

No. 12-23

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2012

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UNITED STATES OF AMERICA,  
*Petitioner,*

— *against* —

WILLIAM BARNES,  
*Respondent.*

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

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**BRIEF FOR PETITIONER**

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**TEAM 18**  
*Attorneys for Petitioner*

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## QUESTIONS PRESENTED

- I. Whether a district court abuses its discretion when it excludes a murder victim's out-of-court statement under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), where the defendant's co-conspirators made the declarant unavailable for trial and the government establishes that the defendant could reasonably have foreseen that his co-conspirator would murder the declarant to silence him.
- II. Whether Federal Rule of Evidence 501 recognizes an evidentiary privilege for information gathered in a journalistic investigation, and if it does, whether the privilege should be absolute or qualified.
- III. Whether a district court abuses its discretion when it refuses to allow an investigator to offer lay opinion testimony under Federal Rule of Evidence 701 about alleged code words and phrases in conversations though the witness formed his opinions by reading transcripts and reviewed the investigatory work of other law-enforcement personnel.

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## **OPINIONS BELOW**

The United States District Court for the Southern District of Boerum announced its ruling in open court, and the transcript of that hearing is included in the record at pages 5–16. The opinion of the United States Court of Appeals for the Fourteenth Circuit is unpublished and included in the record at pages 20–35.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

This case involves the First Amendment to the United States Constitution, which provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I. This case also involves the Sixth Amendment to the United States Constitution, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI.

## **STATEMENT OF THE CASE**

### ***Statement of the Facts***

In May of 2000, the defendant, William Barnes, inherited the Big Top Circus from his father; however, by July 2011, the small business approached bankruptcy. (R. at 1.) Rather than being forced to close his doors forever and walk away empty-handed, Barnes salvaged any investment he could from the property by harvesting the ivory of the circus elephants. (R. at 2.) Barnes knew he could not succeed with this plot independently, so he enlisted the help of his former accomplice, Alfred Anderson. (R. at 1.) The partners had worked together on a similar scheme in 2010 that resulted in Anderson being convicted of fraud for using an unregistered charity to solicit funds for a bear-hunting trip. (R. at 1.) Barnes escaped conviction from those charges. (R. at 1.)

***The Conspiracy.*** After combining with Anderson and conning two other circuses to “quarter” their elephants on Barnes’ acreage, the pair added a third a member to the conspiracy, James Reardon. (R. at 2.) With the elephants set to arrive on December 2, 2011, the three conspirators worked to ensure the rest of the plan was in place. (R. at 2.) On October 2, 2011, Barnes contacted an undercover agent, believing he was a weapons distributor, and arranged to illegally purchase three AK-47s. (R. at 2.) Four days later, he set up a one-day helicopter rental for the day of the elephant slaughter so the conspirators could maximize the number of elephants killed. (R. at 3.) Finally, on October 15, Barnes and Anderson finalized the details of the elephant massacre, and Anderson wired Barnes \$1,000 for himself and Reardon to pay for the firearms. (R. at 3.)

***The Murder.*** Barnes’ scheme was falling perfectly into place until he received a call from Anderson on November 29 expressing concern that Reardon was a serious threat to the conspiracy and should be killed before he disclosed the details of the illegal scheme. (R. at 19.) Initially Barnes suggested they hold off and “just shut him up for a while,” but when Anderson would not abandon the plan to kill Reardon, Barnes simply said “I don’t want anything to do with this,” and then ended the call. (R. at 19.) Subsequently, Barnes did nothing to prevent the murder. (R. at 7.) He did not warn Reardon; he did not contact law enforcement; and he did not abandon the goals of the conspiracy. (R. at 7.) Less than twenty-four hours later, Reardon was murdered in his apartment. (R. at 7.) The same evening, Anderson was apprehended by police and confessed to the killing. (R. at 7.) Unbeknownst to Anderson or Barnes, Reardon had already betrayed the conspiracy and disclosed the details of the elephant-killing scheme to his friend, Daniel Best. (R. at 7.)

***The Exposé.*** Not only was the plot leaked to Daniel Best, but just two days later, journalist Kara Crawley published an exposé in the Boerum Times revealing the heinous details to the public. (R. at 11.) Barnes had naively offered Crawley unrestricted access to the circus during the early stages of his scheme hoping she would write a favorable article that would result in last-minute profit before the execution of the elephants. (R. at 2.) To the contrary, Crawley received a tip from an employee at the circus who overheard Barnes discussing his plan to harvest the ivory. (R. at 10.) The employee agreed to explain the scheme in a videotaped conversation with Crawley. (R. at 10.) According to Crawley, the employee insisted on remaining anonymous, but allowed his or her face to be visible during the recording. (R. at 10.) Based on the information from the unidentified source, Crawley published the article exposing the conspiracy on December 1, 2011, and Barnes was taken into custody the same day. (R. at 3.) The indictment charged Barnes with two counts of conspiracy to deal unlawfully in firearms, two counts of conspiracy to commit a crime of violence against an animal enterprise, and one count of conspiracy to commit unlawful takings under the endangered species act. (R. at 3-4.)

***The Investigation.*** Prior to Barnes' arrest, the conspiracy was being investigated by Agent Narvel Blackstock. (R. at 12.) As part of his investigation, Blackstock intercepted approximately one dozen conversations between the conspirators and transcribed them contemporaneously. (R. at 13.) However, Blackstock died, and Agent Thomas Simandy was assigned to the case on December 15. (R. at 12.) While Agent Simandy had never worked on an animal poaching case, he had conducted a variety of other criminal investigations. (R. at 14.) As part of his investigation, Simandy reviewed the certified transcripts and interviewed the firearms and helicopter dealers involved with Barnes. (R. at 13.)

### ***Nature of the Proceedings***

***The Pre-trial Hearing.*** On May 1, 2012, the District Court held a pre-trial hearing based on three separate evidentiary motions. (R. at 5.) In the first motion, the government sought to introduce out-of-court statements by a murdered co-conspirator of the defendant as an exception to hearsay under Rule 804(b)(6) based on conspiratorial liability. (R. at 6.) The second motion was made by Crawley to quash the subpoenaed she was issued based on a journalist's privilege. (R. at 6.) The government opposed Crawley's motion arguing that no such privilege existed, and that even if it did, it would not apply to Crawley in this case. (R. at 11:172–74.) In the third motion, the government moved to introduce lay opinion testimony regarding the meaning of language by the conspirators from the lead investigator, Agent Simandy, under Rule 701. (R. at 6.)

