No. 12-23

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

--against--

WILLIAM BARNES,

Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Does a defendant in a criminal case forfeit his Confrontation Clause rights and any hearsay objections under Federal Rule of Evidence 804(b)(6), when his co-conspirator murders the hearsay declarant in order to prevent him from exposing their conspiracy, and the defendant can reasonably foresee the declarant's murder?

II. Does an evidentiary privilege for information gathered in a journalistic investigation exist under Federal Rule of Evidence 501, when the burden on truth-seeking and evidentiary benefit outweighs any potential public or private interest and the creation of a new privilege is not within the bounds of light and reason?

III. Does an undercover detective need to be qualified as an expert witness under Federal Rule 701 in order to give opinion testimony regarding the meaning of code words when he only testified as to his overall knowledge of the case at hand, and did not use any specialized knowledge in order to form his opinion?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

Statement of the Facts 1

Procedural History 3

SUMMARY OF THE ARGUMENT 4

STANDARD OF REVIEW 6

ARGUMENT 6

I. The trial court erroneously excluded Reardon's statements because Federal Rule of Evidence 804(b)(6) permits the admission of otherwise inadmissible hearsay evidence when a party has wrongfully prevented the declarant from testifying, and the party would inequitably benefit from the windfall of their misconduct..... 6

A. Reardon's murder was within the scope and in furtherance of an ongoing conspiracy, and reasonably foreseeable to Barnes as a necessary or natural consequence of that conspiracy..... 8

B. Organized criminals should not benefit from the windfall of their co-conspirators actions; as such policy would incentivize rather than deter witness tampering..... 13

II. The lower court erred in finding an absolute privilege for reporters because the creation of a new privilege represents a departure from the precedence of case law and is not within the bounds of the light of reason and experience..... 15

A. The reporter's privilege does not meet the three-pronged test of *Jaffee v. Redmond* which outlined the test for the creation of new privileges..... 16

1. The privilege does not serve public or private interests, because it denies the court access to all the evidence, and does not provide any significant benefit to the press..... 17

2. The evidentiary benefit outweighs the privilege and the burden on truth seeking because the subpoena was made in good faith and pertained to a serious claim..... 20

3. Creating a privilege is not within the bounds of the light of reason and experience because it runs counter to prevailing court precedence..... 22

B. An absolute privilege would disregard other competing public interests and make the media untouchable even when their information is vital to the fair administration of justice..... 24

III. The lower courts erred in excluding Simandy's proper lay opinion testimony regarding the meanings of the alleged code words because the trial court wrongly applied the standard for which a lay witness may give opinion testimony under Federal Rule 701..... 26

A. The trial court wrongly interpreted Rule 701(a) because it failed to take into account that Simandy had personal knowledge of the facts being related in the conversation transcripts..... 27

B. Agent Simandy's testimony was helpful to clearly understanding his testimony and to determining a fact in issue..... 30

C. Agent Simandy's testimony was not based on scientific, technical, or other specialized knowledge..... 31

CONCLUSION 33

TABLE OF POINTS AND AUTHORITIES

I. UNITED STATES SUPREME COURT CASES

Branzburg v. Hayes, 408 U.S. 665 (1972)……..passim

Crawford v. Washington 124 S. Ct. 1354(2004)……7

Davis v. Washington 126 S. Ct. 2266 (2006)……...7

Elkins v. United States, 364 U.S. 206 (1960)……17

Giles v. California 128 S.Ct. 2678(2008)……7,8,13

Jaffee v. Redmond, 518 U.S. 1 (1996)……passim

New York Times Co. v. Jascalevich, 439 U.S. 1317, 1322 (1978)……23

Pinkerton v. United States 66 S. Ct. 1180(1946)……passim

Pierce v. Underwood, 487 U.S. 522, 558 (1998)……6

Reynolds v. United States 98 U.S. 145(1878)……...6,7

United States v. Bryan, 339 U.S. 323, 331, (U.S. 1950)……17

United States v. Nixon, 418 U.S. 683 (U.S. 1974)……18

Zurcher v. Stanford Daily, 436 U.S. 547 (1978)……...19

II. UNITED STATES COURT OF APPEALS CASES

In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006)……16

In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004)……...20,21

United States v. Ahn, 231 F.3d 26 (D.C. Cir. 2000)……..23

United States v. Cherry 217 F.3d 811 (10th Cir. 2000)……5,9,11,12,15

United States v. De Peri, 778 F.2d 963, 977-78 (3d Cir. 1985)……30

United States v. Dinkins 691 F.3d 358 (4th Cir. 2012)……..13

United States v. Freeman 498 F.3d 893 (9th Cir. 2007)……...30,32

United States v. Gray 405 F.3d 227(4th Cir. 2005)……..10,14

United States v. Jayyousi 657 F.3d 1085 (11th Cir. 2011)……28

United States v. Peoples 250 F.3d 630 (8th Cir. 2001)……...…27,29,30

United States v. Rollins 544 F.3d 820 (7th Cir. 2008)……..30,31

United States v. Saulter, 60 F.3d 270 (7th Cir. 1995)……28

United States v. Simas, 937 F.2d 459 (9th Cir. 1991)……30

United States v. Thompson, 286 F.3d 950 (7th Cir. 2002)……6,10,15

III. UNITED STATES DISTRICT COURT CASES

Gatlin v. United States, 925 A.2d 594 (D.C. 2007)……9

In re Application of Chevron Corp. 736 F. Supp. 2d 773 (S.D.N.Y. 2010)……..25

United States v. Basciano, 430 F.Supp. 2d 87 (E.D.N.Y. 2006)……...11

United States v. Rivera, 292 F. Supp. 2d. 827 (E.D.Va. 2003)……12,14

IV. STATE COURT CASES

Kurzynski v. Spaeth 538 N.W.2d 554 (App.1995)……24

State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992)……..26

V. CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI……7

V. STATUTORY PROVISIONS

18 U.S.C.A. §371……3

18 U.S.C.A. §922(a)(1)(a)……...3

18 U.S.C.A. §§ 43……3

18 U.S.C. §3731……..…….4

VI. FEDERAL RULES

Fed. R. Evid. 501……...4,5,16,25,33

Fed. R. Evid. 602……...27

Fed. R. Evid. 701……*passim*

Fed. R. Evid. 702…….26,27,32

Fed. R. Evid. 804(b)(6)……...*passim*

VII. SECONDARY SOURCES

193 A.L.R. Fed. 703 (2004)……...……6,10,11

Clifford S. Fishman & Anne T. McKenna, *Wiretapping and Eavesdropping,* §41:24….26

STATEMENT OF THE CASE

Statement of the Facts

Defendant William Barnes ("Barnes") had a plan to harvest whatever money he could from his financially destitute circus. (R. 1.) He planned that, on December 15, 2011, 40 endangered Asian elephants would be grazing on his land in rural southern Boerum when he and his two friends would snipe them from his rented helicopter. (R. 2, 3.) After they were killed, Barnes planned to saw off their rare ivory tusks and put them on the market. (R. 2.)

