to confront and cross-examine witnesses against him. U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36,

54 (2004). While the Sixth Amendment provides defendants with a general right to confront witnesses, there are exceptions to this right. Nevertheless, “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” *Id.* (citing *Mattox v. United States*, 156 U.S. 237 (1985)). Rather, the Sixth Amendment “admit[s] only those exceptions established at the time of the founding.” *Id.* One of those exceptions is the doctrine of forfeiture-by-wrongdoing, which allows testimonial statements to be admitted when the defendant’s own misconduct caused the declarant to be unavailable at trial. *United States v. Dinkins*, 691 F.3d 358, 382 (4th Cir. 2012); *United States v. Washington*, 547 U.S. 813, 833 (2006).

Congress codified this common law doctrine of forfeiture-by-wrongdoing in Rule 804(b)(6). Rule 804(b)(6) provides that a statement will not be excluded as hearsay if the statement is “offered against a party that [1] wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness and [2] did so intending that result.” FED. R. EVID. 804(b)(6). Therefore, courts should admit evidence under Rule 804(b)(6) “only when the government has shown by a preponderance of the evidence that the defendant’s wrongdoing ‘was intended to render the declarant unavailable as a witness.’” *Dinkins*, 691 F.3d at 383 (quoting *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005)).

By codifying this hearsay exception, Congress limited courts from judicially recognizing any other exceptions to the hearsay rule. According to the plain meaning rule, a court should not be able to expand intentional liability to include conspiratorial liability.

The plain meaning of Rule 804(b)(6) requires courts to apply this exception “only when the defendant engaged in conduct *designed* to prevent the witness from testifying.” *Dinkins*, 691 F.3d at 383 (emphasis in original) (quoting *Giles v. California*, 554 U.S. 353, 359 (2008)). In

Giles v. California, this Court explained that “[t]he manner in which this rule was applied [under common law] makes plain that unopposed testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.” 554 U.S. at 361 (emphasis in original). Therefore, plain meaning analysis supports the Fourth Circuit’s interpretation of the rule. Although some courts have expanded the forfeiture-by-wrongdoing exception to include conspiratorial liability, the plain meaning of Rule 804(b)(6) prohibits such expansion.

A. Expanding the Forfeiture-by-Wrongdoing Doctrine to Include *Pinkerton*’s Conspiratorial Liability Frustrates the Rule’s Plain Meaning.

When employing the “traditional tools of statutory construction,” *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), courts must first look to the plain meaning of the text. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In *Caminetti v. United States*, this Court stated that “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.” 242 U.S. at 485. This Court further noted that if the plain meaning can be ascertained, “the sole function of the courts is to enforce it according to its terms.” *Id.* When the statutory term is not defined, courts “generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used.” *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). Where the traditional tools of statutory interpretation provide an unambiguous answer of statutory interpretation, Congress’s intention for the statute is the rule of law. *Chevron*, 467 U.S. at 843.

Despite this interpretive command, some courts have expanded Rule 804(b)(6) to include the *Pinkerton* doctrine of co-conspirator liability. *Dinkins*, 691 F.3d at 384; *United States v. Rivera*, 292 F. Supp. 2d 827, 833 (E.D. Va. 2003). In *Pinkerton v. United States*, two brothers were involved in a conspiracy but did not both directly participate in the commission of the substantive offenses. 328 U.S. 640 (1946). This Court held that both brothers were liable for the

substantive offenses because the offenses were committed in furtherance of the existing conspiracy and were reasonably foreseeable as a necessary or natural consequence of the conspiracy. *Id.* at 647–48. Thus, under *Pinkerton*, the forfeiture-by-wrongdoing exception would apply to a defendant when his co-conspirator engages in wrongdoing that ultimately renders the declarant unavailable as a witness. *Dinkins*, 691 F.3d at 384.

Expansion of the forfeiture-by-wrongdoing exception into the broad doctrine of conspiratorial liability, however, frustrates the plain meaning interpretation of Rule 804(b)(6). As a statutory rule of evidence, Rule 804(b)(6) is subject to this Court’s rules for statutory interpretation. According to the plain meaning of this hearsay exception, the exception will only apply if the two statutory elements are met. First, the defendant must have either wrongfully caused or acquiesced in wrongfully causing the witness’s unavailability. FED. R. EVID. 804(b)(6). Second, the defendant must have *intended* to make the witness unavailable. *Id.* By applying *Pinkerton*, a court would allow the government to circumvent these two statutory requirements.

B. Reardon’s Hearsay Statements Against Barnes Were Properly Excluded Because Barnes Did Not Engage nor Acquiesce in Wrongdoing and He Lacked the Requisite Intent to Procure Reardon’s Unavailability as a Witness, as Required by the Plain Meaning of Rule 804(b)(6).

According to the plain meaning of Rule 804(b)(6), a party must (1) either wrongfully cause *or* acquiesce in wrongfully causing *and* (2) have the intent to procure the declarant’s unavailability as a witness. FED. R. EVID. 804(b)(6).

Black’s Law Dictionary defines “cause” as “something that produces an effect or result.” BLACK’S LAW DICTIONARY 250 (9th ed. 2009). Therefore, “an act which in no way contributed to the result in question cannot be a cause of it.” Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 638 (1920). “Acquiesce,” on the other hand, is defined as, “to

accept tacitly or passively; to give implied consent to (an act).” BLACK’S LAW DICTIONARY 26 (9th ed. 2009). The words “cause” and “acquiesce” in Rule 804(b)(6) are separated by an “or,” which serves as a coordinating conjunction to suggest the inclusive combination of alternatives. Therefore, either act may satisfy this prong.