***The District Court Ruling.*** In a ruling from the bench, the court ruled against the government on all motions. (R. at 17.) First, it denied the government's first motion finding conspiratorial liability did not satisfy Rule 804(b)(6)'s requirement that a defendant cause or acquiesce in causing a declarant's unavailability. (R. at 17.) Alternatively, the court granted Crawley's motion to quash, finding a journalist's privilege should be recognized. (R. at 5.) Finally, the court denied the government's second motion to introduce Agent Simandy's testimony holding that the agent lacked first-hand knowledge. (R. at 17.)

***The Interlocutory Appeal.*** The government appealed the district court's evidentiary rulings. (R. at 20.) On appeal, the Fourteenth Circuit Court of Appeals affirmed all three rulings. (R. at 20.) On the forfeiture-by-wrongdoing exception to hearsay, the court found that intent imputed based on conspiratorial liability would not satisfy the requirements of the exception, and therefore the district court properly held the statements inadmissible. (R. at 27-

28.) On the second motion, the court held that an absolute journalist's privilege existed under Rule 501, and affirmed Crawley's motion to quash. (R. at 30.) On the final motion, the court found that Agent Simandy's testimony would not be proper under Rule 701 because he lacked personal knowledge and because he would be relying on particular expertise in violation of Rule 701(c). (R. at 31.)

### **SUMMARY OF THE ARGUMENT**

The Federal Rules of Evidence and the Constitution ensure the efficient and fair administration of justice for all involved in the judicial process. This guiding principle must act as a framework and remain at the forefront of all evidentiary decisions. The Fourteenth Circuit Court of Appeals failed to abide by this principle and incorrectly decided all three issues before it.

#### **I.**

The district court abused its discretion by excluding Daniel Best's testimony under Rule 804(b)(6) exception to hearsay. The exception is specifically designed for courts to safeguard against witness tampering and defendants benefitting from their own wrongdoing. Reardon's statements are admissible under the forfeiture-by-wrongdoing exception because Barnes is conspiratorially liable for causing Reardon to be unavailable at trial.

The Sixth Amendment Confrontation Clause and many of the Federal Rules of Evidence are designed to ensure that criminal defendants receive a fair trial under the founding principles of this country. However, when criminal defendants engage in misconduct to circumvent the rules and procedures that ensure the equitable administration of justice, they cannot be allowed to benefit from that misconduct. Holding otherwise would only encourage wrongdoing and witness tampering by defendants and jeopardize the integrity of the judicial process.

According to the principles of conspiratorial liability, the intent to prevent Reardon's testimony by killing him is imputed upon Barnes based on his participation in the conspiracy. This is exactly the type of wrongdoing Rule 804(b)(6) seeks to prevent. Consequently, all statements made by Reardon against Barnes are admissible at trial, even though they would otherwise constitute hearsay.

This Court should reverse the court of appeals' judgment excluding these statements.

## II.

The district court erred in granting journalist, Kara Crawley's motion to quash the subpoena to testify for the government. The lower courts mistakenly recognized a federal journalist's privilege under Rule 501. Kara Crawley, nor any other citizen, is exempt from the normal duty of appearing before a jury answering questions relevant to a criminal investigation.

The American judicial system is strongly based on the principle that the public "has a right to every man's evidence." In reliance on that principle, courts have maintained a strong presumption against recognizing evidentiary privileges. Neither the First Amendment, nor any other constitutional provision, protects citizens from complying with court-ordered subpoenas and disclosing relevant information, even confidential, to juries in criminal proceedings. The Freedoms of Press and Speech do not provide journalists with any special immunity from applying the general laws of this country.

The enactment of Federal Rule of Evidence 501 does not permit the creation of a journalist's privilege because the significant burden imposed on truth-seeking by the privilege far outweighs any nominal benefit that would result. Moreover, the lack of unanimous application of such a privilege by the States indicates a lack of recognition in the common law in light of reason and experience.

However, even if the Court finds that a federal journalist's evidentiary privilege is permissible under the Federal Rules of Evidence, that privilege must be qualified. An absolute application of the journalist privilege would be harmful to the judicial process because it prevents litigants from accessing critical evidence and government agents from performing their essential job tasks. Together, these evidentiary gaps impede the credibility of the justice system. A qualified privilege would provide journalist's with some protection under the First Amendment while simultaneously offering litigants and prosecutors access essential evidence for the presentation of their cases. Under the facts of this case, the qualified privilege would not insulate Crawley from disclosing her source. The requested information is highly relevant. No other means exist to gain access to the information. And the information is necessary to resolve the underlying claim.

This Court should reverse the court of appeals' judgment granting Crawley's motion to quash the subpoena based on the lack of a journalist privilege under Rule 501.

### **III.**

The district court abused its discretion in excluding Agent Simandy's testimony as lay witness opinion under Rule 701. His thorough review of the conversation transcripts and his investigation of the conspiracy provided him with first-hand knowledge under Rule 701. The mere fact that he did not actively participate in the conversations or listen to them contemporaneously does not prevent him from forming opinions about the meaning of the code words rationally based on his personal perception.

Agent Simandy is more intimately familiar with the conversations and details of the conspiracy than any other witness, excluding the conspirators themselves. His unique understanding of the conspiracy gained through his investigation is adequate to create personal

knowledge and to assist the jury in understanding the context of the conspirators' coded conversations. Furthermore, this opinion is proper as lay testimony under Rule 701 because it is not simply an attempt to evade the exacting requirements of expert testimony under Rule 702. A witness's reliance purely on the information gathered in the current investigation does not constitute *specialized knowledge* under Rule 701(c). Consequently, Agent Simandy's testimony is proper under 701.

This Court should reverse the court of appeals' judgment excluding Agent Simandy's testimony because he has personal knowledge and can properly testify as a lay witness.

### **STANDARD OF REVIEW**

The district court resolved the evidentiary issues by granting motions to exclude the government's evidence and by granting Crawley's motion to quash a subpoena. (R. at 16–17.) Ordinarily the Court reviews these evidentiary rulings for abuse of discretion. *United States v. Hardy*, 224 F.3d 752, 756 (8th Cir. 2002). When an evidentiary ruling implicates the Sixth Amendment's Confrontation Clause, the Court reviews that issue de novo. *United States v. Williams*, 632 F.3d 129, 132 (4th Cir. 2011).

A district court's determination with respect to the journalists' privilege is also reviewed for "abuse of discretion." *Lee v. Dep't of Justice*, 413 F.3d 53, 58-59 (D.C. Cir. 2005). But a district court abuses its discretion by misinterpreting a statute's meaning and scope. *See In re Application of Esses*, 101 F.3d 873, 875 (2d Cir. 1996) (per curiam).