This would not be the first time that Barnes engaged in an illegal hunting activity. (R. 1.) In August 2008, Barnes began going on bear hunting expeditions with Alfred Anderson ("Anderson"). (*Id.)* In order to fund the trips, Barnes and Anderson amassed donations in the name of an unregistered charity called "Boerum 4 Animals," which the two created together. (*Id.*) Barnes was never charged with a crime in this case, but Anderson was convicted of fraud in July 2010 and made to perform 100 hours of community service. (*Id.*) After discovering that his circus was in financial ruin, on July 30, 2011, Barnes would once again suggest that Anderson join-in on a big-game hunt. (R. 2.) On September 1, 2011, Barnes and Anderson agreed to allow James Reardon ("Reardon") to join the hunting scheme. (*Id.*)

On July 10, when Barnes learned that his business, Big Top Circus ("Big Top"), needed to raise $500,000 by December or file for bankruptcy, he looked to his 20 Asian elephants for relief. (R. 1.) On July 12, Barnes contacted two other circuses, Boerum City Circus ("Boerum City") and Flying Feats Circus ("Feats"), which each had ten elephants, and invited them to join Big Top in a special month of holiday elephant performances.

(R. 1, 2.) As an added bonus, Barnes suggested that the elephants be quartered at his expansive property, which was a very similar environment to that of the elephant's native habitat. (R. 2.) The circuses agreed, and planned for their elephants to arrive in early December. (R. 2.)

In order to raise the profile of his planned elephant show and wring what profit he could from Big Top before the hunt, Barnes contacted reporter Kara Crawley ("Crawley") on August 30. (R. 2, 9.) He offered her unrestricted access to the circus in exchange for publicity. (R. 2, 9.) Crawley agreed, and took her first tour of the circus on September 15. (R. 2, 9.) Over a period of two weeks, Crawley developed a rapport with an employee who knew she was publishing a story about the circus. (R. 10.) The employee was video-taped without concealing his face and explained to Crawley that he or she had overheard Barnes and another person discussing a plan to kill the elephants for their ivory. (R. 10.) The employee asked that Crawley conceal his or her identity while the employee still worked for the circus. (R. 10.)

A day after gaining Anderson's approval, Barnes contacted Weapons Unlimited. (R. 2.) Unbeknownst to Barnes, he was speaking to Jason Lamberti ("Lamberti"), an undercover agent for the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). (*Id.*) Lamberti informed Barnes that he would be able to get him fully automatic weapons at a discount if Barnes was willing to deal under the table, and Barnes agreed. (*Id.*) Based on the information Lamberti gathered, the FBI obtained a warrant permitting interception of Barnes' telephone calls, and began monitoring and recording all calls to and from Barnes' home. (*Id.*) One of these calls was to rent a helicopter for December 15. (R. 3.) Originally, the calls were monitored and transcribed by Agent Blackstock; however, after

his death the case was assigned to Agent Thomas Simandy, who thoroughly reviewed the transcripts and interpreted certain code words and phrases. (R. 13.)

Anderson first called Barnes on November 15 to express his concern about Reardon. (R. 7, 18.) Anderson told Barnes that he feared Reardon would expose the plot and suggested that they "get rid of him." (*Id.*) Anderson explained that Reardon was asking "legal" questions about "permits and stuff" and told him that he couldn't lose his job. (*Id.*) The next telephone call regarding Reardon came in at 2:00 a.m. on November 29. (R. 7, 19.) Anderson told Barnes that he was going to "take care of [Reardon]." (*Id.*) After discussing the ramifications of Reardon going to the police, Barnes told Anderson to "hold off" and "just shut him up for a while." (R. 19) Before the call ended, Barnes said, "I want nothing to do with this." (R. 7, 19.) Later that night, at 7:30 p.m. Daniel Best observed Anderson running out of Reardon's home. (R. 7.) When he entered the home, Best discovered Reardon dead. (*Id.*) Anderson was arrested later that day and confessed to killing Reardon in order to prevent him from exposing the conspiracy. (*Id.*)

On December 1, 2011, based on information she gained from an unidentified employee of Big Top, reporter Crawley published an exposé of Barnes' plan to kill the elephants. (R. 3, 11.) Barnes was taken into custody later that day. (R. 3.)

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.A. §§ 371 and 922(a)(1)(a), two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C.A. §§ 43, and 371, and one count of conspiracy to commit unlawful takings under the Endangered Species Act. (R. 3, 4.) On May 1, the District Court heard evidence

concerning three pre-trial motions, including: (1) the governments motion in limine to admit hearsay statements by Best under Federal Rule of Evidence 804(b)(6); (2) the Defense's motion to quash the government's subpoena seeking journalist Crawley's sources; and (3) the government's motion in limine to admit FBI Agent Simandy's lay witness opinion testimony. (R. 5, 6, 24-25.) The District Court ruled against the government on all three issues.

The United States then brought an interlocutory appeal pursuant to 18 U.S.C. §3731 to contest the District Court's rulings. On July 2, 2012, the Fourteenth Circuit affirmed the District Court's decisions, holding that: (1) the hearsay statements by Best were excluded; (2) the journalist's privilege was absolute; and (3) Simandy's testimony did not meet the requirements of lay witness testimony under Federal Rule of Evidence 701. The United States subsequently filed a petition for writ of certiorari, which was granted on October 1, 2012.

SUMMARY OF THE ARGUMENT

The lower courts both incorrectly ruled that: (1) the hearsay statement by Reardon is inadmissible under Federal Rule of Evidence 804(b)(6); (2) Crawley was protected from a motion for compelled disclosure by a privilege for reporters under Rule 501; and (3) the lay witness testimony by Agent Simandy was inadmissible under Rule 701. First, the hearsay statements by Reardon are admissible under Federal Rule of Evidence 804(b)(6), despite Barnes' Confrontation Clause objections because Reardon's murder triggered the forfeiture by wrongdoing exception provided by Rule 804(b)(6). Barnes forfeited his Confrontation Clause rights and any hearsay objections when Anderson murdered Reardon as part of the conspiracy under the *Pinkerton v. United States*, 66 S.

Ct. 1180 (1946) conspiratorial liability theory extended in *United States v. Cherry*, 217 F.3d 811 (2000). Moreover, the murder was reasonably foreseeable to Barnes, and Barnes took no action to prevent it. Thus, Barnes lost his right to object, and the hearsay statements should be admitted.

Second, Crawley was not protected from a motion for compelled disclosure by a privilege for reporters under Rule 501. Such a privilege runs counter to prevailing Supreme Court guidance which declined to create a reporters privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The lower courts misapplied the privilege test of *Jaffee v. Redmond*, 518 U.S. 1 (1996), which is distinguished from the facts in the present case because journalistic confidentiality is not essential, and the benefits do not justify a new evidentiary privilege. Moreover, the court erred by making the privilege absolute, which disregards competing public interests. A special privilege for reporters harms criminal investigations by excluding relevant evidence from the courtroom and making reporters the arbiters of what evidence is relevant.