The Rule’s use of the preposition “and” with the object of the preposition, “intent,” supports the assertion that inadmissible hearsay may be admitted, conditioned upon the party’s requisite intent. Courts have noted that the “extension of co-conspirator liability to ‘reasonably foreseeable but originally unintended substantive crimes’ must be limited by due process.” *United States v. Cherry*, 217 F.3d 811, 817 (10th Cir. 2000) (quoting *United States v. Alvarez*, 755 F.2d 830, 851 n. 27 (11th Cir. 2000)). As such, the court in *United States v. Cherry* stated that they had “never extended the doctrine to hold co-conspirators liable for first-degree murder that was not the original object of the conspiracy . . . [because] first-degree murder liability incorporates a specific intent requirement far more stringent than mere foreseeability.” 217 F.3d at 818. Including inadmissible hearsay under the exception, based on *Pinkerton* liability, would “render every minor drug distribution co-conspirator, regardless of knowledge, the extent of the conspiracy, its history of violence, and like factors, liable for first-degree murder.” *Id.* Thus, the court noted that “such a result appears incompatible with the due process limitations inherent in *Pinkerton*.” *Id.*

Here, there is no evidence that Barnes meets either requirement under Rule 804(b)(6). First, Barnes neither engaged nor acquiesced in wrongdoing to procure Reardon’s unavailability as a witness. The government concedes that Anderson killed Reardon, thus, proving that Barnes did not engage in the murder. (R. at 27.) Even if this Court were to find that Barnes was involved in a conspiracy to hunt elephants and that Anderson killed Reardon to prevent him from

disclosing the alleged conspiracy, there is no evidence to support that Barnes acquiesced in Reardon's murder because Reardon's murder was not within the scope of the conspiracy and it was not a reasonably foreseeable consequence of the conspiracy.

Second, Barnes did not have the intent to procure Reardon's unavailability as a witness. As an initial matter, murder was not the original object of the alleged conspiracy. Even if this Court were to find that Reardon's murder was foreseeable, there is no evidence to support the finding that Barnes possessed the specific intent requirement for first-degree murder. Barnes pleaded with Anderson to "[not] do anything," to "hold off," and, finally, stated that he "[didn't] want anything to do with this." (R. at 18–19.) Because Barnes lacked the requisite intent to procure Reardon's unavailability, he did not forfeit his fundamental right to confront and cross-examine witnesses against him. Accordingly, the District Court properly excluded Reardon's hearsay statements based on the plain meaning of Rule 804(b)(6) because Barnes: (1) did not engage or acquiesce in wrongdoing; and (2) did not have the requisite intent to procure Reardon's unavailability as a witness.

C. If This Court Chooses to Apply *Pinkerton* Conspiratorial Liability, Rather Than Adhering to the Plain Meaning of Rule 804(b)(6), Such An Application Should Be Confined to the Test Set out in *Cherry*.

"Mere participation in a conspiracy will not trigger the admission of . . . otherwise inadmissible hearsay evidence under a forfeiture-by-wrongdoing theory." *Dinkins*, 691 F.3d at 385. In *United States v. Cherry*, the Tenth Circuit recognized that mere involvement in a conspiracy may not be sufficient to waive a defendant's Sixth Amendment right to confrontation. 217 F.3d at 820. Rather, a defendant's involvement in a conspiracy must be combined with other factors to find liability under *Pinkerton*. *Id.* Accordingly, *Cherry* laid out a restrictive test which requires that a criminal defendant may be deemed to have waived his hearsay objections if

the proponent of the hearsay establishes by a preponderance of the evidence that the defendant “(1) participated directly in planning or procuring the declarant’s unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” *Id.* at 813.

In *United States v. Emery*, the Eighth Circuit held that the defendant’s actions constituted “engaging or acquiescing in wrongdoing” under Rule 804(b)(6). 186 F.3d 921 (8th Cir. 1999); FED. R. EVID. 804(b)(6). In that case the defendant took a proactive role in planning the murder of the victim. He recruited others to help kill the victim, discussed the plan for the murder, and even provided options for disposal of the body. Moreover, he lured the victim into his house, participated in beating her to death, and sank her body and car in a river. *Emery*, 186 F.3d at 927.

Unlike the defendant in *Emery*, Barnes did not directly engage in planning or procuring Reardon’s murder. Barnes took no affirmative acts to silence Reardon. Rather, Barnes attempted to reassure Anderson that he was “worried over nothing” when Anderson expressed concerns that Reardon was having second thoughts and even instructed Anderson to “[not] do anything.” (R. 18–19.)

A court may find that the second prong is satisfied when the witness’s unavailability is in furtherance of the conspiracy, within the scope, and a reasonably foreseeable consequence of an ongoing conspiracy. For example, in *United States v. Rivera*, the court held that the evidence was sufficient to establish that the witness’s murder was committed within the scope of and in furtherance of the conspiracy and that the murder was reasonably foreseeable to defendant. 292 F. Supp. 2d at 833. There, the government established by a preponderance of the evidence that

defendant was a member of a conspiracy, aware of the conspiracy's plan to murder the victim, acquiesced in planning the murder, and had a personal desire to murder the victim to prevent her from cooperating with the government.

However, in *United States v. Thompson*, the Seventh Circuit held that the informant's murder was not reasonably foreseeable and Rule 804(b)(6) could not be imputed to all three defendants. 286 F.3d 950, 965–66 (7th Cir. 2002). There, two of the defendants, who were part of a drug conspiracy, were not shown to have known or to have had any reason to know that an informant would be murdered in furtherance of the conspiracy, given the absence of evidence that the conspiracy had previously engaged in murder or attempted murder. *Id.*

Like the defendant in *Thompson*, Anderson had no prior record of violence. Consequently, Barnes had no reason to believe that Anderson was capable of murder. (R. at 19.) Anderson expressed a desire to “get rid of” Reardon for the first time on November 15, 2011. (R. at 19.) After Barnes reassured him and instructed him to “[not] do anything,” Anderson proceeded to wait fourteen days, during which he did not do anything to procure Reardon's unavailability, before calling Barnes again on November 29, 2011. (R. at 18–19.) During this second conversation, Barnes again instructed Anderson to “hold off.” (R. at 19.) Based on their previous conversation, Barnes reasonably assumed that Anderson would listen to his instructions.

Unlike in *Rivera*, Reardon's murder was not reasonably foreseeable because the alleged conspiracy was to hunt elephants and did not include any plan to harm a human being. Therefore, at the conspiracy's inception, it was unforeseeable that the conspiracy would lead to the murder of one of the conspirators. Furthermore, the original conspiracy amongst the trio

revolved around hunting elephants; there was no possible way for Barnes to foresee that a natural consequence of the hunt would be the murder of a co-conspirator.

Although the government argues that Reardon's statement should be admissible under the forfeiture-by-wrongdoing hearsay exception because his death was reasonably foreseeable, there is no evidence of the fact that Barnes could reasonably foresee that Anderson would murder Reardon. Anderson had no prior record of dangerous behavior and had previously listened to Barnes when instructed to do so. Barnes neither killed Reardon nor had the requisite intent to do so. Furthermore, the government has not proven by a preponderance of the evidence that Barnes intended to render Reardon unavailable as a witness. Based on Rule 804(b)(6)'s plain meaning, Barnes did not have the requisite intent to procure Reardon's unavailability as a witness. Therefore, the District Court properly excluded Reardon's hearsay statements under the forfeiture-by-wrongdoing exception.

II. THIS COURT SHOULD RECOGNIZE AN ABSOLUTE JOURNALISTIC PRIVILEGE BASED UPON ITS "WISDOM AND EXPERIENCE" BECAUSE THE PRIVILEGE PASSES THIS COURT'S TEST IN JAFFEE FOR WHEN A COMMON LAW PRIVILEGE SHOULD BE RECOGNIZED.

It has been long-recognized that where "the press remains free so too will a people remain free." *Baker v. F. & F. Inv.*, 470 F.2d 778, 785 (2d Cir. 1972). Although this Court held in *Branzburg v. Hayes* that the First Amendment does not guarantee a journalistic privilege, this Court may still recognize a common law journalistic privilege. 408 U.S. 665, 668 (1972). Indeed, Congress has wide discretion to create journalistic evidentiary privileges and has "directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). Accordingly, Rule 501 states that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." FED. R. EVID. 501.

A. The Journalistic Privilege Meets the Three-Part Test Established in *Jaffee*.

This Court, in *Jaffee v. Redmond*, articulated the factors that should be weighed before introducing a new common law privilege. 518 U.S. at 11–13. First, the privilege must serve private and public interests. *Id.* at 11. Second, those interests must outweigh the “likely evidentiary benefits that would result from the denial of the privilege.” *Id.* at 11–12. Finally, courts should consider the policy decisions across the states to determine whether to fashion a new privilege. *Id.* at 12–13.

i. The Journalistic Privilege Serves Both Private and Public Interests.

The privilege serves public interests by fostering “newsgathering, news dissemination[,] and the need for a journalist to protect his or her source.” *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). As Justice Stewart stated in his dissent in *Branzburg*, “Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society.” 408 U.S. at 726 (Stewart, J., dissenting). A journalistic privilege protects the press’s ability to enlighten the citizenry. “[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by government officials.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Therefore, the press relies on government sources to expose such governmental abuses of power.

Additionally, the privilege serves private interests by protecting those confidential sources that provide information while also ensuring that journalists have unfettered access to that information. Sources rely on anonymity to protect them from the consequences of exposure. In fact, “[a] journalist’s inability to protect the confidentiality of sources s/he must use will jeopardize the journalist’s ability to obtain information on a confidential basis.” *Riley*, 612 F.2d at 714. “By protecting sources from exposure, the privilege will encourage the disclosure of

sensitive information to the press The press would be limited in its ability to report on government if sources could not be protected from exposure.” (R. at 29.).

ii. *The Journalistic Privilege Outweighs Any Evidentiary Benefits.*

The benefits of a journalistic privilege outweigh the benefits of denying the privilege. In *Jaffee*, this Court explained that “[i]f the privilege were rejected, confidential conversation between psychotherapists and their patients would surely be chilled.” 518 U.S. at 12–13. First, sources will not disclose information without the privilege’s protection. Second, those sources that do disclose information will remain anonymous. Not only would this rob the public of vital information, but it would also keep courts from identifying those anonymous sources. *Miller v. Transam. Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980). Where the denial of a journalistic privilege results in a loss of evidence and, at least, partial loss in the benefits of a free press, the public’s interests cannot be served. The government argues that this Court should not recognize the privilege because the public would be best served by submitting “critical evidence” to the jury. (R. at 11.) However, this argument is meritless because without a privilege and its protection, these sources would be unwilling to disclose information. Thus, denying the privilege would ultimately harm the public.

iii. *A Majority of States Recognize a Journalistic Privilege.*

Forty-two out of fifty states recognize a journalistic privilege. Of these states, thirty-one have protected journalists by statute. Anthony L. Fargo & Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist’s Privilege Problem*, 33 WM MITCHELL L. REV. 1347, 1355 (2007) (listing those state’s statutes).¹ New Mexico protects journalists with

¹ See ALA. CODE § 12-21-142 (2005); ALASKA STAT. §§ 09.25.300-.390 (2006); ARIZ. REV. STAT. ANN. § 12-2237 (2003 & Supp. 2006); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (West 1995 & Supp. 2007); COLO. REV. STAT. § 13-90-119 (2005 & Supp. 2006); CONN. GEN. STAT. § 52-146t (Lexis 2007); DEL. CODE ANN. tit. 10, §§ 4320-4326 (1999 & Supp. 2006); D.C. CODE §§ 16-4701 to -4704 (2005); FLA. STAT. § 90.5015

a formal court rule. N.M. STAT. ANN. § 11-514 (West 2012). Finally, the ten remaining states recognize a journalistic privilege as a constitutional requirement.² As this Court stated in *Jaffee*, “any state’s promise of confidentiality would have little value if the [individual] were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” 518 U.S. at 13. Therefore, because all three factors are met, this Court should recognize an absolute journalistic privilege.

B. A Qualified Privilege Would Defeat the Purpose of the Journalistic Privilege.

The government argues that, if this Court were to recognize a privilege, it should be qualified rather than absolute. (R. at 11.) First, the government claims that the *Branzburg* plurality opinion recognized a qualified privilege. Second, the government contends that this Court should be swayed by the fact that a majority of circuit courts recognize a qualified privilege. Finally, the government alleges that a qualified privilege will best protect both interests by allowing courts to weigh the interests in every circumstance. However, these arguments are meritless because the government misinterprets the *Branzburg* Court.

(1999 & Supp. 2007); GA. CODE ANN. § 24-9-30 (1995 & Supp. 2006); 735 ILL. COMP. STAT. §§ 5/8-901 to -909 (2003 & Supp. 2006); IND. CODE ANN. §§ 34-46-4-1 to -2 (1999 & Supp. 2006); KY. REV. STAT. ANN. § 421.100 (West 2005); LA. CODE EVID. ARTS. 1451-1459 (West 1999 & Supp. 2005); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2006); MICH. COMP. LAWS § 767.5a (2000 & Supp. 2006); MINN. STAT. §§ 595.021-.025 (2006); MONT. CODE ANN. §§ 26-1-901 to -903 (2006); NEB. REV. STAT. §§ 20-144 to -147 (1999); NEV. REV. STAT. § 49.275 (2006); N.J. STAT. ANN. §§ 2A:84A-21 to -21.13 (West 1994 & Supp. 2006); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992 & Supp. 2007); N.C. GEN. STAT. § 8-53.11 (2005); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.04, .12 (West 2006); OKLA. STAT. tit. 12, § 2506 (1993 & Supp. 2007); OR. REV. STAT. §§ 44.510-.540 (2003 & Supp. 2006); 42 PA. CONS. STAT. ANN. § 5942 (West 2000 & Supp. 2006); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (1997 & Supp. 2006); S.C. CODE ANN. § 19-11-100 (Supp. 2006); TENN. CODE ANN. § 24-1-208 (2000 & Supp. 2006).

² See, e.g., *In re Contempt of Wright*, 700 P.2d 40 (Idaho 1985) (state and federal constitutions); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977) (state constitution); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978) (federal constitution); *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100 (Mass. 1988) (common law); *State ex rel. Classic III, Inc., v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (federal constitution); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (state constitution); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974) (federal constitution); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974) (federal constitution); *Senear v. Daily Journal-Am.*, 641 P.2d 1180 (Wash. 1978) (common law); *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978) (state and federal constitutions).

Furthermore, a qualified privilege would eviscerate the relationship between journalists and potential sources by injecting uncertainty into the guarantee of confidentiality.

The government is accurate in its claim that circuit courts have interpreted *Branzburg* to create a qualified privilege. *See, e.g., Baker v. F & F Inv.*, 470 F.2d 778, 781 (2d Cir. 1972); *Riley*, 612 F.2d at 715; *see also Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1974). However, as Justice Posner observed in *McKevitt v. Pallasch*, these courts' reading of *Branzburg* is "surprising[]." 339 F.3d 530, 532 (7th Cir. 2003). While Justice Powell did write a concurring opinion in *Branzburg* that suggested that privilege claims should be balanced against "vital constitutional and societal interests," the majority opinion explicitly rejected a qualified journalistic privilege. *Branzburg*, 408 U.S. at 710, 702 (Powell, J., concurring). While Justice Powell's concurrence represents the necessary fifth vote of the majority, both the circuit courts and the government give this concurrence weight that is disproportionate to the support given to it by the *Branzburg* bench. Where *Branzburg*'s ultimate holding, as well as subsequent Supreme Court jurisprudence, demonstrates a decided preference for absolute privileges, to hold otherwise would be misguided.

This Court's decision in *Branzburg*, as well as subsequent Supreme Court decisions, demonstrates that common law privileges should be absolute, not qualified. In rejecting a qualified First Amendment journalist privilege, the *Branzburg* majority explained that "[i]f newsman's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it[,] is hardly a satisfactory solution to the problem." *Id.* at 702. In *Jaffee*, this Court held that the newly recognized psychotherapist privilege must be absolute because the balancing test of a qualified privilege would "eviscerate the effectiveness of the privilege." 518 U.S. at 17–18. In *Swidler & Berlin v.*

United States, this Court ruled that the attorney-client privilege survives the death of the client, and again refused to make the privilege qualified. 524 U.S. 399, 409 (1999). “Balancing *ex post* the importance of the information against client interests . . . introduces substantial uncertainty in the privilege’s application.” *Id.* (emphasis in original). Privileges are meant to foster trust to allow full disclosure, whether it is between an attorney and a client, a psychotherapist and a patient, or a journalist and his or her source. Introducing uncertainty into these relationships will destroy this trust, chill these communications, and, ultimately, render the privilege useless.

C. The Identity of Crawley’s Source Should Be Protected by the Journalistic Privilege.

An absolute privilege would protect confidential information, *Jaffee*, 518 U.S. at 9–10, obtained by a journalist during the course of a journalistic investigation. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). To determine whether a person is a journalist for the purpose of recognizing a journalistic privilege, this Court must determine “the person’s intent at the inception of the information-gathering process.” *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). Confidentiality between a journalist and his or her source is defined as “the promise or understanding that names or certain aspects of communication will be kept off the record.” *Branzburg*, 408 U.S. at 728 (Stewart J., dissenting).

Additionally, circuit courts have recognized a journalistic privilege where the information sought is not confidential. *See, e.g., von Bulow*, 811 F.2d at 144; *see also United States v. Blanton*, 534 F. Supp. 295, 296–97 (S.D. Fla. 1982), *aff’d*, 730 F.2d 1425 (11th Cir. 1984). Where the information is not confidential, courts will decline to recognize the privilege only if the movant can show that the information sought is relevant and cannot easily be obtained by other means. *Gonzales v. Nat’l Broad. Co., Inc.*, 194 F.3d 29, 36 (2d Cir. 1998). Courts have

also considered whether declining to recognize the privilege would chill the relationship between journalists and potential sources. *Blanton*, 534 F. Supp. at 296.

i. *Under an Absolute Journalistic Privilege, the Identity of Crawley's Source Should Be Protected.*

Here, an absolute journalistic privilege applies because Crawley satisfies both prongs of the test. Crawley, a journalist for the *Boerum Times*, was investigating the treatment of elephants at Big Top. (R. at 9.) During her time at Big Top, she gained the trust of an employee who worked in the elephant stables. (R. at 10.) The employee knew Crawley's name and that she was investigating Big Top as a journalist. (R. at 10.) This employee told Crawley that Barnes and another party planned to kill the elephants for their ivory. (R. at 10.) The employee gave Crawley the tip under the condition that he or she remain anonymous. (R. at 10.) The employee requested that a pseudonym be used in place of a real name and that Crawley not reveal the tip while the source was still working for Big Top. (R. at 10.) While the interview with the employee was videotaped, that video was "intended for . . . Crawley's notes" and "[Crawley's] eyes only." (R. at 10, 22.) The employee took care to speak in hushed tones and ensure that their conversation was not overheard. (R. at 10.) The employee was "very concerned for his or her safety if Mr. Barnes found out what he or she had revealed" to Crawley. (R. at 10.) Therefore, an absolute journalistic privilege should protect the identity of Crawley's source.

Nevertheless, the government contends that the identity of Crawley's source is not protected by a journalistic privilege because Crawley forfeited any claim of confidentiality. However, the government's argument is meritless. The circumstances surrounding the source's disclosure demonstrate that the disclosure was contingent upon Crawley maintaining the source's anonymity. Furthermore, even if this Court were to find that this source's identity was not

confidential, the government would not be able to meet the burden necessary to overcome the privilege.

Notwithstanding the fact that Crawley video-recorded the source's interview, Crawley's testimony demonstrates the confidentiality of her source's identity. For example, Crawley and her source took steps to ensure that their interview was not overheard. (R. at 10.) Moreover, the source was fearful for his or her safety if Barnes were to discover the disclosure. (R. at 10.) These facts demonstrate that there was a "promise or understanding that names or certain aspects of communication [would] be kept off the record." *Branzburg*, 408 U.S. at 728 (Stewart J., dissenting).

The fact that the interview was videotaped is inconsequential. The source relied on Crawley's promise that his or her identity would remain anonymous and that the tape would be for "her eyes only." (R. at 10.) The fact that the record is silent as to whether Crawley honored the source's request that she not publish her article until the source was no longer employed at Big Top is equally inconsequential. Were Crawley to make a showing that her source was no longer employed at Big Top when she published her article, she would essentially be creating a distinct trail for anyone to discover the source's identity. Therefore, such a showing should be protected by the privilege.

Should this Court determine that the source's identity is not confidential, the privilege should still apply because the government has failed to demonstrate that the information is not reasonably obtainable from other available sources. The source's identity could be obtained through normal investigative efforts, such as interviewing Big Top employees and reviewing recent employee resignations. Moreover, these investigative efforts would not chill the relationship between journalists and their sources.

For example, in *United States v. Cuthbertson*, the Third Circuit held that the subpoenaed information could not be obtained from another source. 630 F.2d 139, 149 (3d Cir. 1980). There, the defendants served CBS with a subpoena asking CBS to produce its investigator's interview notes before trial. *Id.* at 142. The sources, from whom the information was obtained, waived confidentiality. *Id.* at 147. The court held that since interviewing those sources would not guarantee that the defendants would obtain the same original statements made during the interviews, the information was not reasonably obtainable. *Id.* at 148.

Likewise, in *United States v. Blanton*, the Attorney General sought to compel Patrick Malone of the *Miami Herald* to testify and confirm non-confidential statements that the defendant made to Malone during his investigation. 534 F. Supp. 295, 296 (S.D. Fla. 1982). The court held that the privilege was properly invoked in spite of the fact that the statements were not confidential because of "the chilling effect" enforcement of the subpoena would have on the flow of information to the press and public. *Id.*

Unlike *Cuthbertson*, Crawley's source did not waive confidentiality. Furthermore, the government is not seeking statements made by the source, but rather, the source's identity itself. (R. at 25.) Unlike a statement made during a specific interview, the source's identity is tangible and could potentially be discovered by interviewing Big Top employees or by reviewing recent employee resignations.

Like in *Blanton*, such a chilling effect would be present here should Crawley be compelled to reveal her source. Even if this Court were to find that the source's identity was not confidential, the source only cooperated with Crawley based on her promise to keep his or her anonymity. Because revealing the source's identity would make the source fear for his or her

life, the circumstances of this case are precisely the type that would chill the relationship between journalists and the public, should disclosure be compelled.

ii. *Even if This Court Recognizes a Qualified Journalistic Privilege, Crawley's Source Should Be Protected.*

A qualified journalistic privilege requires the courts to weigh “(1) whether the information is relevant; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information.” *Larouche v. Nat’l Broad. Co.*, 780 F.2d 1134, 1137 (4th Cir. 1986); *Miller v. Transam. Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

In *LaRouche v. National Broadcasting Co.*, the plaintiff failed to “exhaust all his non-party depositions . . . to demonstrate to the court unsuccessful, independent attempts to gain the requested information” before making a motion to compel discovery of NBC’s confidential sources. 780 F.2d at 1139. Consequently, the Fourth Circuit found that the plaintiff did not meet the second prong of the qualified privilege test and failed to overcome the journalistic privilege.

In *Baker*, the plaintiffs failed to demonstrate a compelling interest in requiring disclosure of the journalist’s source. *Baker*, 470 F.2d at 785. The Second Circuit noted that the source’s identity was not “essential to the case” because there may be other available sources to the information sought. *Id.* at 783. Consequently, the court found that the plaintiffs failed to meet the third prong of the qualified privilege test. *Id.*

The subpoena requesting the identity of Crawley’s source does not pass the three-prong test necessary to defeat the journalist privilege. Although Crawley concedes that the information is relevant to the government’s prosecution, the government has failed to meet the remaining two prongs of the test.

As an initial matter, the government has failed to show that it attempted to secure the source's identity by any other methods. Like in *LaRouche*, the government here has made no showing that it has exhausted independent attempts to learn the source's identity. Indeed, the record is devoid of any evidence that the government even interviewed the employees that came into contact with Crawley during her investigation. Therefore, this Court, like the *LaRouche* court, should find that the journalist privilege has not been defeated.

Additionally, the government has not demonstrated a compelling interest in the source's identity. Crawley published her story and the information she obtained from her source. (R. at 10–11.) The government has not demonstrated that the source's identity is necessary to achieve a conviction. Like in *Baker*, there may be other avenues by which the government can make its case: Reardon's testimony, intercepted phone conversations, evidence of the allegedly rented helicopter, and evidence of the allegedly purchased illegal weapons. (R. at 2–3.) Without a showing that the source's identity is necessary, in addition to the evidence the government already intends to present, the privilege cannot be defeated. Accordingly, the District Court properly recognized an absolute journalistic privilege and ruled that Crawley's source was protected by that privilege.

III. TESTIMONY OF LAW ENFORCEMENT PERSONNEL IS NOT ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 701 WHEN IT IS BASED ON SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE.

Law enforcement officers are often qualified as experts to interpret intercepted conversations that use code words of illegal trade. *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). However, courts must be wary of the subversion of reliability requirements of expert testimony under Federal Rule of Evidence 702 (“Rule 702”) and disclosure and discovery

requirements under Federal Rule of Criminal Procedure 16(a)(1)(E) (“Rule 16(a)(1)(E)”) when expert testimony is admitted under the guise of lay opinion. *Id.*

Rule 701 limits a lay witness’s testimony to testimony that is: “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701. The Advisory Committee explained that subdivision (c) was added in 2000 “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” FED. R. EVID. 701 advisory committee’s note. Subdivision (c) serves 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 of expert testimony set forth in Rule 702 and pre-trial disclosure requirements set forth in Federal Rule of Criminal Procedure 16.” *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). According to this amendment, when a witness’s testimony is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702, it must be scrutinized under the rules regulating expert opinion. FED. R. EVID. 701 advisory committee’s note.

Under Rule 702, “a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion . . . if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” FED. R. EVID. 702. If the witness qualifies as an expert under Rule 702, the government must provide the defendant with a written

summary of any testimony that it intends to use during its case-in-chief at trial upon request.

FED. R. CRIM. P. 16.

To satisfy the purpose and design of subdivision (c) of Rule 701, a witness's testimony that is based on scientific, technical, or other specialized knowledge, must qualify as an expert witness's testimony. This Court should hold that Agent Simandy must meet the requirements of Rule 702 because his opinions were based on his investigative work for this case as well as his five years of experience working as an FBI Agent. Accordingly, the District Court properly excluded Agent Simandy's lay witness testimony.

A. Agent Simandy's Testimony Was Properly Excluded Under Rule 701 Because It Does Not Meet the Requirements of Rule 701.

“When a law enforcement officer is not qualified as an expert by the court . . . [his] testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation[s], has personal knowledge of the facts being related in the conversation[s], or observed the conversation[s] as they occurred.” *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). A lay witness's testimony must be based on personal knowledge of the matter, which is rationally based on the witness's perception. FED. R. EVID. 602; FED. R. EVID. 701. Courts have interpreted this requirement to imply that a lay witness must not testify to opinions based on specialized knowledge, skills, or education that is not in possession of the jurors. *See, e.g., United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010); *see also Peoples*, 250 F.3d at 641; *see also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244–45 (9th Cir. 1997).

In *United States v. Johnson*, the Fourth Circuit held that an agent's interpretations of intercepted phone calls, based on post-wiretap interviews, constituted post-hoc assessments and second hand information. Therefore, his opinion did not qualify as his personal knowledge and perception as required by Rule 701. 617 F.3d at 293. Moreover, where the agent based his

interpretations of the phone calls on his experience as a DEA Agent, the court reasoned that that portion of his testimony “should have been considered that of an expert.” *Id.*

In *United States v. Peoples*, the Eighth Circuit opined that “lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying.” 250 F.3d at 641. It should not be used “to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”

Id. There, an FBI Agent testified about recorded telephone conversations between the defendants that she did not personally observe. Furthermore, she gave her opinion regarding the meaning of words and phrases used by the defendants during these conversations. *Id.* The court held that the agent lacked first hand knowledge of the matters about which she testified because “her opinions were based on her investigation after the fact, not on her perception of the facts.”

Id. Furthermore, the court held that she testified to specialized explanations of apparently neutral words that were based on her investigation and experience. *Id.* This served as expert testimony under the guise of lay opinion, which “invaded the province of the jury.” *Id.*

i. *Agent Simandy’s Testimony Is Not Rationally Based on His Perceptions.*

First, Agent Simandy’s opinion of the meaning of the alleged code words and phrases in the intercepted telephone conversations is not rationally based on his perceptions. Similar to the witnesses in *Johnson* and *Peoples*, Agent Simandy testified to his interpretations of intercepted conversations that he did not personally observe, but rather investigated after the fact. (R. at 13–14.) Unlike the witness in *Peoples*, who testified to the meaning of code words of a recorded conversation, Agent Simandy’s opinion was based on merely reviewing transcribed conversations, which were memorialized by another agent, and interviewing witnesses who were also not present during the conversations at issue. Testimony that is based on hearing a recorded

conversation provides a stronger basis for interpreting the words because the witness has heard the context and emotions of the speakers. Agent Simandy, however, did not have this opportunity in his investigation. Furthermore, interviewing parties who were not present to the conversations at issue may have contaminated Agent Simandy's interpretation of the facts.

ii. Agent Simandy's Testimony Is Not Helpful to Clearly Understanding His Testimony or Determining a Fact In Issue.

Second, Agent Simandy's opinion is not helpful to the jury in clearly understanding his testimony or determining a fact in issue. Similar to the witness in *Peoples*, Agent Simandy was not simply testifying to help the jury understand the intercepted telephone conversations. Instead, Agent Simandy was providing his specialized interpretation of code words used within the conversations based on his post-hoc investigation and experience as an FBI agent. Surely, a layperson with no personal knowledge of the conversations at issue would not be able or allowed to interpret the meaning of specific code words.

iii. Agent Simandy's Testimony Requires "Specialized Knowledge."

Third, Agent Simandy's testimony was based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Similar to the witnesses in *Johnson* and *Peoples*, Agent Simandy based his interpretation of the meaning of the alleged code words and phrases on his findings from his investigation and his five years of experience working for the FBI. Furthermore, the government conceded that Agent Simandy's testimony and familiarity with the investigation would assist the jury in perceiving the meaning of the allegedly coded language "that the jury would not be able to easily discern," implying that he was testifying based on knowledge that was beyond what is in possession of the jurors. (R. at 15.)

Although the government argues that the "Eleventh Circuit has held that an agent may testify as a lay witness to the meaning of code words and phrases after reviewing intercepted

telephone conversations,” (R. at 15.), this holding is followed by only three circuits. *See, e.g., Janyousi v. United States*, 657 F.3d 1085, 1103 (11th Cir. 2011); *see also United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011); *see also United States v. Zepeda-Lopez*, 478 F.3d 1213, 1217–22 (10th Cir. 2007). The government ignores that the First, Second, Third, Fourth, and Eighth Circuits have all rejected lay opinion testimony without the witness’s personal participation in, or contemporaneous observation of, the subject of their testimony. *See, e.g., Swajian v. Gen. Motors Corp.*, 916 F.2d 31, 36 (1st Cir. 1990); *see also United States v. Garcia*, 413 F.3d 201, 212–13 (2d Cir. 2005); *see also Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 224–28 (3d Cir. 2008); *see also Johnson*, 617 F.3d at 293; *see also Peoples*, 250 F.3d at 640. Furthermore, the Seventh and Ninth Circuits have both allowed lay opinion testimony, but only in specific instances where the testimony was based on a mixture of both first hand and second hand knowledge. *See, e.g., United States v. Rollins*, 544 F.3d 820, 831–32 (7th Cir. 2008); *see also United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007).

The Fourteenth Circuit correctly found that Agent Simandy’s testimony was not admissible under Rule 701. The government was merely seeking to avoid exposing the frailties of its expert testimony, which would have been exposed had Agent Simandy been subjected to the more stringent standards of Rule 702.

B. Agent Simandy’s Testimony Does Not Satisfy the Requirements of Rule 702 Because It Is Not Based on Reliable Principles and Methods.

Rule 702 requires proponents of an expert witness to demonstrate by a preponderance of the evidence that the witness is qualified, relied on sufficient facts and data and reliable principles and methods, and reliably applied the principles and methods to the facts. FED. R. EVID. 702; FED. R. EVID. 104. Furthermore, the proponent must prove that the facts and data used to formulate the basis of the testimony are “of a type reasonably relied upon by experts in

the particular field.” FED. R. EVID. 703. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, this Court established the responsibility of trial judges to act as “gatekeepers” in excluding unreliable expert testimony and laid out guidelines for determining the reliability of expert testimony. 509 U.S. 579, 597 (1993).

Accordingly, every witness brought under Rule 702 is required to prove that the principles and methods relied upon are (1) testable; (2) subject to peer review and publication; (3) recognized to have a known or potential error rate; and (4) generally accepted in the relevant scientific community. *Id.* at 593–94; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). These factors are not determinative and should be considered “where they are reasonable measures of the reliability of expert testimony.” *Carmichael*, 526 U.S. at 152.

The Advisory Committee noted that where a “witness is relying solely or primarily on experience, then the witness must explain how the experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” FED. R. EVID. 702 advisory committee’s note. Although Agent Simandy testified to working as “an agent for the Federal Bureau of Investigation for the past five years” and having been assigned to approximately fifty cases, most of them drug-related, he avoids explaining how his extensive experience with drug-related cases allows him to sufficiently form an opinion as to the present facts. (R. at 12.) Ultimately, his lack of experience in investigating crimes against animals undermines his ability to reach reliable conclusions that will help the trier of fact determine the meanings of the alleged code words used in poaching schemes.

To determine the reliability of the principles and methods employed by Agent Simandy and their application to the facts of this case, this Court should determine whether Agent Simandy’s testimony grew naturally and directly out of research that he conducted independent

of the litigation. *Daubert v. Merrell Dow Pharm., Inc.*, 951 F.2d 1128, 1317 (9th Cir. 1991), *vacated*, 509 U.S. 579 (1993) (holding that “general acceptance” is not a necessary precondition to admissibility of scientific evidence under the Federal Rules of Evidence). Ultimately, before this Court can admit Agent Simandy’s testimony, it must find that his expert testimony is properly grounded in an accepted body of learning or experience in his field, well-reasoned, and not speculative. FED. R. EVID. 702 advisory committee’s note.

Agent Simandy determined the meaning of the alleged code words in the intercepted conversations by relying on transcribed conversations and interviews with witnesses who were not parties to these conversations. Although Agent Simandy testified to relying on his own investigation and the transcribed conversations in formulating his opinion, he avoided proving the reliability of the principles and methods used within his field in these types of investigations. Moreover, he has avoided proving that he applied those methods reliably to the facts of this case. Accordingly, this Court should find that Agent Simandy’s opinion fails to meet the requirements of Rule 702 and, therefore, fails to qualify as expert witness testimony.

C. The Government’s Violation of Federal Rule of Criminal Procedure 16 Prejudiced Barnes.

Rule 16(a)(1)(E) “requires the government to disclose to the defendant a written summary of [expert] testimony.” *Figueroa-Lopez*, 125 F.3d at 1246. This requirement minimizes the “surprise that often results from unexpected testimony, reduce[s] the need for continuances, and . . . provide[s] the opponent with a fair opportunity to test the merit of the expert’s testimony through focused cross-examination.” FED. R. CRIM. P. 16 advisory committee’s note.

In this instance, the government failed to properly submit Agent Simandy’s opinion testimony. In purporting to bring in his testimony under Rule 701, the government not only

attempted to evade the reliability requirements of Rule 702, but also the discovery disclosure requirements of Rule 16(a)(1)(E). In doing so, the government not only stripped Barnes of his right to object to Agent Simandy being qualified as an expert, it also deprived him of the opportunity to bring forth an expert witness to rebut Agent Simandy's testimony and offer an alternative interpretation of the alleged code words. This Court should not permit the government to circumvent these well-established rules by presenting Agent Simandy under the guise of a lay witness. Thus, the District Court properly excluded Agent Simandy's lay witness testimony.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Honorable Court AFFIRM the holding of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis under Rule 804(b)(6); (2) there exists an absolute journalistic privilege under Rule 501, which protects Crawley's source; and (3) where an agent neither participated in the conversation nor observed it, the agent may not provide lay opinion testimony concerning the meaning of code words or phrases based on a review of intercepted and transcribed telephone conversations and his investigation under Rule 701.

Respectfully Submitted,

Team 36R
Counsel for Respondent

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