## ARGUMENT AND AUTHORITIES

### I. THE MURDER VICTIM'S OUT-OF-COURT STATEMENT WAS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(6)'S FORFEITURE-BY-WRONGDOING EXCEPTION TO THE HEARSAY RULE.

Barnes is responsible for causing James Reardon's death to prevent him from revealing the conspiracy to others. When a defendant causes a declarant's unavailability at trial, statements made by that declarant against the defendant are admissible as exceptions to the hearsay rule. Fed. R. Evid. 804(b)(6). This is known as the forfeiture-by-wrongdoing exception. *See Reynolds v. United States*, 98 U.S. 145, 158 (1879) ("The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by the accused's own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."). Reardon's statements regarding Barnes and the conspiracy just hours before his murder are admissible under this exception to the hearsay rule because Barnes was a co-conspirator and thereby liable for Anderson's act in causing Reardon's death.

Barnes convinced the district court that the admission of these out-of-court statements violated his right to confront his accusers. While the Sixth Amendment's Confrontation Clause provides criminal defendants with a fundamental right to confront their accusers or witnesses by cross-examination, a defendant waives this right by participating in intentional misconduct, such as threatening the life of or causing the death of a witness, with the purpose of preventing that witness from testifying at trial. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (recognizing confrontation not required when a common law exception existed at the founding of the Constitution). Reardon's hearsay evidence was thus improperly excluded under the "forfeiture by wrongdoing" exception to the Confrontation Clause. *Davis v Washington*, 547

U.S. 813, 833 (2006) (finding that “forfeiture-by-wrongdoing” was a common law exception to the Confrontation Clause).

This longstanding principle has found its way into the evidentiary rules. Federal Rule of Evidence 804(b)(6) codifies the common-law doctrine of “forfeiture by wrongdoing” as an exception to the general rule barring admission of hearsay evidence. *United States v. Gray*, 405 F.3d 227, 235, 240 (4th Cir. 2005). The rule states: “The following are not excluded by the hearsay rule if the declarant is unavailable as a witness ... (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Fed. R. Evid. 804(b)(6). In addition, Federal Rule of Evidence 804(a) states that: “[a] declarant is not unavailable as a witness if... absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” Fed. R. Evid. 804(a). To apply the “forfeiture by wrongdoing” exception, a court need only find, by a preponderance of the evidence, that “(1) the defendant engaged or acquiesced in wrongdoing; (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.” *Gray*, 405 F.3d at 241.

Reardon’s statements are admissible under Federal Rule of Evidence 804(b)(6) because Barnes rendered Reardon unavailable to testify at trial by being responsible in part for his death. Although Anderson pulled the trigger that caused Reardon’s death, Barnes is nonetheless liable for Reardon’s death because it was in furtherance of the conspiracy between the three men. While Barnes did not explicitly agree to kill Anderson, the forfeiture-by-wrongdoing exception is applicable because he did not disavow or thwart the plan and consequently failed to remove his own liability from the crime.

**A. Traditional principles of conspiracy liability apply to the forfeiture-by-wrongdoing analysis.**

This Court addressed the concept of conspiracy liability in the landmark case of *Pinkerton v. United States*. 328 U.S. 640, 646 (1946). There, two brothers, Daniel and Walter Pinkerton, were found guilty on several counts of violation of the Internal Revenue Code and one count of conspiracy to commit the violations. *Id.* at 641. The Court held that even though Daniel Pinkerton did not directly participate in the substantive offenses, he had conspired with Walter Pinkerton to commit an illegal act, and Walter Pinkerton committed the substantive offenses in furtherance of that conspiracy. *Id.* at 645–47. The Court also noted that Daniel Pinkerton did not sufficiently withdraw from the conspiracy by doing some affirmative act “to disavow or defeat the purpose” of the conspiracy to relieve himself of liability. *Id.* at 646. Despite his lack of direct participation, the Court upheld his conviction, finding he had the requisite criminal intent and was legally responsible for the criminal activity. *Id.*

After *Pinkerton*, when parties enter into a conspiracy to break the law, the partners are liable for the actions of one another if those actions are in furtherance of the conspiracy and are reasonably foreseeable. *Id.* This Court defined a conspiracy as “two or more [who] confederate and combine together to commit or cause to be committed a breach of the criminal law.” *Id.* at 644. In a conspiracy, “the criminal intent to do the act is established by the formation of the conspiracy,” and remains with *all* conspirators for *all* acts that are completed in furtherance of the conspiracy. *Id.* at 647 (emphasis added).

The Tenth Circuit Court of Appeals discussed how the government can satisfy *Pinkerton*’s requirements in *United States v. Cherry*. 217 F.3d 811 (10th Cir. 2000). In that case, five defendants were indicted in a drug conspiracy ring. *Id.* at 813. One of the co-conspirators, Joshua, murdered the cooperating witness, while another co-conspirator, Price, assisted by

obtaining a car to be used during the murder. *Id.* at 814. The other three co-conspirators did not know of, nor did they participate in, the murder. *Id.* The government appealed the suppression of the witness's out-of-court statements against Price and the other three non-participating co-conspirators. *Id.* at 813. Relying on *Pinkerton*, the court held that participation in an ongoing conspiracy can constitute a waiver of confrontation rights and hearsay objections when the act causing the unavailability of the witness was done in furtherance of the conspiracy and was reasonably foreseeable. *Id.* at 821. The court also pointed out that "actual knowledge is not required for conspiratorial waiver by misconduct if the elements of *Pinkerton*" are satisfied. *Id.* Consequently, the court remanded the case to the lower court to determine whether the murder was within the conspiracy's scope and was reasonably foreseeable by the co-conspirators. *Id.* at 822.

Here, however, the government has met its burden of proving by a preponderance of the evidence that Anderson's wrongful procurement of Reardon's unavailability was within the scope of the conspiracy and reasonably foreseeable by Barnes as a necessary and natural consequence of the conspiracy. Barnes, Anderson, and Reardon were all a part of a conspiracy to deal unlawfully in firearms, commit violence against an animal enterprise, and commit an unlawful taking under the Endangered Species Act. (R. at 2-4.) Anderson, Barnes's co-conspirator, murdered Reardon to stop him from disclosing information about the conspiracy and betraying the other two members. (R. at 4.) This act furthered the conspiracy by avoiding the exposure of the conspirator's illegal activities and was reasonably foreseeable because Anderson notified Barnes of his plan to murder Reardon before actually executing it. Consequently, Barnes has now waived his hearsay objection to Reardon's statements.