Lastly, the lay witness testimony by Agent Simandy was admissible under Federal Rule of Evidence 701. Agent Simandy's interpretation of the conversation was rationally based on his perception of the words being used in relation to other aspects of this case. The testimony only pertained to words being used in the conversation between the co-conspirators, and would be immensely helpful to a jury who would be unfamiliar with the words unless context was provided. Further, the testimony was not based on scientific, technical, or other specialized knowledge; rather, it regarded a conversation that used words in a unique manner, such that no expert could identify a pattern any more so than a layman. Agent Simandy's testimony is relevant and admissible to the case.

Accordingly, this Court should reverse the ruling of the Circuit Court on all issues.

STANDARD OF REVIEW

The standard of review for these issues is *de novo* as they are questions of pure law. *Pierce v. Underwood*, 487 U.S. 522, 558 (1998).

ARGUMENT

I. The trial court erroneously excluded Reardon's statements because Federal Rule of Evidence 804(b)(6) permits the admission of otherwise inadmissible hearsay evidence when a party has wrongfully prevented the declarant from testifying, and the party would inequitably benefit from the windfall of their misconduct.

Under Rule 804(b)(6), a hearsay statement offered against a party may be admitted if the party "wrongfully caused or acquiesced to wrongfully causing the declarant's unavailability as a witness, and did so intending that result." Fed. R. Evid. 804(b)(6). The purpose of the rule is to prevent witness tampering and is based on the common law maxim that no one should profit from his or her own wrongdoing. Fed. R. Evid. 804 Advisory Committee's Note (1997)(Subdivision (b)(6)), *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002). The rule does not require any criminal action in order to wrongfully procure the witness's unavailability. Fed. R. Evid 804 Advisory Committee's Note (1997)(Subdivision (b)(6)). *See also* 193 A.L.R. Fed 703.[1]

In *Reynolds v. United States,* the Supreme Court applied the doctrine of forfeiture by wrongdoing to admit what would otherwise be un-confronted hearsay statements.[2]

---

[1] "Rule 804(b)(6) of the Federal Rules of Evidence is an attempt to respond to the problem of witness intimidation whereby the criminal defendant, his associates, or friends through one means or another, often a simple telephone call, procures the unavailability of the witness at trial and thereby benefits from the wrongdoing by depriving the trier of fact of relevant testimony of a potential witness." 193 A.L.R. Fed 703.

[2] "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

Reynolds v. United States, 98 U.S. 145 (1878). While the Supreme Court has been more reluctant to forego a criminal defendant's Confrontation Clause[3] rights than in the past (*see Crawford v. Washington*, 124 S. Ct. 1354 (2004)*, Giles v. California*, 128 S.Ct. 2678 (2008)), the Court has expressly stated that the forfeiture by wrongdoing exception still applies to un-confronted testimony when a defendant has wrongfully procured a witness's unavailability with the purpose of preventing them from testifying. *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) ("We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."") (quoting *Crawford*, 124 S. Ct. at 62).

In *Giles v. California*, this Court held that in order for a defendant to forfeit his or her Confrontation Clause rights, the defendant must have acted with the purpose of preventing the witness from testifying. *Giles,*128 S.Ct., at 2684. Therefore, un-confronted hearsay evidence against a defendant would only come into evidence if the government affirmatively showed that the declarant was unavailable because the defendant acted with the desire to keep him or her from testifying. *Id.*

The *Giles* decision has left open an essential issue with regards to the Confrontation Clause: the status of conspiratorial liability under *Pinkerton v. United States*, 66 S. Ct. 1180 (1946). *Pinkerton* conspiratorial liability still applies to

---

complain if competent evidence is admitted to supply the place of that which he has kept away." *Reynolds v. United States,* 98 U.S. at 158.

[3] "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. amend. VI

Confrontation Clause issues even after the decision in *Giles*.[4] In the case at hand, Reardon's hearsay statements are highly relevant to the government's case as a narrative, which describes Barnes' role in the conspiracy to kill the elephants to harvest their ivory. (R. 25.) Reardon's statements are also highly probative of Barnes' intent to acquire the illegal weapons for his co-conspirators. (*Id.*) Accordingly, the lower courts erred in suppressing Reardon's un-confronted hearsay statements because: (A) his murder was within the scope and in furtherance of an ongoing conspiracy, and reasonably foreseeable to Barnes as a necessary or natural consequence of that conspiracy; and (B) to give organized criminals a windfall based on their involvement in a conspiracy would incentivize rather than deter witness tampering.

A. Reardon's murder was within the scope and in furtherance of an ongoing conspiracy, and reasonably foreseeable to Barnes as a necessary or natural consequence of that conspiracy.

A defendant forfeits his Confrontation Clause rights and any hearsay objections based on the acts of his co-conspirators, when the act is for the benefit of the overarching, ongoing conspiracy. *Pinkerton*, 66 S. Ct., at 647. In *Pinkerton*, this Court held that, "an overt act of one partner [in a conspiracy] may be the act of all without any new agreement specifically directed to that act." *Id*. In some cases, this includes holding a defendant criminally liable for the acts of fellow conspirators, even in the case of first-degree murder.[5]

---

[4] "The Supreme Court has never overruled [*Pinkerton*]; to the contrary, the Court has upheld it in numerous cases over the past two decades." Forfeiture of Confrontation Rights Post-Giles: Whether A Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses, 14 N.Y.U. J. Legis. & Pub. Pol'y 281.

[5] "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." *United States v. Cherry*, at 818 (declining to extend *Pinkerton* to include criminal liability for first-degree murder based on the facts, but adopting the reasoning in regards to forfeiture by wrongdoing.)

In *United States v. Cherry*, the Tenth Circuit Court of Appeals applied the conspiratorial liability test laid out in *Pinkerton* specifically to the Confrontation Clause, and hearsay evidence challenges. *United States v. Cherry*, 217 F.3d 811 (2000). The court reasoned that the term "acquiesce" in Rule 804(b)(6) should be interpreted to mean that a defendant's Confrontation Clause rights may be deemed waived when the defendant either directly participated in procuring a potential witness's unavailability, or when the *Pinkerton* test for conspiratorial liability is met. *Id.* Under the *Cherry* doctrine, Reardon's un-confronted hearsay statements should have been admitted against Barnes because: (1) the act was within the scope and in furtherance of an ongoing conspiracy; and (2) Barnes should have reasonably foreseen the act as a necessary or natural consequence of the conspiracy. *Id.* at 821. *Also see Gatlin v. United States*, 925 A.2d 594 (D.C. 2007) (holding that a defendant waived his Confrontation Clause rights based on conspiratorial liability when a government witness was murdered after giving testimony to a grand jury).

The court in *Cherry* noted that in order to be within the scope of a conspiracy, the act does not need to be limited to the primary goal of that conspiracy, but can also include "secondary goals relevant to the evasion of apprehension and prosecution for that goal – such as escape, or, by analogy, obstruction of justice." *Cherry,* 217 F.3d at 821.

In this case, Anderson wanted to silence Reardon for the good of the conspiracy at large so that law enforcement would not prevent the hunt, and so that Reardon would not testify against Barnes and Anderson after the plan was fulfilled. (R. 7.) In the two telephone conversations with Barnes regarding Reardon, Anderson stated that he wanted Reardon killed because he was afraid that Reardon would expose the plan to the police.