Additionally, similar to the facts in *Cherry*, a potential witness—Reardon, in this case—was murdered by one member of the conspiracy to prevent discovery or prosecution of the conspiracy. (R. at 7:37–50.) This murder was in furtherance of the conspiracy and was reasonably foreseeable. Therefore, according to what has been described as the *Cherry* doctrine, as a member of the conspiracy, Barnes has acquiesced to the wrongdoing that caused Reardon’s unavailability. As such, Reardon’s statements implicating Barnes are admissible. Unlike *Cherry*, the defendant here had actual knowledge that his co-conspirator intended on murdering the witness. Although the *Cherry* court held that actual knowledge was not necessary to forfeit the hearsay objection, it noted that a defendant’s knowledge would be relevant in proving the other elements of *Pinkerton*. *Id.* at 821. The fact that Barnes knew about the plot to murder Reardon and did nothing to prevent the act or notify police is even more probative of his acquiescence to the murder, thereby forfeiting his right to the hearsay objection. Barnes made no affirmative act to withdraw from the conspiracy by defeating the plan for murder, even after Anderson notified him of the plans to kill Reardon. (R. at 19.) This agreement in the conspiracy and failure to foil the murder plan establish Barnes’s intent to murder Reardon under the conspiratorial liability theory.

**B. *Giles* did not foreclose the application of conspiratorial liability to the forfeiture-by-wrongdoing exception.**

Several circuits have followed the *Cherry* doctrine and permitted the admission of hearsay statements against defendants where the declarant was made unavailable by the defendant’s co-conspirator. *See, e.g., United States v. Johnson*, 496 F.3d 951, 971 (8th Cir. 2007) (admitting statements from a witness that was made unavailable based on the “defendant’s role as an aider and abettor”); *United States v. Carson*, 455 F.3d 336, 364 (D.C. Cir. 2006) (forfeiting the defendant’s confrontation rights, noting the forfeiture applies with the same force to defendants

whose co-conspirators procure the unavailability of a witness when their wrongdoing was within the scope of the conspiracy and was reasonably foreseeable); *United States v. Thompson*, 286 F.3d 950, 955 (7th Cir. 2002). The court of appeals held this line of cases was inconsistent with *Giles v. California* where this Court explained that “the exception applies only when the defendant [has] engaged in conduct designed to prevent the witness from testifying.” (R. at 26) (citing 554 U.S. 353, 359–60 (2008)). But, contrary to the court of appeals’ holding, nothing in the opinion limited the exception to instances where the defendant acted directly. Instead, *Giles* merely clarified the nature of the act required to trigger the forfeiture-by wrongdoing exception.

The defendant in *Giles* was tried for murdering his ex-girlfriend. 554 U.S. at 359. He argued that he shot at her in self-defense when she lunged at him after making threats to his life. *Id.* At trial, over the defendant’s objection, the prosecution introduced statements that victim made to police a few weeks prior to her murder claiming the defendant had abused her. *Id.* On appeal, the prosecution argued the victim’s out-of-court statements should be admitted under the forfeiture-by-wrongdoing exception simply because the defendant caused her death. *Id.* at 357. However, the Court held that the exception would not apply unless the defendant acted with the intent to keep her from testifying. *Id.* at 359. In reaching this conclusion, the Court relied on the common-law and modern language of the exception and the historical application of the exception throughout history. *Id.* at 369. Consequently, the Court refused to admit the victim’s statements against the defendant because the prosecution could not prove that the defendant had the intent to prevent her from testifying when he killed her. *Id.* at 377.

Intent can be established under *Pinkerton* and *Giles* concurrently to satisfy the forfeiture-by-wrongdoing exception. In this case, the defendant argues that the *Giles* decision effectively overrules the *Cherry* doctrine, and that as a result, there must be evidence that Barnes personally

intended to prevent Reardon's testimony for the forfeiture-by-wrongdoing exception to apply. But this is a misapplication of the *Giles* holding. The *Giles* court was not faced with the issue of conspiratorial liability, nor was the matter even addressed. Rather, the Court was primarily focused on whether an act that rendered a witness unavailable at trial must be accompanied by the intent to procure such a result. Ultimately, the Court found that the intent to make the witness unavailable was necessary to invoke the hearsay exception.

The defendant need not personally form this intent. If a conspirator procured a witness's unavailability with the intent to prevent the witness's testimony, this satisfies the holding in *Giles*. That intent can be imputed upon the co-conspirator defendant according to *Pinkerton* and *Cherry*. When these cases are read together, the rule of law permits the hearsay statements in this case. Barnes's co-conspirator, Anderson, killed Reardon, the declarant, in an effort to "shut him up." (R. at 19.) In the conversation between Barnes and Anderson on November 29, 2011, the conspirators discussed their concern of Reardon abandoning the conspiracy and betraying the two of them. (R. at 19.) Anderson stated that he was going to "take care of him [Reardon]." (R. at 19.) Barnes ended the call by stating, "I don't want anything to do with this," but did nothing that would prevent or defeat the plot to kill Reardon or the ultimate goal of the conspiracy. (R. at 19.) Later, the same day, Reardon was murdered, and Anderson subsequently confessed to the killing. (R. at 7.)

Like *Pinkerton*, the parties in this case conspired to commit illegal acts. (R. at 21.) In furtherance of that conspiracy, Anderson, the co-conspirator of Barnes, killed the declarant in this case to keep him from betraying the conspiracy. (R. at 7, 19.) Under *Giles*, Anderson had the intent to prevent the declarant from testifying. This murder was reasonably foreseeable because Anderson notified Barnes in advance of the murder, but Barnes did nothing to stop

Anderson, prevent the murder, or thwart the goals of the conspiracy. (R. at 19.) As a result, and according the holding in *Cherry* and *Pinkerton*, Anderson's intent is imputed upon Barnes causing a waiver of his hearsay objection under the forfeiture-by-wrongdoing exception.

**C. The forfeiture-by-wrongdoing exception is necessary to prevent a defendant from benefitting under the law from his own wrongdoing.**

Reardon's statements should be admitted into evidence because excluding them would promote Anderson and Barnes' wrongful conduct. The Advisory Committee notes made this specific point:

Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself.

Fed. R. Evid. 804(b)(6) advisory committee's note (citing *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)). As a matter of public policy and equity, a defendant who silences a witness through violence or intimidation is barred from objecting to the admission of the witness's out-of-court statements inculcating the defendant. The exception avoids rewarding Barnes for his misconduct. *State v. Byrd*, 967 A.2d 285, 295 (N.J. 2009) (noting the purpose of the common-law forfeiture rule was to "remov[e] the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceeding.'").

Moreover, as the dissenting judge below recognized, "if a defendant may be convicted of murder based upon the foreseeable act of a co-conspirator, it is at the very least incongruous that hearsay evidence may not be admitted against him on the same basis." (R. at 33) (Zhu, J., dissenting); *see also Cherry*, 217 F.3d at 818 ("It would make little sense to limit forfeiture of a defendant's trial rights to a narrower set of facts than would be sufficient to sustain a conviction

and corresponding loss of liberty.”). Thus, *Pinkerton*’s formulation of conspiratorial liability appropriately assesses if a co-conspirator’s actions can be imputed to a defendant to determine whether that defendant has waived confrontation and hearsay objections.

## **II. KARA CRAWLEY HAS NO RIGHT TO AN EVIDENTIARY PRIVILEGE FOR INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION.**

Journalist Kara Crawley has no right to an evidentiary privilege protecting the information she gathered in her investigation of Big Top Circus because the public’s need for effective law enforcement outweighs the burden on newsgathering. Further, Federal Rule of Evidence 501 does not permit the creation of a journalist’s privilege on these facts. In the only case reviewing an evidentiary privilege for journalists, the Supreme Court specifically refused to recognize that such a privilege exists. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972). Additionally, Congress’s enactment of Rule 501 in the Federal Rules of Evidence does not permit the creation of a journalist’s privilege. No journalist is exempt from the duty to testify when subpoenaed.

Alternatively, if the Court creates a privilege, that privilege must be qualified, not absolute. An absolute privilege would prevent litigants from accessing critical evidence, inhibit the government from performing its essential tasks, and impede the credibility of the justice system. Joshua A. Faucette, *Your Secret’s Safe with Me . . . or So You Think: How the States Have Cashed in on Branzburg’s “Blank Check,”* 44 Val. U. L. Rev. 183, 217 (2009) (discussing the varying treatments of the journalist’s privilege by the States). However, even if the Court creates a qualified journalist’s privilege, the facts would not warrant the application of such a privilege.

### **A. The Public’s Interest in Law Enforcement and in Ensuring an Effective Grand Jury Proceeding Overrides the Need for a Journalist’s Protection Under the First Amendment.**

No evidentiary privilege should be created protecting the information Kara Crawley gathered in her Big Top Circus investigation because the necessity for effective law enforcement

prevails over any burden that may be placed on Crawley in this case. The Fifth Amendment grand jury requirement makes the subpoenaing of witnesses an essential task for the administration of justice. *Branzburg*, 408 U.S. at 688. Complying with a subpoena and appearing before a court to answer questions about a criminal investigation is a generally applicable duty of all citizens. *Id.* at 685. Generally applicable laws serving the public may be imposed against the press despite the possible burden on the First Amendment. 301 U.S. 103, 132 (1937). Moreover, in *Branzburg v. Hayes*, the Court recognized the importance of witness testimony noting that “the public has a right to every man’s evidence.” 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

In *Branzburg*, this Court heard a consolidation of district court cases in which news reporters were subpoenaed to testify about confidential sources in grand jury hearings. *Id.* at 667. The journalists moved to quash the subpoenas to avoid disclosing confidential information they had gathered. *Id.* at 669. The Court held that the interest in “fair and effective law enforcement aimed at providing security for the person and property of the individual” prevails over the consequential and uncertain burden on the First Amendment. *Id.* at 690.

The facts of this case are analogous to those in *Branzburg*. Crawley was subpoenaed to testify in a federal criminal proceeding after she investigated and published a story regarding Barnes’s conspiracy to kill elephants for ivory. (R. at 9:98–11:156.) Like *Branzburg*, Crawley motioned to quash the subpoena. (R. at 6:26.) However, in this case, the district court granted the motion and the court of appeals upheld the decision. (R. at 29.) This was an erroneous decision. Just like the *Branzburg* case, the public’s interest in investigating and prosecuting crime, here, outweighs any burden on Crawley’s newsgathering ability. She is not immune to the generally applicable law requiring the enforcement of subpoenas.

## **B. Federal Rule of Evidence 501 Does Not Create an Evidentiary Privilege for Information Gathered in a Journalistic Investigation.**

After refusing to recognize a journalist's privilege, the *Branzburg* Court specifically noted that Congress maintained the authority to refashion the rules if it found a journalist's privilege was necessary. Three years later, Congress enacted the Federal Rules of Evidence exclusive of any evidentiary privilege for journalists. Instead, the enactment included Rule 501, providing that privileges must be governed by the principles of common law in light of reason and experience. Fed. R. Evid. 501.

This Court clarified the application of this rule in *Jaffee v. Redmond*. 518 U.S. 1 (1996). In that case, the Court created a psychotherapist-patient privilege based on three factors: (1) "the significant public and private interests supporting recognition of the privilege, (2) the "modest" evidentiary burden imposed, and (3) the "uniform judgment" of all fifty states and the District of Columbia that enacted legislation recognizing some variation of such a privilege. *Jaffee*, 518 U.S. at 9–14. Conversely, when those factors are applied in the present case, the public and private interests do not warrant the creation of a journalist's privilege; the recognition of such privilege would unduly burden truth-seeking; and no uniformity of State legislation exists to demonstrate the need of such privilege in light of reason and experience.

### **1. A journalist's privilege would not satisfy important public and private interests.**

Significant public and private interests would not be best served by the creation of a journalist's evidentiary privilege. A proposed privilege serves a private interest when it protects communications in a relationship that is "rooted in the imperative need for confidence and trust." *Jaffee*, 518 U.S. at 10. For example, in *Jaffee*, the Court noted that "confidentiality is a *sine qua non* for successful psychiatric treatment." *Id.* However, that relationship must also serve a

significant public interest. *Id.* at 11. In *Jaffee*, the Court created a psychotherapist-patient privilege because it found that the privilege was necessary for successful psychotherapy and that the mental health of the citizenry is a public interest of “transcendent importance.” *Id.* The Court compared this to the public’s interest in the observance of law and administration of justice created through the attorney-client relationship and the public interest in marital harmony created by the spousal privilege. *Id.*

In contrast to *Jaffee*, the journalist-source relationship is not so rooted in confidentiality that failure to guarantee such confidentiality would result in complete failure of the relationship. Unlike the psychotherapy relationship, confidential sources are not the *sine qua non* of journalism, but merely a useful tool. Since the founding of this country, the press has thrived without recognition of a journalist’s privilege. *Branzburg*, 408 U.S. at 698–99. Furthermore, the transcendent importance of the freedoms of press and speech under the First Amendment are to prevent government oppression and interference, not to maintain the anonymity of confidential sources. U.S. Const. amend. I. The rights under the First Amendment belong to the public at large to have access to the news, not to journalists for protection of their sources.