(R. 7, 18, 19.) Aware of Anderson's growing animosity toward him, Reardon actually did confide in his friend, Best. (R. 8.) Reardon told Best that he was involved in a conspiracy to hunt the endangered elephants, and that he feared that Anderson might harm him. (*Id.*) After Reardon was found murdered, Anderson admitted that he killed Reardon in order to keep him from going to the police, or in any other way uncovering the plot. (R. 7.)

Based on the two late-night telephone calls to his home, Barnes knew of Anderson's desire to kill Reardon. (R. 18, 19.) Further, he knew that if Reardon were murdered, it would be for the benefit of his own criminal plot, and he did nothing to stop it. (*Id.*) In fact, Barnes recognized the necessity of silencing Reardon if they were going to go through with the scheme[6], and even instructed Anderson to "shut him up for a while." (R. 19.) This instruction constitutes forfeiture by wrongdoing because Barnes directly acquiesced to Anderson committing some act to silence Reardon.[7]

It is irrelevant whether Barnes was giving Anderson a green light to commit murder, or to silence Anderson by some other non-criminal means because Rule 804(b)(6) does not require that the wrongful act that causes a declarant's unavailability be a crime. Fed. R. Evid. 804 Advisory Committee Note, *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002). *See also United States v. Gray*, 405 F.3d 227 (4th Cir. 2005) (stating that "we have held that a defendant need only intend "in part" to procure the declarant's unavailability.") Therefore, in order for Barnes to have forfeited his Confrontation Clause rights and any hearsay objections, he need only acquiesce to some

---

[6] Anderson: "But when he sees the news—"
Barnes: "Yeah, yeah, you're right." (R. 19.)

[7] To show that a defendant intended by his act of misconduct to procure a witness's unavailability... State need not show that defendants sole motivation was to procure the witness's absence; rather, it need only show that the defendant was motivated in part by a desire to silence the witness. 193 A.L.R. Fed. 703 §3.

action to intentionally make Reardon unavailable as a witness, including: threats causing Reardon to flee; causing Reardon to refuse to testify; or helping Reardon to hide or flee, along with other, more extreme methods. 193 A.L.R. 703 §§7[a]-10. *Also see United States v. Basciano*, 430 F.Supp.2d 87, 90-91 (E.D.N.Y. 2006) (holding that a defendant forfeits their right to confrontation when the defendant threatens a witness and, as a result, makes them unavailable to testify[8].)

To cap liability for the wrongful action when the result of that action is more severe than desired would lead to an inequitable result and thus interrupt the vital balance between a defendant's right to confrontation and the integrity of the justice system. *See Cherry*, 217 F.3d at 816. Therefore, the test for acquiescence should demand that a defendant who attempts to make a potential witness unavailable is responsible for whatever results from that attempt.

Moreover, Barnes entered into the plot with Anderson knowing that he was nefarious. (R. 1.) Barnes had conspired with Anderson before by creating an unregistered charity called "Boerum 4 Animals" in order to pay for bear-hunting expeditions using funds donated to the charity. (*Id.*) Anderson was arrested for this scheme, yet neither of the conspirators hesitated in entering into the second hunting ruse. (R. 1, 2.) Barnes should have known that Anderson would likely go to great lengths in order to better cover-up the current plot, even before Anderson suggested murder.

In light of the possibility that a defendant might lose his right to confrontation based on the actions of his co-conspirators, the *Cherry* court held that a co-conspirator could protect his constitutional rights by withdrawing entirely from the conspiracy.

[8] The court in *Basciano* stated that the defendant would relinquish his confrontation rights only if it were found that the witness were made unavailable because of his threats, and instructed the government to make a more affirmative showing of the witness's unavailability. *Basciano*, 430 F.Supp.2d at 91.

Cherry 217 F.3d at 817. Once the conspirator withdraws, he is no longer liable for the conspiracy, except, for any actions that occurred during his involvement. *Id.* The court held that withdrawal requires a showing that the defendant has performed "some act to disavow or defeat the purpose of the conspiracy. *Cherry,* at 818 (quoting *Hyde v. United States*, 225 U.S. 347, 369, 32 S. Ct. 793 (1912)).

In the case at hand, Barnes did not withdraw from the conspiracy. At the end of the second telephone conversation regarding Reardon, Barnes ends the call by saying, "I want nothing to do with this." (R. 19.) However, this statement is not a clear enough withdrawal from the conspiracy itself, nor do his actions following the conversation indicate that he actually withdrew. In order for Barnes to withdraw from a conspiracy with which he was so actively involved, he must have made an affirmative showing of his intent to back out of the previous agreement. *Id. See United States v. Rivera*, 292 F. Supp. 2d. 827, 836 (2003) (stating that "given Rivera's leadership role in MS-13, he surely could have halted the plan and hence it follows that he, at the very least, acquiesced in it.")[9] Here, Barnes merely made a statement after being woken up in the middle of the night, and made no other acts that would indicate that he withdrew, such as canceling the order for the AK-47s or informing Anderson and Reardon that the hunt was off. (R. 19.)

The Fourth Circuit Court of Appeals recently applied the test set forth in *Cherry*, and concluded that a defendant's hearsay statements could still be held against him based on the principles of conspiratorial liability set forth in *Pinkerton* even when he was not actively involved in the murder. *United States v. Dinkins,* 691 F.3d 358 (4th Cir. 2012).

---

[9] It should be noted that the court in *Rivera* also based its decision, in part, on the fact that the defendant gloated about the witness's death after the fact. However, his actions before the murder were what the court considered when deciding that the defendant waived his right to confrontation. *Rivera*, 292 F. Supp. 2d. at 836

The court further held that, in order to conform to *Giles*, forfeiture by wrongdoing must be supported by evidence that the conduct was designed to make the witness unavailable to testify. *Id.* at 385.

In this case, Barnes was not actually involved in the murder of the witness, but he did express a desire to have Reardon silenced for the benefit of the plot, much like the defendant in *Dinkins*. (R. 19.) Although the Defendant in this case did not make an actual attempt on the witness's life and did not express a desire to kill him, he did want Reardon silenced and instructed Anderson to "shut [Reardon] up for a while." (*Id.*) Thus, even though Barnes was apprehensive about Anderson's plan to kill Reardon, he still acquiesced in causing Reardon's unavailability in some other way. This acquiescence falls under the 804(b)(6) forfeiture by wrongdoing exception and meets the Confrontation Clause requirements set forth in *Giles.* As a result, this Court should overturn the decisions of the lower courts and admit Reardon's testimony because the *Pinkerton* conspiratorial liability standard still applies to forfeiture by wrongdoing when a witness is made unavailable by a defendant's co-conspirator.

B. Organized criminals should not benefit from the windfall of their co-conspirators actions; as such policy would incentivize rather than deter witness tampering.

The courts have consistently held that the right to confrontation must be balanced with the need to maintain the integrity of the justice system.[10] The need to deter witness tampering is especially strong in regard to organized crime, where conspirators may execute the wrongful acts on behalf of the overarching conspiracy, and their co-conspirators may receive the benefit of the windfall for those acts.