**2. The burden on truth-seeking outweighs the value in recognizing a journalist’s privilege.**

Any conceivable benefit that might result from the creation of a journalist’s privilege pales in comparison to the burden imposed on truth-seeking. Under Rule 501 and the *Jaffee* test, the significant public and private interests served must outweigh the burden on truth-seeking for a privilege to be established. 518 U.S. at 11. Here, the creation of a journalist privilege would hinder the court’s ability to administer justice because it would exclude valuable evidence when a journalist declined to testify. This encumbrance on justice outweighs the uncertain benefit to the journalist’s relationship with confidential sources.

In establishing the psychotherapist privilege, the *Jaffee* Court determined that the burden imposed by the privilege was modest compared to the benefit to public and private interests. *Id.* The Court reasoned that without the privilege, confidential communications between the psychotherapist and patient would be chilled consequently minimizing the possible evidence that could be ascertained from psychotherapists. *Id.* at 12. In either scenario, the judicial system would not materially benefit from an increase in evidence.

This is not the case regarding the journalist's privilege. The relatively little benefit that might result from such a privilege would be overcome by the amount of evidence unavailable at trial. Even in recent history, courts have relied on and required journalists to provide valuable information and names of confidential sources in order to properly fulfill their truth-seeking function. Jaime M. Porter, *Not Just "Every Man": Revisiting the Journalist's Privilege Against Compelled Disclosure of Confidential Sources*, 82 Ind. L.J. 549, 551–52 (2007) (discussing the decline in recognition of a journalist's privilege). For example, the Newspaper Association of America stated that more than twenty-four reporters across the nation were subpoenaed or questioned about confidential sources in 2004–2005 alone. *Id.* (quoting Katherine Q. Seeyle, *Journalists Say Threat of Subpoena Intensifies*, N.Y. Times, July 20, 2005, at C1). Without access to such evidence, courts would be unable to efficiently fulfill their truth-seeking duties.

### **3. The journalist's privilege is not uniformly recognized by the states.**

The policy decision of the states and federal courts provide no basis to determine that a journalist's privilege should be created. The lack of consensus among state legislatures indicates that no "reason and experience" exists under Rule 501 to support the recognition of a new privilege. *See Jaffee*, 518 U.S. at 13. At best, states and federal circuit courts are greatly divided on the treatment of a journalist's privilege. Joshua A. Faucette, 44 Val. U. L. Rev. at 197–211.

Without a uniform recognition by the states, the third factor in the *Jaffee* analysis cannot be satisfied.

In creating the psychotherapist privilege under Rule 501, the *Jaffee* Court relied on the fact that all fifty States and the District of Columbia had enacted some form of the privilege. 518 U.S. at 12. The Court noted that because state legislatures understood the need to preserve the “integrity of the factfinding function of their courts,” the consensus among every state could be interpreted as “reason and experience” as required by Rule 501. *Id.* at 13. Essentially, this Court deferred to the States’ unanimous interpretation that Rule 501 permitted a psychotherapist privilege. *Id.*

The same rationale cannot be applied in the present case because no unanimity exists among the states. As of 2011, only thirty-three states had enacted statutes providing for a journalist’s privilege. Kathleen Ann Ruane, *Journalist’s Privilege: Overview of the Law and Legislation in Recent Congresses*, Cong. Research Serv. RL34193, 2 (2011), available at <http://www.fas.org/sgp/crs/secretary/RL34193.pdf> (discussing the current status of federal legislation regarding a journalist’s privilege). Moreover, none of these shield laws are the same. Joshua A. Faucette, 44 Val U. L. Rev. at 185. The states have interpreted Rule 501 inconsistently and some have seemingly ignored the holding in *Branzburg*. The lack of uniformity by the states signals a lack of reason and experience, precluding the Court from recognizing a journalist’s privilege.

**C. Even if the Court Finds That a Journalist’s Privilege Exists, That Privilege Is Qualified Rather Than Absolute.**

If this Court creates an evidentiary privilege for journalists, that privilege must be qualified rather than absolute. An absolute journalist’s privilege would deny essential and otherwise admissible evidence to litigants, hinder state and federal prosecutors from completing their primary duties, and jeopardize the integrity of the justice system. Joshua A. Faucette, 44 Val. U.

L. Rev. at 217 (citing *United States v. LaRouche Campaign*, 841 F.2d 1176, 1177 (1st Cir. 1988); *Branzburg*, 408 U.S. at 692). Alternatively, even if the Court creates a qualified journalist's privilege, the facts of this case would not warrant the application of such a privilege under the commonly used qualified privilege structures.

An absolute privilege prevents litigants from accessing critical evidence. The American criminal justice system is fundamentally based on the right of the accused to have a fair and impartial trial. U.S. Const. amend. VI; *see also Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (noting that it is not unreasonable to assume that the conviction of the innocent person is a significantly more serious risk than the acquittal of the guilty); *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[A] fundamental value determination of our system that it is far worse to convict an innocent person than let a guilty man go free.”). To guarantee that right, judges and juries must be able to make an accurate determination of the facts.

This requirement is also present in civil proceedings. An absolute journalist's privilege would inhibit litigants from accessing valuable evidence critical to the merits and disposition of their cases. For example, in *United States v. LaRouche Campaign*, the defendant subpoenaed NBC for the outtakes of an interview with a key witness against the defendant. 841 F.2d at 1177. The production company refused to turn over the tapes arguing that they were protected under the First Amendment. *Id.* The First Circuit Court of Appeals held that granting NBC protection under the First Amendment would deprive LaRouche of his Sixth Amendment rights because he would not have access to possibly exculpatory information and refused to do so. *Id.* at 1182. Similarly, if this Court were to find that an absolute journalist's privilege existed, litigants would frequently be denied access to otherwise admissible evidence, placing the integrity of the American judicial system in peril.

An absolute privilege inhibits the government from performing essential job functions. Like the problems that arise from defendants' inability to access evidence, an absolute privilege would also hinder government officials from fulfilling required duties. Denying access to certain information creates evidentiary gaps that could ultimately lead to faulty convictions or acquittals. Joshua A. Faucette, 44 Val. U. L. Rev. at 217. Additionally, the increasing number of subpoenaed journalists is evidence that the government and courts rely on the evidence solicited from the news media. Jaime M. Porter, 82 Ind. L.J. at 551. By providing journalists with an absolute evidentiary privilege, government and law enforcement will not have adequate information to carry out their essential functions.

Recognition of an absolute privilege by this Court would impact the reliability and integrity of the justice system. By denying criminal defendants, other litigants, and those charged with prosecuting crimes access to critical evidence that would permit a court to make an accurate determination of fact, the judicial system cannot operate effectively or efficiently. Joshua A. Faucette, 44 Val. U. L. Rev. at 218. Furthermore, recognizing an absolute journalist privilege would indicate deference to newsgathering over the fair administration of justice. *Id.* That decision would give credence to the unreasonable idea that "it is better to write about crime than to do something about it" a notion this Court already stated it refused to entertain in *Branzburg*. 408 U.S. at 692. The creation of anything other than a qualified privilege for journalists would seriously jeopardize the credibility and efficiency of the justice system.

If any journalist's privilege exists, it must be qualified rather than absolute because an absolute privilege is not permitted under the law, nor is it practical for the efficient and fair administration of justice. In fact, of the jurisdictions that recognize an evidentiary privilege for journalists, a large majority only provide a qualified privilege. Joshua A. Faucette, 44 Val. U. L.

Rev. at 197–98. A qualified privilege is proper because it promotes the fair administration of the law by providing litigants and the government with access to the evidence necessary to present their case. *Id.* at 221. Simultaneously, the qualified privilege offers deference to journalists by requiring certain standards to be met before the disclosure of information and confidential sources would be compelled. *Id.* Even though about twenty-five states recognize some type of qualified privilege, how they have qualified that privilege varies significantly. *Id.* at 197–200. The most likely models to be used in the creation of a federal journalist’s privilege would be those laid out in the one Supreme Court case that has addressed the issue: *Branzburg*. 408 U.S. at 709–20.

The qualified privilege should provide a framework to guide courts and journalists. The first model, offered by Justice Powell in his concurrence, maintains that the privilege should be determined by judging the facts on a case-by-case basis and “the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* at 710. The concurrence offers the court more discretion than both the majority and dissent in *Branzburg*, but also provides little guidance to courts or journalists in deciding exactly when the privilege would be recognized.

Alternatively, a second model was offered by the dissent in *Branzburg*. *Id.* at 725. There, Justices Stewart, Brennan, and Marshall suggested a three-prong test that should be required to overcome the journalist’s privilege. Jaime M. Porter, 82 Ind. L.J. at 558. Essentially, a movant would be required to show that the information sought is highly material and relevant to the claim, that there are no less destructive alternative means for accessing the information, and there is a compelling interest in the information. *Id.* at 739–40. This test acknowledges the need for a journalist protection under the First Amendment while providing litigants the opportunity to

access critical evidence when they can show a valid and reasonable need. Several jurisdictions have relied on this framework. *See, e.g., N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006) (overturning a district court decision to protect the information gathered in the journalist's investigation); *In re Petroleum Prods.*, 680 F.2d 5 (2d Cir. 1982) (holding the journalist's privilege was proper because the information sought was not relevant to the underlying action).

If this Court decides to create the journalist's privilege, it should model that privilege on Justice Powell's formulation in *Branzburg*. That test would give state courts discretion to allow relevant evidence to be admitted that would help juries determine the facts while preserving the ability for journalists to conceal their sources when information is less important or relevant.

**D. Crawley would not be entitled to qualified immunity under the facts presented here.**

Even under a qualified privilege, Crawley does not meet the standards proposed in *Branzburg*. Under the dissent's three-part test, a journalist's privilege is not recognized when the material requested is highly material and relevant, there are no other means of accessing the information, and the information is necessary to the underlying claim. *Branzburg*, 408 U.S. at 739–40. The requested evidence is highly material and relevant because it is the name of a key witness to the conspiracy. (R. at 10:137–38.) No evidence indicates that the information can be sought in another manner because Crawley is the only person that knows the witness's identity. *Id.* Additionally, the confidential witness apparently has first-hand knowledge regarding Barnes's participation in the conspiracy, (R. at 10:137–38.) That knowledge is essential in proving the elements of counts three, four, and five dealing with the Conspiracy to Commit Violence Against an Animal Enterprise and Conspiracy to Commit Unlawful Takings under the Endangered Species Act, (R. at 3–4.)

Moreover, even if the Court applied the balancing test from Justice Powell's concurrence, the privilege would not be proper in this case. The fact that the witness agreed to be videotaped while sharing information indicates she had no reasonable expectation of privacy. *See* (R. at 10:150–51.) Nonetheless, the need to adjudicate the heinous crimes in this case outweighs the need to protect the non-confidential information. The district court abused its discretion when it decided that journalists enjoy immunity from disclosing their sources.

### **III. AGENT SIMANDY'S CODE-WORD TESTIMONY WAS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 701 AS LAY WITNESS OPINION.**

The government sought to introduce Agent Simandy's testimony concerning alleged code words and phrases used during the intercepted telephone conversations between the co-conspirators. (R. at 23.) He testified that Barnes's repeated references to "blood diamonds" were in fact references to elephant ivory tusks. (R. at 23.) He also testified that the repeated references to "Charlie tango" described a helicopter that Barnes rented for the enterprise. (R. at 24.) He also testified that the phrase "black cat" referred to three AK-47s Barnes agreed to purchase from Agent Lamberti at Weapons Unlimited. (R. at 24.) The government offered this testimony as lay testimony under Federal Rule of Evidence 701. (R. at 30.) The district court excluded this testimony solely because Agent Simandy had not been a "participant in a conversation," or "a listener to a conversation who contemporaneously observes the speakers." (R. at 30.) This was an abuse of discretion.

The court of appeals imposed a requirement not found in the Federal Rules of Evidence. A witness may offer lay testimony if he or she has personal knowledge of the matter that is the subject of the testimony. Fed. R. Evid. 602, 701. A lay witness may also offer an opinion, provided that the opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or 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. Lay opinions include testimony that “relates to the appearance of persons or things, . . . the manner of conduct, competency of a person, . . . and an endless number of items that cannot be described factually in words apart from inferences.” Fed. R. Evid. 701 advisory committee’s note. Agent Simandy’s testimony satisfied all three of the Rule’s requirements. The district court clearly abused its discretion in refusing to admit this evidence simply because he did not personally observe or participate in the conversations.