[10] "But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.... One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 547 U.S. 813, 833 (2006).

The District Court in *United States v. Rivera* held that courts must read the forfeiture by wrongdoing doctrine as balancing the defendant's rights with the veracity of the justice system, and preventing the creation of a loophole for organized criminals. *United States v. Rivera,* 292 F.Supp.2d 827 (2003). The defendant in *Rivera* was shown to continue his leadership role in the gang "MS-13" when, while imprisoned, he communicated to fellow gang members that he wanted a police informant to be silenced so that she could not testify against him. *Id.* In *Rivera*, the defendant took no part in the witness's murder, did not specify how she was to be silenced, and even pretended to be unaware of what happened to the witness[11]. *Id.* at 835. Regardless, the court stated that "these facts collectively point persuasively to the conclusion (1) that [the witness's] murder was committed within the scope of and in furtherance of a conspiracy in which Rivera participated, and (2) that this murder was reasonably foreseeable to Rivera." *Id.* at 833. The defendant thus forfeited his Confrontation Clause rights based on the acts of his fellow gang members.

To hold that the standard for forfeiture by wrongdoing only involves an affirmative, direct act on the part of defendants gives them not only the windfall of their involvement in these conspiracies, but an advantage over the ordinary criminal. More importantly, it gives criminal defendants power over the witnesses themselves. This is an "abhorrent behavior which strikes at the heart of the system of justice itself" and should not be tolerated. Fed.R.Evid. 804 Advisory Committee Note at Comment(b)(6) , s*ee also United States v. Gray,* 405 F.3d 227 (4th Cir. 2005). As a matter of public policy, the

[11] "Rivera's brother, Payaso, informed Rivera that Philosopher had "something important to tell you about Smiley, and then Rivera, without any additional information... responded, "She... disappeared or something?" The immediacy of this response reveals that Rivera was already aware, more than a week before Paz's death, that members of MS-13 planned to murder her." *Rivera*, 292 F.Supp.2d. at 835.

rights of defendants must be evenly balanced with the protection of witnesses. *See United States v. Thompson,* 286 F.3d 950, 962 (7th Cir. 2002) (stating that the purpose of the forfeiture by wrongdoing doctrine is to "deter criminals from intimidating or 'taking care of' potential witnesses against them.") To give defendants any kind of advantage for committing wrongs against witnesses is to discourage witnesses from coming forward, and to cripple the criminal justice system. Therefore, this Court should reaffirm its decision in *Pinkerton* and hold that forfeiture by wrongdoing may be established based on a co-conspirator's actions when they meet the test set forth in *Cherry*, because a defendant's right to confrontation must be balanced with the protection of potential witnesses.

The District Court erred in suppressing Reardon's statements because the statements were highly relevant to the government's case against Barnes, and Barnes had forfeited his Confrontation Clause rights when Reardon was murdered for the sake of Barnes' own plot. This Court should admit Reardon's hearsay statements under the doctrine of forfeiture by wrongdoing because Barnes waived his right to confrontation based on his continued involvement in the conspiracy.

II. The lower court erred in finding an absolute privilege for reporters because the creation of a new privilege represents a departure from the precedence of case law and is not within the bounds of the light of reason and experience.

The Government’s motion to compel disclosure of sources from Crawley should be upheld because current law does not extend a special privilege for reporters. There is a significant public interest in allowing all admissible evidence into the courtroom, and the creation of a new privilege would place an undue burden on the triers of fact. Moreover, the decision by the lower court to create a new privilege for reporters departs

from the well-established aversion by federal courts to adopt one. Federal Rule of Evidence 501 provides:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: The United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.
> Fed. R. Evid. 501.

This rule allows federal courts to define the law of privileges in accordance with common law, and allows individual states to create privileges by statute.[12]

While several states have enacted laws to resolve the issue of privileges in the courtroom, many federal courts have firmly denied a new privilege. See *In re Grand Jury Subpoena, Judith Miller,* 438 F.3d 1141, 1147 (D.C. Cir. 2006) (stating: "The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.") Regardless, the lower court in the present case premised its creation of a new privilege based upon the three-pronged test of *Jaffee v. Redmond*, 518 U.S. 1 (1996). The court erred in two ways: A) the court misapplied *Jaffee* by failing to relate factual evidence from the present case to the elements of the test; and B) impaired the fair administration of justice by further requiring the privilege be absolute instead of qualified.

A. The reporter's privilege does not meet the three-pronged test of *Jaffee v. Redmond*, which outlined the test for the creation of new privileges.

[12] "The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases." Fed. R. Evid. 501 advisory committee's note.

In *Jaffee,* this Court established the psychotherapist-patient privilege, which allowed a therapist to refuse to disclose statements made by a police officer during the course of counseling sessions. *Id.* This Court held that the statements made during the sessions were protected from compelled disclosure, because exceptions from the general rule disfavoring the creation of new privileges may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* at 9 (quoting *Elkins v. United States*, 364 U.S. 206, 234, (1960) (Frankfurter, J., dissenting)).

Here, the judicial creation of a new privilege for reporters is erroneous for the same three reasons that *Jaffee* outlined: 1) the public and private interests would not be served by the privilege; (2) the weight of the interests that may be served by the privilege and the burden on truth-seeking that might be imposed by it are slight in comparison to the evidentiary benefit; and (3) the privilege is not within the bounds of the light of "reason and experience." *Jaffee* at 9-14. While the lower court adopted this test to find a new privilege for Crawley, it is evident that the facts of the present case bear no relation to the creation of a privilege that *Jaffee* prescribed.

1. The privilege does not serve public or private interests, because it denies the court access to all the evidence, and does not provide any significant benefit to the press.

There is little evidence that a journalist privilege would serve public or private interests. Indeed, federal courts have resisted the creation of new constitutional privileges,[13] because they "contravene a fundamental principle of our jurisprudence that the public has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331

[13] While several appeals court cases have differed from *Branzburg* and provided qualified privilege against compelled disclosure *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), there nonetheless remains no recognized federal common law privilege for reporters.

(U.S. 1950). Moreover, such privileges should not be "lightly created or expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683 (U.S. 1974).

In the only Supreme Court ruling on a journalist privilege, the Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), was faced with a consolidation of separate suits by reporters who refused to testify, citing the privilege. These reporters had interviewed individuals who had engaged in possible illegal actions, but refused to reveal those sources before a grand jury, and were held in contempt. *Id.* On review, the Supreme Court ruled that there is no constitutional privilege afforded to journalists, and declined "to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. Moreover, the Court emphasized that the press had flourished for years without a privilege, and the existing constitutional rules were "not a serious obstacle." *Id*. at 669.

The Court in *Branzburg* found no compelling reason why the public interest in law enforcement was insufficient to override the burdens placed on reporters to testify about evidentiary matters. *Branzburg,* 690-91. The Court stated that: "The only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination." *Id.* at 689-90. A new privilege for Crawley and other reporters runs counter to the public interests that *Branzburg* described.

The lower court merely focuses on one aspect of public interests that the new privilege might promote: the free flow of information. (R. 29.) The court contends that a privilege encourages the "disclosure of sensitive information to the press, which

otherwise, would be less likely to be shared with the press." *Id.* Yet, this argument was explicitly rejected in *Branzburg*, when the Court stated that, "existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Branzburg* at 699.

In a case involving search warrants of newspaper buildings (a heightened intrusion compared to a subpoena), the court in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), also dismissed these concerns stating:

> Nor are we convinced, any more than we were in *Branzburg v. Hayes*, that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment. *Zurcher v. Stanford Daily* at 566.

It is important that the court is granted a complete and accurate picture of the evidence relating to a defendant. Denying the jury full and unabated access to evidence about the heinous activities in this case is in sharp conflict with the fair administration of justice.[14]

In this case, the interest in having complete evidence for the court to consider outweighs the need for this employee to remain anonymous. The employee who appeared on camera did so freely, without asking for their face to be hidden. Further, the only stated reason the employee wished to remain anonymous was because he or she was concerned for their safety if Barnes found out who revealed the information to Crawley. (R. 10.) There was no discussion between the parties about the possibility of testifying in court; rather, the concern was the immediate need for anonymity while the story was

[14] This is due to the Court's recognition that the power of grand jury investigations should be broad in order for "its public responsibility to be adequately discharged. " *Costello v. United States*, 350 U.S. 364 (1956).

being published. (R. 12, 22.) Thus, the lower court's concern that "much of the evidence that parties desire would never come into evidence" (R. 29), is mere conjecture, and does not account for the realities of the reporter-source relationship. When weighing the public interest in protecting Crawley's sources against the private interest in compelling disclosure, it is clear that a privilege should not be granted.

2. The evidentiary benefit outweighs the privilege and the burden on truth seeking because the subpoena was made in good faith and pertained to a serious claim.

There is clear evidentiary benefit to be gained by compelling disclosure because Crawley's source is a vital factor in discovery and the benefit gained significantly outweighs any incidental burden. The purpose of the Government's subpoena is to offer the court a complete and accurate record of all the evidence.[15] Because Crawley interviewed an employee who told her that Barnes was planning on killing the elephant herd (R. 10), a subpoena compelling disclosure is well within the bounds of normal procedure. The evidentiary benefit is that, after examination of the evidence, the jury will be able to see a pattern of conspiracy to commit a felony.

In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004) dealt with similar issues when a prosecutor investigated the leak and publication of videos centering on a grand jury investigation of corruption. *Id.* at 44. After the prosecutor exhausted other means to acquire the necessary information, he requested a subpoena requiring a reporter to sit for deposition. *Id.* The reporter refused, citing a privilege to withhold confidential information. *Id.* at 41. The First Circuit denied the privilege to the reporter, and the subpoena by the prosecutor was upheld. *Id.*

---

[15] "Hence, the grand jury's authority to subpoena witnesses is not only historic, but essential to its task." *Branzburg* at 688.

Significantly, the court relied on *Branzburg* in their ruling, but also the balancing tests of three other Circuits,[16] stating that "the disclosure of a reporter's confidential sources may not be compelled unless directly relevant to a non-frivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source." *Id.* at 45. In the case at hand, the Government's motion for compelled disclosure of Crawley is a comparable situation. The interview Crawley conducted was particularly relevant to the criminal investigation because it contained evidence directly tying the conspiracy to Barnes. (R. 22.) This material being requested pertains to a "non-frivolous claim" and was undertaken in good faith to present to the court a convincing case. *In re Special Proceedings* at 45.

Further, as in *In re Special Proceedings,* the Government did not have access to the same information from a different source.[17] There was only one video interview of an employee detailing the material elements of the conspiracy. (R. 10.) In order to introduce admissible evidence relating to the heinous crime of slaughtering a herd of endangered elephants, the motion for compelled disclosure was filed against Crawley because the evidentiary benefit was significant. Crawley's exposé of Barnes was published in the *Boerum Times* on December 1, 2011; the very same day the Government acquired a warrant and took Barnes into federal custody. (R. 22-24.) There is substantial relation between the information sought and the compelling governmental interest to procure evidence.

---

[16]See *Cusumano*, 162 F.3d at 716-17; *LaRouche,* 841 F.2d at 1180; *Bruno*, 633 F.2d at 597-98.

[17] The Supreme Court twice rejected any automatic requirement that non-confidential sources be exhausted. *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990); *Branzburg*, 408 U.S. at 701-02.

3. Creating a privilege is not within the bounds of the light of reason and experience because it runs counter to prevailing court precedence.

The affiliation between a reporter and her source does not rise to the level of protection as that of the narrowly contrived psychotherapist-patient privilege created in *Jaffee*, where confidentiality is an utmost concern.

A strong public interest exists to protect a patient's right to privacy by encouraging them to share information freely with their psychotherapist in order to receive necessary treatment. A criminal investigation into the most private medical matters between a psychotherapist and patient effectively dissevers the necessary trust between the two. *See Jaffee* 518 U.S. at 10 ("the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.") The type of privilege supported in *Jaffee* is not analogous to the present case, because the level of trust required for a reporter and her source does not rise to the same level as a psychotherapist and patient. Further, the relationship is not significantly hindered by the lack of a privilege.

The lower court asserts the reporter-source relationship is comparable in order to establish trust in the same way that psychotherapists require confidentiality to carry on their work. The Supreme Court rejected this contention in *Branzburg* when the Court stated:

> Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus

> deterring the commission of such crimes in the future. *Branzburg* at 695.

Here, the relationship between Crawley and her source is different from a psychotherapist and a patient, because while reporters have carried on their work without a privilege for hundreds of years, psychotherapists cannot do the same without the assurance of protection. Arguments otherwise go far astray from judicial precedence.[18]

Additionally, *Jaffee* established the psychotherapist privilege because all 50 states and the District of Columbia had enacted the same privilege. *Id*. at 2. *Jaffee* merely confirmed what every state already recognized. But in the present case, few states have adopted a reporter's privilege, and there is no universal standard that the lower court may recognize. While states are permitted to draft evidentiary rules to their fitting, creating a new privilege for reporters is counterintuitive to the purpose of creating a privilege.[19] Courts have spoken against the creation of a new privilege, based upon the principle that journalists have no compelling need to be treated differently than other citizens "merely because the possessor of the documents or other evidence sought is a journalist." See *New York Times Co. v. Jascalevich*, 439 U.S. 1317, 1322 (1978); cf. *United States v. Ahn*, 231 F.3d 26, 37 (D.C.Cir.2000). There is insufficient evidence that current jurisprudence gives the lower court justification to create this new privilege.

The lower court did not provide convincing support that the "reason and experience" prong of *Jaffee* was sufficiently tied to privileges adopted by certain states. Instead, by continuing to focus on the burden on reporters to comply with criminal

---

[18] "We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us." *Branzburg* at 698.

[19] In yet another jurisdiction, the Ninth Circuit refused to recognize a reporter's privilege in response to a grand jury subpoena. *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993).

investigations, the lower court sidestepped the weight of evidence against a privilege in order to reach their desired conclusion. (R. 29.) By doing so, the court created a privilege based upon faulty reasoning and relied on arguments that have been consistently rejected by the Supreme Court.[20]

B. An absolute privilege would disregard other competing public interests and make the media untouchable even when their information is vital to the fair administration of justice.

If this court were to affirm the creation of a new journalist privilege, such a protection must be qualified, and not absolute. This limitation has already been recognized in civil cases when journalists are called upon to disclose information. In *Kurzynski v. Spaeth*, 196 Wis. 2d 182 (App.1995), the court held that when a party to civil litigation seeks discovery of nonparty journalists, the journalist's privilege is not absolute:

> Where the information sought is non-confidential, a civil litigant is entitled to request a discovery notwithstanding a valid assertion of the journalist's privilege upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. *Kurzynski v. Spaeth* at 196.

If the journalist privilege has been deemed limited in civil cases, the privilege should certainly be limited in criminal cases where the stakes are so much greater. Thus, if a court does find there are strong public policy reasons to create a reporter's privilege, then a court may still mitigate that privilege in cases where public policy demands that the sources be disclosed. If there are policy reasons that advocate for such a privilege, a court

[20] "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Branzburg v. Hayes*, 408 U.S. 665, 698-99 (1972)

must acknowledge there are contrary policy reasons that warn against it. To hold that the privilege is absolute would be to disregard all other competing interests.

Even in jurisdictions that have adopted a qualified privilege, reporters are equally held to a reasonable standard. The court in *In re Application of Chevron Corp.* 736 F. Supp. 2d 773, 781 (S.D.N.Y. 2010) stated the concern as such:

> But the qualified privilege does not foreclose the issuance of compulsory process to journalists or excuse them from demonstrating, in an appropriate manner, that the privilege applies to particular documents or information in question. The word "journalist," in other words, is not an incantation that protects against the issuance of a subpoena, although a properly supported claim of privilege may well protect against the imposition of, or limit, any duty to comply with it. *In re Application of Chevron Corp*. at 781.

The court recognized the power reporters may wield by refusing to disclose sources, and warned against it. There is a danger of an uncontrolled press in creating an absolute privilege for journalists, who are widely trusted to present the truth, as they would never be obligated to reveal their sources. Thus, the level of accountability for what journalists publish would be diminished, and any faith the public has in a news source's accuracy would be shattered if journalists never had to cite to any source of information. To create an absolute privilege would not preserve the free-press, but would foster a more corrupt mass media.

Therefore, all three elements in the *Jaffee* analysis disfavor the creation of a new journalist privilege. Following the guidelines of Rule 501, the creation of this privilege does not fall within the light of reason and experience, and there is significant public interest in ensuring that the judge and jury are presented with a full and complete evidentiary record. The disclosure of Crawley's source is a unique and imperative piece

of evidence to the case at hand, and the interests of the Government to facilitate a criminal investigation far outweigh the incidental and slight burden on Crawley. Thus, the decision of the lower court erred in creating an absolute privilege for reporters, and this Court should overturn their decision.

III. The lower courts erred in excluding Simandy's proper lay opinion testimony regarding the meanings of the alleged code words because the trial court wrongly applied the standard for which a lay witness may give opinion testimony under Federal Rule 701.

Federal Rule of Evidence 701 permits the admission of opinion testimony by a lay witness if the testimony is: (1) rationally based on the witness's perception; (2) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Fed. R. Evid. 701. The purpose of the rule is to ensure that the trier of fact has an accurate reproduction of the event, and that a party will not introduce an expert to testify disguised as a layperson. Fed. R. Evid. 701 Advisory Committee Note (2000). Despite its limitations, Rule 701 is not intended to affect opinion testimony by a non-expert that results "from a process of reasoning familiar in everyday life." *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992), *see also* Fed. R. Evid 701 Advisory Committee Note (2000), Fishman and McKenna, *Wiretapping and Eavesdropping* §41:24(c). Thus, the answer to whether testimony should be admitted as an "expert" opinion turns in large part on whether a witness would require any kind of specialized "knowledge, skill, experience, training, or education" in order to form such an opinion. Fed. R. Evid. 702.

In the case at bar, this Court should reverse the decision of the Court of Appeals for the Fourteenth Circuit, and admit Simandy's testimony for the following three reasons: (A) the trial court wrongly interpreted Rule 701(a) by failing to consider

Simandy's personal knowledge of the record about which he was testifying; (B) the testimony will be helpful to the jury in deciphering the meaning of seemingly nonsensical code words; and (C) the testimony is not based on any specialized evidence that would confuse the jury, or would infringe on Rule 702 expert testimony.

A. The trial court wrongly interpreted Rule 701(a) because it failed to take into account that Simandy had personal knowledge of the facts being related in the transcripts.

Under Federal Rule of Evidence 602, a witness may not testify unless "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. The personal knowledge requirement is expounded upon in *United States v. Peoples,* 250 F.3d 630 (8th Cir. 2001) where the Eighth District held that lay testimony is admissible "when the law enforcement officer is a participant in the conversation, *has personal knowledge of the facts being related in the conversation*, or observed the conversations as they occurred" (emphasis added). *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001).

Both the District Court and the Appellate Court in this case erred in their interpretation of Rule 602 because they failed to take into account the fact that there are three methods under which the testimony may be considered rationally based. *See Peoples*, 250 F.3d at 641. Both courts only took into consideration whether Simandy had either participated in or observed the conversation contemporaneously, and neglected to find that Simandy did in fact have personal knowledge of the facts being related in the conversations based on his study of the records. (R. 17, 30-32)

In *United States v. Saulter*, 60 F.3d 270 (7th Cir. 1995), the Seventh District held that Rule 701 does not require that the witness have participated in the conversations.[21] *Id.* at 276. The court made its determination based on the fact that the witness was an admitted drug dealer and knew the defendant well enough to be familiar with his behavior. *Id.* Like Simandy, the witness did not participate in the conversation, nor did he observe it contemporaneously. *Id.* However, he was deemed to have personal knowledge based on his own life experience. *Id.* By this same reasoning, Simandy's testimony was falsely excluded because the courts did not consider his own personal knowledge of the records about which he testified.

Additionally, the Eleventh Circuit held in *United States v. Jayyousi* that a lay witness may also give opinion testimony that is based on personal knowledge gained from the investigation itself. *United States v. Jayyousi*, 657 F.3d 1085 (2011). In *Jayyousi*, an FBI agent who was familiar with terrorist codes testified about code words used by the defendants in wiretapped conversations; however, the agent was not qualified as an expert witness. *Id.* The Eleventh Circuit held that a law enforcement lay witness may express his opinion based on overall professional experience, or based on overall knowledge of the investigation, and need not be a direct participant in the conversation. *Id.*

Given the decision in *Jayyousi*, Simandy's testimony should be admitted because it related to information with which he is personally familiar given his investigation of the case. He need not have been a part of the conversations, or even have listened to the conversations contemporaneously because Simandy was not testifying to facts of the

[21] "We believe it sufficient that the witness has personal knowledge of the subject discussed and the persons involved." *Saulter,* 60 F.3d at 276.

case. He is merely testifying to the contents of the telephone conversations, of which he had reviewed comprehensively. (R. 13-14.) Here, Agent Simandy became extensively involved in the investigation and became very familiar with Barnes and his co-conspirators. (*Id.)* Based on this and his outside interviews, Simandy had enough personal knowledge of the telephone conversations to testify about them.

In this case, the Court of Appeals for the Fourteenth Circuit erroneously based its exclusion of Simandy's testimony on *United States v. Peoples.* In *Peoples*, the Eighth Circuit excluded an agent's testimony because she had no personal knowledge of the subject of her testimony. However, *Peoples* may be distinguished here because the agent in that case did not base her opinion on her personal knowledge of the facts. *Peoples*, 250 F.3d 630. In *Peoples*, the court reasoned that the agent's testimony included statements about the defendants' state of mind, and repeated that the defendants were responsible for the murder for which they stood trial. *Id.* at 640. The court concluded that the agent's testimony was more like an argument in favor of the prosecution than it was an opinion regarding the meaning of words and phrases because the agent speculates as to situations and frames of mind about which she can have no personal knowledge.[22] *Id.*

Agent Simandy's testimony in this case was materially dissimilar from that in *Peoples* because Simandy was able to point to facts in the case that supported his impressions of the code words. (R. 13-14.) For example, when Simandy stated that he believed that the conspirators' references to "Charlie tango"[23] referred to the helicopter

---

[22] In *Peoples*, the agents' explanations include such statements as: "I contend [Lightfoot] is needing a loan to pay the hit man to actually murder Ross"; "When he discusses lost and found, I believe he is talking about no one had found the body yet. It's just a lost situation until somebody finds the body"; and "I believe [Peoples] was there to actually murder Ross at the time." *Peoples,* 250 F. 3d at 640.

[23] "Charlie tango is ready." (R. 13.)

that the defendant rented, he explained that he drew this conclusion because the reference was made two days after Barnes rented the helicopter. (R. 13.) Additionally, when the reference to a "black cat"[24] was made, the agent explained that he believed it to be a reference to the AK-47s because the call was made the day after Barnes had illegally purchased the weapons. (R. 13.)

Here, Simandy was not making conclusive statements about Barnes' reasoning or intentions, unlike the agent in *Peoples*. He merely stated that, based on the timing of the references, he believed they were in reference to actual, uncontested facts in the case. (R. 13.) Simandy did not go on to argue that his opinions were conclusive proof of Barnes' guilt. Further, if Simandy's testimony is admitted, he will be open to cross-examination after giving his testimony, which will give Barnes the opportunity to question how he came to his conclusions. In the end, the jury as the finder-of-fact can decide how much weight to give to Simandy's testimony.

B. Agent Simandy's testimony would be helpful to clearly understand ambiguous code words.

Courts have continually found that the testimony by a law enforcement investigator is helpful to the jury when the investigator testified regarding his understanding of the meaning of a declarant's vague or ambiguous statements. *See United States v. Freeman,* 498 F.3d 893 (9th Cir. 2007); *United States v. Simas*, 937 F.2d 459, 464-65 (9th Cir. 1991); *United States v. De Peri*, 778 F.2d 963, 977-78 (3d Cir. 1985).

The Seventh Circuit found in *United States v. Rollins* that an agent's lay testimony was helpful to the jury because it assisted the jury in understanding "what the parties in the conversations said and what they meant." *United States v. Rollins*, 544 F.3d, 820, 831

[24] "Black cat was arranged." (R. 13.)

(7th Cir. 2008). Because the defendants often spoke in a seemingly nonsensical manner in their conversations, the court found that it was helpful to the jury to have someone like the agent, who had become familiar with their unusual conduct, to explain the code words.[25] *Id.* The court also determined that the testimony helped the jury to decide several facts at issue, including the defendants' mental states, and their roles and level of involvement within the conspiracy. *Id.*

Here, Agent Simandy's testimony would be helpful to the jury because his opinion put each of the coded conversations into context of the overall conspiracy. Like in *Rollins*, the co-conspirators in this case were using an entirely unique set of code words that are very likely to confuse the jury if introduced without any guidance. Because of Agent Simandy's extensive review of the transcripts and the facts and circumstances surrounding the conversations, he would be able to help the jury to interpret what would otherwise seem like meaningless words within the conversations, and save the court a significant amount of time.

While Agent Simandy did not use any expert techniques in interpreting the code words, he did spend months investigating the case at hand. (R. 14-15.) The jury would not be able to look as extensively at the records without needlessly delaying the court proceedings.

C. Agent Simandy's testimony was not based on scientific, technical, or other specialized knowledge.

[25] "Even the conspirators themselves did not always pick up right away on the meaning of these peculiarly coded conversations. During many of the conversations, one of the speakers would start talking out of the blue about "having drinks," the height of a "singer" in a "band," "work," "big shoes and little shoes"" *Rollins*, 544 F.3d at 831.

The prohibition against a lay witness using specialized knowledge is to prevent lay testimony from coming into evidence when it should actually be categorized as expert testimony.[26] Fed. R. Evid. 701 Advisory Committee Note (2000). Often, especially in drug cases[27], the concern with admitting lay testimony by a law enforcement officer who is interpreting code words is that the lay testimony begins to resemble expert testimony without going through the necessary qualification process. *Id. See also Freem*an, 498 F.3d 893 (2007) (holding that the testimony of a police detective who had specialized knowledge was admissible as lay testimony when the interpretations were made by relying on facts rather than specialized knowledge).

Since Agent Simandy's testimony was not based on specialized knowledge prohibited by Rule 701, there is no danger that his testimony was too similar to expert testimony. Simandy could not draw upon his own experience in the FBI because the case involved an area of law with which he had never worked, and because the conspirators were using code words that they had personally invented. (R. 13-14.) *See Rollins,* 544 F.3d, at 831-832.[28]

Based on his personal knowledge of the investigation, his rationally perceived interpretations of the conversations, the helpfulness of his testimony to the jury, and the fact that none of his opinions were based on specialized knowledge, Agent Simandy's

---

[26] If scientific, or technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702.

[27] "Drug jargon 'is a specialized body of knowledge, familiar only to those wise in the ways of the drug trade, and therefore a fit subject for expert testimony.'" *Freeman,* 498 F.3d at 901 (quoting *United States v. Griffith*, 118 F. 3d 318, 321 (5th Cir. 1997)

[28] Seventh Circuit affirmed the decision of the trial court to allow an officer's lay testimony when "the testimony is not coming in based on his experience as the law enforcement officer, it is based on his experience only within this conspiracy." (quoting the trial court??)

opinions should have been admitted as lay testimony under Federal Rule of Evidence 701.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court REVERSE the decision of the United States Court of Appeals for the Fourteenth Circuit and hold: (1) that the hearsay declaration made by Reardon against Barnes is admissible based on the doctrine of forfeiture-by-wrongdoing; (2) that an evidentiary privilege for information gathered by journalists is not recognized under Rule 501; and (3) that Agent Simandy's lay witness testimony about code words is admissible under Rule 701.