**A. Agent Simandy May Offer Lay Opinion Testimony Gained From His Review of the Conversation Transcripts and His Specific Investigation in this Case.**

Agent Simandy’s testimony was based on his own “perception.” Fed. R. Evid. 701(a). He reviewed the certified conversation transcripts and made a thorough investigation of the case file. (R. at 31.) The lower courts acknowledge that Agent Simandy did so but, rather, contend that he had to personally participate in the conversations to offer a lay opinion under Rule 701. That holding unnecessarily limits the scope of lay opinion testimony under Rule 701.

Other courts have addressed the same type of testimony and have held that the lay witness need not actually have participated in the conversations to satisfy Rule 701(a). For example, in *United States v. Saulter*, the Seventh Circuit Court of Appeals admitted testimony by a lay witness offering his opinions about the meaning of code words used in recorded conversations, of which he did not take part. 60 F.3d 270, 276 (7th Cir. 1995). The witness was deemed to have personal knowledge based on his own drug dealings and familiarity with the defendant. *Id.* Likewise, in *United States v. Jayyousi*, the Eleventh Circuit Court of Appeals held that a witness could provide testimony as to the meaning of code words even when he did not participate or observe the conversation. 657 F.3d 1085, 1102 (11th Cir. 2011). There, the court found that the testifying agent’s opinion was rationally based on his perception after he investigated the case,

read wiretap summaries and verbatim transcripts, and listened to recordings of some of the intercepted calls long after they occurred. *Id.* He was not a participant in the conversation, nor did he listen to the calls contemporaneously. *Id.* The court plainly held that direct participation in or observation of a conversation was not required to acquire first-hand knowledge of the matter. *Id.*

If Barnes wanted to discredit Agent Simandy's testimony, he has many alternatives. Agent Simandy readily admitted that he did not participated in the conversations or observed them in real time. (R. at 15.) Barnes has access to the records he personally examined. (R. at 15.) He can review them and offer a different version of what the code words could mean. Barnes can cross-examine Agent Simandy about his perception and argue that the opinions are unfounded. But Barnes's problems with Agent Simandy's lay opinion testimony go to weight, not admissibility. *See United States v. Gaytan*, 649 F.3d 573, 579 n. 1 (7th Cir. 2011) ("A law-enforcement officer's testimony is a lay opinion if it is limited to what he observed ... or to other facts derived exclusively from [a] particular investigation."), *cert. denied*, 132 S. Ct. 1129 (2012). They do not provide a basis for excluding the testimony altogether.

Agent Simandy's opinion is based on personal knowledge and permissible as lay opinion. He gained personal knowledge through his investigation of the conspiracy. After being assigned to the case following the death of the original agent, he reviewed certified transcripts of the conversations in question and performed the rest of the investigation including interviewing the undercover agents working with the defendant. (R. at 12:211–13:226.) Thus, Agent Simandy can offer opinions rationally based on his perception.

**B. Simandy's Testimony Is Helpful to Clearly Understand the Co-Conspirators' Conversation and Determining the Facts at Issue.**

Besides being based on first-hand knowledge, Agent Simandy's testimony is also helpful for the jury to clearly understand the code used by the co-conspirators so that the facts at issue can be clearly determined. When an agent's particular familiarity with an investigation can assist a jury in understanding communications between parties, the agent's perceptions are admissible as lay opinion. *Jayyousi*, 657 F.3d at 1103. Agent Simandy's opinions as a lay witness are admissible here because his in-depth understanding of the details of the conspiracy will help the jury decipher the unique form of communication between the conspirators.

The issue turns on whether the testimony is helpful. In a case where the code being used would be easily understood by a jury, a witness's perception of the meaning of code language is not as critical. *See United States v. Cano*, 289 F.3d 1354, 1360 (11th Cir. 2002) (holding lay opinion testimony not necessary because the jury could have easily deciphered the drug jargon being used). Where, as here, the co-conspirators had different code words that the jury would have trouble picking up their meaning, lay opinion testimony is proper. *United States v. Rollins*, 544 F.3d 820, 831–32 (7th Cir. 2008) (recognizing it is "helpful to have explanations from the investigator who became intimately familiar with the unusual manner of communicating used by these conspirators.")

In this case, the jury is also likely to have trouble deciphering the conversations between the conspirators, not only because they are probably not familiar with the complexities of conspiracies to kill animals, but also because the code the conspirators used was very unique. For example, Agent Simandy testified that he believed the conspirators used "blood diamonds" to refer to elephant ivory tusks, "Charlie tango" for helicopters, and "black cat" for AK-47s. (R. at 13:229–37.) Agent Simandy can put these code words into context by linking them to the

times and dates of other events he learned of through his investigation. His perception based on his investigation is necessary for the jury to fully understand the conversations of the conspirators and is therefore admissible under Rule 701.

**C. Testimony Based on a Specific Investigation Does Not Constitute Scientific, Technical, or Other Specialized Knowledge.**

Agent Simandy's opinion testimony is proper as lay testimony because it is based solely on the personal knowledge he acquired throughout the current investigation rather than any scientific, technical, or other specialized knowledge. Rule 701(c) limits lay witness opinion testimony to that which is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. The Advisory Committee's notes indicate the rule was "amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simply expedient of proffering an expert in lay witness clothing." *Id.*, advisory committee's note.

The line between permissible and impermissible testimony relates to whether it relates to a witness's general experience or an investigation in a particular case. Testimony based on extensive past experience in a particular field, such as drug trafficking jargon, would not be permissible as lay testimony under Rule 701. Conversely, opinion testimony not based on extensive prior knowledge, but rather gained through present perception, is admissible from a lay witness. Agents Simandy's testimony regarding the meaning of code words is an opinion based only on his participation in the present investigation. *See Rollins*, 544 F.3d at 832–33 (allowing testimony when agent had an extensive background in narcotics; but the court limited lay opinion testimony to opinion "based on his own person observations and perceptions derived from *this particular case*." (emphasis added); *see also United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (holding agent's testimony about meaning of code words admissible as lay opinion

because it was based on participation in *this* conspiracy, (emphasis added)) (overruled on other grounds). In *Rollins*, 544 F.3d at 832–33 (emphasis added). Agent Simandy’s testimony is based exclusively on his participation in this investigation, not past experience deciphering code words. The district court abused its discretion in imposing a limitation not found in the Federal Rules of Evidence, as Agent Simandy may offer lay opinion testimony under Federal Rule of Evidence 701 without participating in or personally observing the conversations.

### CONCLUSION

This Court should reverse the judgment of the Fourteenth Circuit Court of Appeals and remand the case for trial.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER