
No. 12-23

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term 2013

UNITED STATES OF AMERICA

Petitioner,

--against--

Respondent,

WILLIAM BARNES.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH
CIRCUIT

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

- I. Whether, under Federal Rule of Evidence 804(b)(6), a trial court may admit into evidence an unavailable declarant's statement against a criminal defendant, when it was reasonably foreseeable that a co-conspirator would murder the declarant with the intent to procure his silence in furtherance of the conspiracy.
- II. Whether, under Federal Rule of Evidence 501, the Fourteenth Circuit ruled incorrectly by extending an absolute testimonial privilege to journalists?
- III. Whether, under Federal Rule of Evidence 701, a law enforcement officer may proffer lay opinion testimony interpreting code words when based on a review of telephone intercepts and the officer's case investigations when he or she did not contemporaneously participate in or observe the intercepted conversations.

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The Federal Rules of Evidence as enacted by Congress in 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. app. (1988). The complete text of Rules 804(b)(6), 701, and 501 are set forth in Appendix 1 to this Brief.

STATUTORY PROVISION INVOLVED

The Federal Rules of Evidence as enacted by Congress in 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. app. (1988). The Complete text of Rules 804(b)(6), 701, and 501 are set forth in Appendix 1 to this Brief.

STATEMENT OF THE CASE

Statement of the facts

In July 2011, Respondent, William Barnes, contrived a plan to kill forty elephants, including many not owned by Respondent, and harvest their ivory in an attempt to improve his deteriorating financial situation. In May of 2000, Respondent inherited of the Big Apple Circus (“Big Apple”) located in Southern Boerum. (R. 1.) In August of 2008 Respondent met Alfred Anderson (“Anderson”) at a hunting convention and thereafter established an unregistered sham charitable organization with Anderson named Boerum 4 Animals. (R. 1.)

On July 10, 2011 Respondent learned he was facing bankruptcy by December 2011. (R. 1.) In short time, Respondent abandoned trying to save Big Apple, and instead embarked upon his criminal conspiracy. On July 12, 2011 Respondent contacted two Boerum circuses inviting them to graze their elephants in Big Apple’s sanctuary. (R. 1, 2.) Each circus was expected to bring ten elephants each on December 2, 2011.

On July 30, 2011 Respondent contacted Anderson and proposed a scheme to kill the elephants and harvest their ivory, offering Anderson a share in the profits. (R. 2.) Anderson

agreed. (R. 2.) At Anderson's suggestion a third poacher, James Reardon ("Reardon") was recruited and Respondent agreed to Reardon's involvement. (R. 2.) During September 2011 the poaching plan was solidified. Respondent suggested the purchase of automatic weapons and the hiring of a helicopter in order to maximize efficiency when killing the elephants. (R. 2.)

On October 2, 2011, Respondent contacted Weapons Unlimited to purchase three assault rifles. Respondent was told he could circumvent any required waiting period and obtain illegal fully automatic weapons for \$500 each in an under-the-table deal. (R. 3.) Respondent paid Weapons Unlimited in full for delivery on December 5. (R. 3.) However, unknown to Respondent, the Weapons Unlimited dealer was actually undercover agent, Jason Lamberti ("Lamberti"). (R. 2.) Agent Lamberti then contacted the FBI, who issued a warrant permitting interception of Respondent's telephone calls. (R. 2.)

On October 6, 2011, believing the weapons procured, Respondent then contacted Alan Klestadt ("Klestadt") at Copter Corporation, Inc. for a one-day helicopter rental for December 15, 2011. (R. 3.) On October 15, Respondent told Anderson all arrangements were complete and that the poaching would take place on December 15, 2011. (R. 3.) Anderson then wired Respondent \$1000 to cover the purchase of the assault rifles for himself and Reardon. (R. 3.)

Despite having the logistics in place, Respondent's plan began to unravel. In a phone call dated November 15, 2011 Anderson revealed to Respondent that he believed Reardon was unsure about the scheme, and that Reardon's trepidation would lead to a betrayal of the scheme. (R. 7.) Anderson then recommended to Respondent that they "get rid of him", to which Respondent replied, "...don't do anything. Not yet." (R. 18, 7.) On November 28, 2011, Reardon telephoned his friend Daniel Best ("Best") describing Respondent's scheme and stating that he feared for his safety. (R. 8.) This phone call was not intercepted by the FBI. (R. 8.) In a

2:00 am phone call to Respondent on November 29, 2011, Anderson reiterated his concerns about Reardon stating, “We need him [Reardon] out of the picture”, “I’m doing it”. Respondent only said, “I don’t want anything to do with this.” (R. 8.) Later on November 29, Reardon was murdered. Anderson was apprehended and confessed to killing Reardon in order to prevent him from exposing the scheme to the authorities. (R. 8.)

At the same time, in order to promote the December circus spectacular, on August 30, 2011, Respondent contacted Boerum Times journalist Kara Crawley (“Crawley”). (R. 2) Respondent granted Ms. Crawley unlimited access to Big Apple’s facilities. (R. 2.) During her investigation she spoke with an anonymous employee who revealed that he or she had overheard Respondent and another party discussing the plan to kill elephants for their ivory. (R. 10.) Crawley’s source was named pseudonymously and not identified in her article, however, the employee agreed to have the interview videotaped by Crawley. (R. 10.) On December 1, 2011, Crawley published an expose revealing Respondent’s ultimate plan to exterminate the elephants. (R. 3.) Respondent was taken into custody later that same day. (R. 3.)

Following Agent Lamberti’s tip, Federal Bureau of Investigation (FBI) Agent Narvel Blackstock (“Blackstock”) was assigned to the case. (R. 13.) Agent Blackstock transcribed, while contemporaneously listening to, about one dozen intercepted conversations involving Respondent from October to December 2011 (R. 13.) On December 14, 2011, Agent Blackstock died, in circumstances unrelated to this case, and the investigation was transferred to Agent Thomas Simandy (“Simandy”). (R.12.) Agent Simandy thoroughly reviewed the intercept transcripts and conducted interviews with Agent Lamberti and Klestadt. (R. 13.) Through his investigations, Agent Simandy learned that Respondent and his co-conspirators employed certain words and phrases in their conversations. (R. 13); for example, Respondent used the phrase

“Charlie Tango is ready” during a telephone call dated October 8, 2011, two days after Respondent hired the helicopter. (R. 13.)

Procedural History

On December 4, 2011 a grand jury indicted Respondent on; one count of conspiracy to unlawfully deal in firearms without a license under 18 U.S.C. § 922, two counts of conspiring to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and one count of conspiring to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. (R. 3,4.) Before the trial, the United States filed motions *in limine* seeking: (1) the admission of testimony from an unavailable witness under Federal Rule of Evidence 804(b)(6); (2) the journalist’s source and; (3) the admission of Agent Simandy’s lay opinion under Federal Rule of Evidence 701. (R. 5-16.) On May 1, 2012, the District Court for the Southern District of Boerum heard oral arguments and on May 2, 2012, denied the Government’s pretrial motions. (R. 16-17.)

The United States filed an interlocutory appeal to The Court of Appeal for the Fourteenth District of the United States. On July 12, 2012, the Court of Appeals affirmed the District Court’s decision holding: (1) statements by the witness are inadmissible under Federal Rule of Evidence 804(b)(6); (2) there is an absolute journalist privilege under Federal Rule of Evidence 501 and; (3) Agent Simandy’s lay opinion about the meaning of code words was inadmissible under Federal Rule of Evidence 701. (R. 20.) The United States now appeals the decision of the Fourteenth Circuit. The United States Supreme Court granted certiorari for its October 2012 term on October 1, 2012 (R. 36.)

STATEMENT OF THE ARGUMENT

This Court should reverse the Court of Appeals for the Fourteenth District of the United States decision and hold: (1) Respondent's co-conspirator's actions forfeited his right of confrontation under 804(b)(6); (2) that Federal Rule of Evidence 501 does not provide for a journalist privilege and; (3) A law enforcement agent may proffer opinion testimony as to the meaning of code words without contemporaneously participating in or observing the intercepted conversations under Federal Rule of Evidence 701 if there is a proper basis.

First, the Fourteenth Circuit's interpretation of Rule 804(b)(6) as applied to co-conspirator liability waiver in this case is incorrect. The actions of one co-conspirator, within the scope of the conspiracy, intending to, and succeeding in making a witness unavailable may be imputed to fellow co-conspirators. Such waiver via the actions of a co-conspirator is supported by the plain language of Rule 804(b)(6). Further, co-conspirator liability, as defined by this Court in *Pinkerton v. United States* is established if the act is in furtherance of the conspiracy and reasonably foreseeable. Indeed, every Circuit court confronted with this issue has held that under Rule 804(b)(6) co-conspirator liability may be imputed to a defendant.

This Court's recent holding *Giles v. California* requires a trial court to find that the defendant engaged in conduct designed to make the witness unavailable before finding a forfeiture of the defendant's rights. This holding is compatible with pre- *Giles* Circuit court interpretation of Rule 804(b)(6). Thus, *Giles* merely adds an extra dimension to co-conspirator liability within the context of Rule 804(b)(6) requiring the co-conspirators to engage in conduct designed to make the witness unavailable. In this case, Respondent was a part of conspiracy and, in furtherance of the conspiracy, Respondent and his co-conspirator engaged in conduct designed to prevent the

witness, Reardon, from testifying. Therefore, Respondent forfeited his rights under Rule 804(b)(6) to confront the unavailable witness.

Second, an absolute journalist's privilege is contrary to the precedent of this Court and sound public policy. Federal Rule of Evidence 501 leaves the granting of a testimonial privilege to the discretion of the judiciary. Respondent seeks to re-litigate a settled question by equating the vibrancy of our nation's fourth estate with the existence of an absolute testimonial privilege for journalists. This is a false equivalency. Thus, the Fourteenth Circuit's recognition of an absolute journalist's privilege should be reversed.

Privileges, although limiting the information available in judicial proceedings, are recognized if they promote a public good greater than the need for that evidence. However, the benefits of recognizing a privilege must not outweigh its costs to the proper administration of justice. Furthermore, recognizing an absolute journalist's privilege is bad public policy because Respondent neither points to a problem necessitating this Court's action nor an adequate means of defining the scope of the privilege.

If, however, this Court determines that Rule 501 recognizes a journalist's privilege, it should find the privilege to be a qualified one subject to balance against a legitimate need for the information. Respondent mischaracterizes this Court's precedent by arguing the government must show a heightened need for information protected by a qualified privilege. The actual standard is less onerous, and the government has more than met its burden in the case at bar.

Third, the Fourteenth Circuit incorrectly determined Agent Simandy's lay opinion testimony regarding the meaning of Respondent's code words was inadmissible. In reality, Agent Simandy's opinion testimony met all prongs of Rule 701. In confronting lay testimony by law-enforcement officers interpreting code words in conspiracy cases several Circuit courts have

rejected the ridged standard used by the Fourteenth Circuit and, instead, adopted a more holistic standard in determining admissibility. This is because the factual exigencies unique to each case make a one-size-fits-all requirement that a lay witness be a participant in or contemporaneous observer of an intercepted conversation difficult to employ. Additionally, such lay testimony may be of great assistance to the jury by providing context to otherwise unintelligible speech. It is because each case is factually distinct and each witness's testimony based on different sources that granting trial courts discretion in determining admissibility is the correct application of Rule 701.

Determining admissibility in code word interpretation cases under Rule 701 should not hinge solely on whether the witness contemporaneously experienced the conversation. Instead, a trial court should consider whether the totality of the circumstances provide a reasonable basis for the witness's opinion. To craft a rule predicated on temporal considerations alone is unnecessary and creates an absolute bars to otherwise proper and helpful testimony.

Judicial supervision is a reliable guard against admission of testimony straying too far from the dictates of Rule 701. Trial court judges are well situated to determine when and if proffered lay testimony is founded on an impermissible basis. Here, Agent Simandy's testimony strictly drew from his investigation of this particular case. At no time did he base his opinions on past investigations or on his general experience as an FBI agent - he offered no speculative opinion as to the cognitions or culpability of Respondent. Further, the intercept transcripts were verbatim copies of English words spoken by an English-speaking Respondent, thus greatly reducing any possible misapprehension. Finally, Agent Simandy's testimony will be helpful in providing essential context for otherwise unintelligible utterances that, if left to summary argument, would

only confuse the jury. Finally, the safeguard of cross-examination, as contemplated by Rule 701, remains in place

For the foregoing reasons the Government respectfully asks the Court to reverse the decision of the Court of Appeals for the Fourteenth District of the United States.

ARGUMENT

I. UNDER FEDERAL RULE OF EVIDENCE 804(B)(6) A DEFENDANT FORFEITS HIS RIGHT TO CONFRONTATION WHEN A CO-CONSPIRATOR'S WRONGDOING CAUSES A WITNESS TO BE UNAVAILABLE.

Reardon's statements should be admitted against Respondent under Federal Rule of Evidence 804(b)(6) because Respondent entered into a conspiracy to commit and conceal criminal activity, and in the furtherance of that conspiracy, engaged in conduct designed to make the witness unavailable. Anderson and Respondent joined in a conspiracy to commit criminal activity and prevent law enforcement from detecting their criminal activity. This Court has long recognized that a defendant cannot insist on his privilege to confront a witness if the witness' absence is caused by the defendant's wrongdoing. *Reynolds v. U.S.*, 98 U.S. 145, 158 (1878). Anderson's actions were in furtherance of a conspiracy and were known to, and thus foreseeable by, Respondent.

Federal Rule of Evidence 804(b)(6) provides, "A statement offered against a party that wrongfully caused--or *acquiesced* in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result". (emphasis added). Here, the facts make clear Respondent, at the very least, knew of Anderson's intentions to "silence" Reardon and acquiesced, if not assented to Anderson's murderous actions.

In the case at bar, case law and the logical interpretation of Rule 804(b)(6) provide for waiver by misconduct to be imputed from Anderson to Respondent. First, the plain language of the Rule supports the interpretation that a defendant need not directly participate in the

misconduct causing the unavailability of the witness for waiver to apply. Second, under *Pinkerton v. United States*, 328 U.S. 640 (1946), this Court established that a co-conspirator may be held criminally liable for the actions of another. Applying *Pinkerton* to the concept of waiver, Anderson's actions in furtherance of the conspiracy waives Respondent's right to object under Rule 804(b)(6). Finally, the holding in *Giles v. California*, 554 U.S. 353, 361 (2008) complements *Pinkerton* when applied to Rule 804(b)(6) by requiring the defendant to engage in conduct designed to make the witness unavailable. For these reasons, this Court should reverse the Fourteenth Circuit Court's decision and hold that Anderson's misconduct may be imputed to Respondent, thus admitting Reardon's statements into evidence under Rule 804(b)(6).

A. The Language Of Federal Rule Of Evidence 804(B)(6) Makes It Clear That Waiver By Misconduct Can Be Imputed To Other Actors Within A Conspiracy.

Rule 804(b)(6) specifically provides that waiver of the Confrontation Clause applies to a party who "wrongfully causes—or acquiesced in wrongfully causing" the witness's unavailability. In creating this distinction, the Rule provides for two distinct situations: one where the party personally and directly wrongfully causes a witness's unavailability and; one where the party passively allows or complies with conduct causing the witness's unavailability. Fed. R. 804(b)(6). "Acquiesce", as defined in Merriam-Webster's dictionary, means to "accept, comply, or submit tacitly or passively". *Merriam-Webster Dictionary*, (11th ed. 2002). The drafters of Rule 804(b)(6), therefore, expressly intended to allow for forfeiture based on an agency theory, where the defendant passively complied or accepted the actions that caused the witness to be unavailable.

Even before the codification of Rule 804(b)(6) the Circuit courts held that forfeiture may be imputed to a co-conspirator through agency theory. *See e.g., Olson v. Green*, 668 F.2d 421, 429

(8th Cir. 1982), *Mayes*, 512 F.2d 637, 650-51 (6th Cir. 1975). Indeed, the majority of circuit courts, even after the codification of Rule 804(b)(6), when confronting the question of co-conspirator liability held that the language of Rule supports imputed liability. *See e.g.*, *U.S. v. Johnson*, 495 F.3d 951, 972 (8th Cir. 2007); *U.S. v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005); *U.S. v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002); *U.S. v. Cherry*, 217 F.3d 811, 816 (10th Cir. 2000). Similarly, the majority of circuit courts have also recognized that the wrongful action causing a witness's unavailability is not limited to murder, but also includes threats and other forms of violence. *See U.S. v. Dhinsa*, 243 F.3d 635, 651-52 (2d Cir. 2001) (listing the numerous circuit courts that have agreed that murder is not the only way to forfeit ones rights under 804(b)(6)). Thus, the plain language of Rule 804(b)(6) coupled with the majority of subsequent circuit court interpretations of the Rule, confirm that waiver may be imputed to a defendant from the wrongful acts of a co-conspirators, in the furtherance of the conspiracy, when the defendant passively acquiesced to the wrongful actions.

Here, Anderson and Respondent were clearly acting in an agency capacity within their conspiracy and thus waiver may be imputed to Respondent from Anderson's actions. Anderson and Respondent conspired to conduct criminal activity and conceal that activity. (R. 3). Despite Respondent's protest to Anderson taking drastic action, Respondent nevertheless acquiesced to Anderson's ultimate silencing of Reardon. (R. 18,19.) Respondent knew Anderson was thinking of taking drastic measures on November 15, 2011. After Anderson voiced his belief that Reardon needed "get[ing] rid of" Respondent said "Yeah, well, don't do anything. Not yet." (R. 18.) On November 29, 2011, when Anderson stated he wanted to "take care of him [Reardon]" Respondent stated he did not "want anything to do with this", but instead of doing anything to convince Anderson to stop, Respondent simply hung up. (R. 20.) In the seven hours between

the phone call and Reardon's death, there is no evidence Respondent did anything to try to stop Anderson. Thus, looking at the totality of Respondent's actions, or lack thereof, it is evident Respondent acquiesced to Anderson's wrongful act, done with the intention of evading criminal prosecution, of murdering Reardon in the furtherance of their conspiracy. Therefore Anderson's wrongful actions may be imputed to Respondent under Rule 804(b)(6).

B. The Pinkerton Doctrine Is Controlling When Determining Whether Under Federal Rule Of Evidence 804(B)(6) A Co-Conspirator Wrongfully Causing A Witness To Be Unavailable May Be Imputed To Others In The Conspiracy.

The *Pinkerton* doctrine, applied in the context of Rule 804(b)(6) where the potential consequence are less severe than in the context of criminal liability, strikes the appropriate balance between protecting a defendant's rights and preventing witness tampering. In *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946), this Court held that a co-conspirator may be liable for the actions of his fellow conspirator so long as the actions are taken in the furtherance of the conspiracy and are reasonably foreseeable to the non-acting conspirator. *Pinkerton* involved two brothers convicted for conspiring to commit fraud. *Id.* at 641. The Court held that a co-conspirator is liable for an offense committed within the scope of the conspiracy that is reasonably foreseeable until the conspiracy has ended, or when a conspirator takes affirmative steps to stop the conspiracy. *Id.* at 646. The individual co-conspirators need not recommit to the original conspiracy or conspire anew for each offense. *Id.* This is true regardless of the specific intent to commit the underlying substantive offense because the Court recognized the numerous criminal liabilities that one exposes himself to when joining a conspiracy. *Id.* at 646-47.

In applying the *Pinkerton* doctrine, even before the promulgation of Rule 804(b)(6), the Circuit courts recognized that a defendant's participation in a conspiracy could constitute waiver by misconduct. In *U.S. v. Mastrangelo*, Mastrangelo and co-defendant were on trial for a drug

conspiracy. 693 F.2d 269, 271-73 (2d Cir. 1982). After the defendants severed the trial, a key witness for the prosecution was murdered during Mastrangelo's trial. *Id.* at 273. Although Mastrangelo did not directly participate in the murder of the witness, the Second Circuit held Mastrangelo's involvement through knowledge, complicity, planning or involvement in any other way could constitute waiver. *Id.* at 273-74. The Second Circuit further stated that "[b]are knowledge of a plot to kill [the witness] and failure to give warning to appropriate authorities is sufficient to constitute a waiver." *Id.* Other circuit courts have held that there can be waiver by a co-conspirator's misconduct, but required that the defendant / co-conspirator be a more direct participant in making the witness unavailable. *See U.S. v. White*, 838 F. Supp. 618, 623 (D.D.C. 1993) *aff'd*, 116 F.3d 903 (D.C. Cir. 1997) ("...the Court has ruled that it will require the government to show that the particular defendant participated in some manner in the planning or execution of the murder of [the witness]"); *see also Olson v. Green*, 668 F.2d 421, 429 (8th Cir. 1982) ("only Dale Olson or someone acting on his behalf may waive or forfeit that right").

Since the promulgation of Rule 804(b)(6), the circuit courts have uniformly held that the wrongful actions of a co-conspirator causing a witness's unavailability may be imputed to a fellow co-conspirator. In *United States v. Cherry*, the Tenth Circuit held a co-conspirator causing a witness to be unavailable could constitute waiver by misconduct by others in the conspiracy if it was reasonably foreseeable and in furtherance of the conspiracy. 217 F.3d 811 (10th Cir.2000). In *Cherry*, the Tenth Circuit provided three bases for applying waiver by the misconduct of a co-conspirator to a defendant / co-conspirator. First, the court held that the plain language of Rule 804(b)(6) supported imputing a co-conspirator's misconduct to others in the conspiracy. *Id.* at 816. Second, that *Pinkerton* created criminal liability for crimes committed in furtherance of the conspiracy that were reasonably foreseeable, and as a practical matter, it

would make little sense if forfeiture of a defendant's trial rights were limited to a narrower set of facts than would be sufficient to establish criminal liability. *Id.* at 818. Finally, the Tenth Circuit held this approach struck the appropriate balance between the rights of a defendant to confront a witness and the prevention of witness tampering. *Id.* at 820. After *Cherry*, the majority of the Circuit courts when confronting co-conspirator liability in the context of Rule 804(b)(6) have adopted the holding of the Tenth Circuit. *See e.g., U.S. v. Johnson*, 495 F.3d 951, 972 (8th Cir. 2007); *U.S. v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005); *U.S. v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002).

As demonstrated in *Pinkerton*, when a defendant decides to join a criminal conspiracy the defendant exposes himself a number of criminal liabilities. In this case, Respondent initiated a conspiracy to poach elephants, and in furtherance of that conspiracy, his co-conspirator, Anderson, silenced Reardon to avoid detection. Anderson informed Respondent of his intentions and Respondent agreed that something should be done to prevent Reardon from exposing the conspiracy. Respondent spoke to Reardon personally attempting to keep him quiet and then told Anderson to “hold off” from taking any drastic measures. Respondent, however, also told Anderson to “just shut [Reardon] up for a while”. (R. 19, 20.) Although Respondent and Anderson did not agree on the method to silence Reardon, it was reasonably foreseeable to Respondent, from their conversations, that Anderson was planning on murdering Reardon in order to silence him.

Despite this knowledge, Respondent did nothing to prevent the murder of Reardon. Simply stating that one does not want to be apart of a particular criminal action does not absolve one of criminal liability if the action taken by a co-conspirator is in the furtherance of the conspiracy. A defendant must take affirmative steps to prevent the crime. Here, because Respondent took no

affirmative steps to stop the Anderson he remains criminally liable for murder. As held in *Cherry*, it would be an absurd result if Respondent is liable for Reardon's murder, but, in the same breath, conclude his liability is not great enough to forfeit his right to confrontation under Rule 804(b)(6). As with the defendants in *Cherry, Thompson, Johnson, Mastrangelo, and Rivera* it is clear that Respondent, though not directly participating in the murder, cannot escape the liability he inevitably exposed himself to when deciding to participate in a conspiracy. Conspiring to commit a crime and simply stating one disagrees with the means a fellow co-conspirator decides to carry out the agreed upon criminal activity, does not absolve the co-conspirator from criminal liability, and most certainly does not mean a defendant should profit from the witness being unavailable.

C. Waiver By The Misconduct Of A Co-Conspirator Is Compatible With The Court's Holding In Giles.

Respondent will no doubt claim that *Giles v. California* precludes forfeiture based on co-conspirator liability, however, this is assertion is untrue. In fact, *Giles* supports the Government's argument that a defendant need not directly participate in making the witness unavailable. The Court in *Giles* held that Rule 804(b)(6) does not apply when the wrongful conduct causing the witness's unavailability was not designed to prevent the witness from testifying. 554 U.S. 353, 361 (2008). In *Giles* the government sought to introduce the statements of a witness who was also the murder victim for which the defendant was on trial. *Id.* at 362. The Court held that there must be some intention to make the witness unavailable in order for forfeiture by misconduct to apply. *Id.* at 361. Thus, forfeiture applies, "only when the defendant engaged in conduct designed to prevent the witness from testifying". *Id.* at 359.

In the *United States v. Dinkins*, the Fourth Circuit grappled with the compatibility of *Giles* to the doctrine of imputed waiver through the actions of a defendant's co-conspirator. In *Dinkins*, the only circuit case post *Giles* addressing co-conspirator liability in the context of Rule 804(b)(6), the defendant was to be tried for conspiracy to distribute narcotics and use of a firearm in furtherance of the narcotics conspiracy. *U.S. v. Dinkins*, 691 F.3d 358 4th Cir. 2012). While awaiting trial, Dinkins and others attempted to murder a witness for the prosecution. *Id.* 364-65. Their attempts were unsuccessful. *Id.* A year later, while Dinkins was incarcerated, his fellow co-conspirators succeeded in murdering the witness. *Id.* at 383. The Fourth Circuit used case precedent established by circuit courts pre-*Giles*, including the holding in *Cherry*, and found Dinkins forfeited his right to confrontation under Rule 804(b)(6) because the wrongful act of his co-conspirators was in furtherance of the conspiracy and was reasonably foreseeable. *Id.* at 382-83. Further, in recognizing the extra dimension in forfeiture analysis created by *Giles*, the Fourth Circuit held that in addition to the requirements of foreseeability and furtherance of a conspiracy, a defendant must have engaged in conduct designed to prevent the witness from testifying. *Id.* at 383. The Fourth Circuit concluded that, while there was no evidence Dinkins participated in the plan that succeeded in murdering the witness, Dinkins clearly manifested his intent to make the witness unavailable in his previous murder attempts and it was the natural consequence of the original conspiracy that the co-conspirators would finish the job. *Id.* 834-836. Thus, the unavailable witness's statements were admissible against Dinkins under Rule 804(b)(6). *Id.*

Here, as in *Dinkins*, Respondent engaged in conduct designed to make Reardon unavailable. Respondent knew, or at the very least, reasonably foresaw, that Anderson was planning to murder Reardon with the intent of silencing him. Although Respondent may not have wanted Anderson to murder Reardon or to participate in the murder, the conversations clearly show

Respondent acquiesced to Anderson's conduct, which was designed to make Reardon unavailable. Respondent and Anderson were engaged in a conspiracy to conceal their criminal activity. Respondent's intent was to avoid detection and Reardon was a liability. In Respondent's conversation with Anderson he stated that he had tried to "smooth it over" with Reardon, so Reardon would not speak about the incident. (R. 19.) Respondent also told Anderson to "just shut [Reardon] up for a while" before stating he did not want to participate in Anderson's conduct. (R. 19.) Respondent, while protesting the means in which Anderson was going to procure Reardon's silence, wanted Reardon silenced.

Furthermore, Respondent made no attempt to prevent the murder of Reardon despite Anderson's foreseeable murder of Reardon. In the seven hours between the phone call and Reardon's murder, Respondent made no attempt to alert authorities and took no affirmative steps to prevent Anderson from taking action. (R. 7). Thus, Respondent's actions demonstrated that he engaged in conduct designed to prevent the witness from testifying, satisfying *Giles*' requirement that a defendant engage in conduct designed to make the witness unavailable. Therefore Respondent has forfeited his right to confront the witness under Rule 804(b)(6).

The Fourteenth Circuit Court's decision that Rule 804(b)(6) does not provide for co-conspirator liability is directly at odds with the plain language of the Rule and current Circuit court precedent. *Giles* clearly allows for a defendant participating in a conspiracy to forfeit his rights under Rule 804(b)(6) without directly participating in or ordering the misconduct. Respondent should not be allowed to profit from the misconduct of his co-conspirator that was reasonably foreseeable and in furtherance of the conspiracy to which he was a party. For the foregoing reasons, this Court should reverse the decision of the Fourteenth Circuit Court of

Appeals and find that the actions of Respondent's co-conspirator may be imputed to Respondent Rule 804(b)(6).

II. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S EXTENSION OF THE FEDERAL RULES OF EVIDENCE 501 TO RECOGNIZE AN ABSOLUTE TESTIMONIAL PRIVILEGE FOR JOURNALISTS.

This Court should reverse the Fourteenth Circuit's extension of Rule 501 of the Federal Rules of Evidence to include an absolute testimonial privilege for journalists. The Rule states that the "common law- as interpreted by the United States courts in the light of reason and experience- governs a claim of privilege unless ... the United States Constitution; a federal statute; or rules proscribed by the Supreme Court [provide otherwise]." Fed R. Evid. 501. The U.S. Constitution does not compel a journalist's privilege. *See Branzburg v. Hayes*, 408 U.S. 665, 692 (1972). Further, Congress has declined to enact federal legislation creating a journalist's privilege. *See* Free Flow of Information Act of 2011, H.R. 2932, 112th Cong. (2011) (died in committee). Finally, this Court has dealt directly with the issue of a journalist's privilege and conclusively rejected it. *Branzburg*, 408 U.S. at 702. The question, therefore, before this Court is whether it should to fashion a "common law" testimonial privilege for journalists.

As the following discussion will show, federalizing a testimonial privilege for journalists is inconsistent with this Court's limited recognition of evidentiary privileges and would serve to frustrate important public policy goals. Alternatively, should this Court enter into the thicket by creating a new evidentiary privilege, it should only recognize a qualified privilege subject to a balancing against the need for disclosure. At the very least, this Court should reverse the Fourteenth Circuit's recognition of an absolute testimonial privilege for journalists.

A. The Creation Of A Federal Testimonial Privilege For Journalists Does Not Comport With This Court's Limited Recognition Of Evidentiary Privileges And Is Bad Public Policy.

1. A journalist's privilege is not consistent with this Court's limited recognition of privileges.

A journalist's privilege is not consistent with this Court's limited recognition of privileges. Testimonial privileges frustrate society's right to use "every man's evidence" to seek the truth. *See Trammel v. United States*, 445 U.S. 40, 50 (1980). *See also* FED. R. EVID. 102 (Federal Rules of Evidence "shall be construed ... to the end that the truth may be ascertained and proceedings justly determined.") Therefore, the general rule is that testimonial privileges may be granted only to the extent that a refusal to testify has a public good outweighing society's right. *See Trammel v. United States*, 445 U.S. 40, 50 (1980).

This Court has held that the psychotherapist-patient relationship is sufficiently important to justify a testimonial privilege. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). In particular, the very nature of psychotherapy requires a patient to disclose embarrassing - potentially criminal - information. *See id.* at 10. The mere possibility of disclosure in open court may make an effective relationship impossible to form. *Id.* Further, the general public's interest in ensuring that individuals are treated for emotional disturbances before they become a larger problem are served by the recognition of the privilege. *See id.*

In the current case, Respondent asserts that the nature of the journalist-confidential source relationship requires a similar level of protection as the psychotherapist-patient relationship. Otherwise, the argument goes, sources will be "chilled" from speaking with reporters. *See* Geoffrey R. Stone, *Why We Need A Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 49 (2005). However, at common law there was no such privilege, and yet the press flourishes in this country. *Branzburg*, 408 U.S. at 698-99. As one observer noted, even in the wake of the highly

publicized Valerie Plame scandal, confidential sources continued to speak with the press about sensitive issues such as Abu Ghraib and unlawful NSA phone surveillance. *See* Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1355 (2008). Respondent merely parades out anecdotal evidence without explanation for why a journalist's privilege justifies the steep cost to the efficient administration of the judicial system.

2. There are compelling public policy reasons to reject a journalist's privilege.

a. Respondent has not articulated a problem that needs fixing.

This Court should decline to create an evidentiary privilege for journalists because Respondent fails to identify a problem that needs fixing. In *Branzburg*, the defendant-journalists argued for a qualified privilege requiring a compelling interest to overcome. *Id.* at 680. This Court held that reporters should not be excused from furnishing information that other citizens were obligated to disclose. *Id.* at 702. However, in rejecting the privilege, this Court noted that journalists were not without First Amendment protection; trial judges exert significant control over the subpoena process and can ensure inquiries do not cross the constitutional line into bad faith harassment of the press. *Id.* at 707-08. *See also* *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (“[C]ourts should simply make sure that a subpoena ... is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas.”).

By citing high-profile cases, Respondent seeks to create the impression that the problem of haling journalists into court is increasingly burdensome to professional journalism.¹ However, there is scant historical data detailing exactly how many journalists are actually served with subpoenas to testify in federal court.² The mere belief a phenomenon has increased does not mean it has actually increased in prevalence. For example, a recent Gallup poll indicated that

¹ *See e.g.*, Tom Scocca, *Times' Judy Miller, In Contempt, Says She Won't Budge*, The New York Observer (Feb. 19, 2007), <http://observer.com/2007/02/itimesi-judy-miller-in-contempt-says-she-wont-budge/>.

² *See* Kevin Rector, *A Flurry of Subpoenas*, American Journalism Review, (April/May 2008), <http://www.ajr.org/Article.asp?id=4511>.

68% of Americans believe the U.S. crime rate has increased, even as crime rates have continued to fall.³ Analogously, Respondent fails to present sufficient evidence indicating that there is an actual problem the Court needs to fix by federalizing an evidentiary privilege. Accordingly, this Court should decline to act based on mere anecdote.

b. The creation of a privilege poses distinct line-drawing issues and Constitutional issues.

The creation of a journalist's privilege poses distinct line-drawing issues and potential Constitutional problems. In *Branzburg*, this Court recognized that fact when it declined the task of fashioning a journalist's privilege. 408 U.S. at 703. The Court opined that "[s]ooner or later, it will become necessary to define those categories of newsmen who qualif[y] for the privilege" *Id.* at 704. Unlike many other credentialed professions, it is difficult to determine who is a "journalist".⁴ Fierce debates have raged about whether "bloggers" are considered journalists.⁵ Further complicating the question is the proliferation of the smartphone, which some have heralded as ushering in the age of "citizen journalism."⁶ These issues were simply not a consideration when this Court held that "*licensed* psychotherapists" were entitled to a privilege. *Jaffee*, 518 U.S. at 15 (emphasis added). Generally, journalists do not have similar licenses.⁷

Furthermore, the First Amendment advises caution on this issue. As the *Branzburg* Court noted in 1972:

³ Lydia Saad, *Most Americans Believe Crime in U.S. Is Worsening*, Gallup Wellbeing, available at <http://www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx>.

⁴ See Matthew Ingram, *Defining journalism is a lot easier said than done*, GIGAOM, Dec. 15, 2011, <http://gigaom.com/2011/12/15/defining-journalism-is-a-lot-easier-said-than-done/>.

⁵ See Op-Ed., *Are All Bloggers Journalists?*, NEW YORK TIMES, <http://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists>.

⁶ See Sarah Lacy, *Could Sandy be Instagram's big citizen journalism movement?*, PANDODAILY, October 29, 2012, <http://pandodaily.com/2012/10/29/could-sandy-be-instagrams-big-citizen-journalism-moment/>.

⁷ See Matthew Ingram, *No, licensing journalists isn't the answer*, GIGAOM, Sep. 7, 2011, <http://gigaom.com/2011/09/07/no-licensing-journalists-isnt-the-answer/>.

[T]he liberty of the press is the right of the lonely pamphleteer ... just as much as of the large metropolitan publisher ... Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals ... The informative function asserted by representatives of the press ... is performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. *Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures*

408 U.S. at 703 (internal citations and quotations omitted) (emphasis added). Indeed, if the government defines who is “press”, and therefore who is entitled to legal protection, it could have the perverse effect of transforming independent government watchdogs into lapdogs.⁸

Respondent does not provide a satisfactory answer to the line-drawing question. Instead they advance an amorphous “I know it when I see it” standard. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Similarly, the opinion below merely takes it as a given that the term “press” can be easily defined, and extends to this inchoate group an absolute testimonial privilege. *Barnes*, at 28-29. This Court should avoid embroiling itself in these insoluble issues and hold that Rule 501 does not recognize a journalistic privilege.

B. If This Court Determines That The Rules Of Evidence Recognize A Testimonial Privilege For Journalists, It Should Hold That This Privilege Is Qualified And Subject To Being Balanced Against A Legitimate Governmental Need For Disclosure.

Even should this Court hold that Rule 501 recognizes a journalist’s privilege, the privilege should be qualified and require courts to balance the journalist’s need to protect her source against a legitimate need for the information. None of the *Branzburg* judges, including the dissenters, advocated for an absolute testimonial privilege. *See Branzburg*, 408 U.S. at 665; *Id.* at 706 (Powell, J., concurring); *Id.* at 725 (Stewart, J., dissenting). Although Justice Powell joined the 5 judge majority he remarked in his concurrence that, “[t]he asserted claim to privilege

⁸ See Tabitha Waggoner, *Shield Laws in Journalism: Unconstitutional and Immoral*, BACKPACK JOURNALIST, <http://soulbeliefs.com/shield-laws-for-journalists/>.

should be judged on the facts by the striking of the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony ... ” *Branzburg*, 408 U.S. at 706 (Powell, J., concurring). A majority of circuit courts have read Justice Powell’s concurrence as extending some form of privilege to journalists, but none have held the privilege absolute. *See e.g., United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

By using the term “proper balance” some commentators interpret Justice Powell’s concurrence to mean that he agreed with the balancing test set out by the dissent. *See* Paul Marcus, *The Reporter’s Privilege: An Analysis of Branzburg v. Hayes, And Recent Statutory Developments*, 25 *Ariz. L. Rev.* 815, 829 (1984). The dissent’s test required a *compelling interest* in the information to require disclosure. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting). However, this overstates the scope of the concurrence. Justice Powell stated that a qualified privilege could be properly asserted if a journalist had reason to believe his confidential source relationship was being implicated without a *legitimate purpose*. *Branzburg*, 408 U.S. at 706 (Powell, J., concurring). This appears to be little more than a clarification of the “bad faith” exception contained in the majority opinion. *See Branzburg*, 408 U.S. at 707-08.

Here, Respondent argues the government must meet a heightened burden to overcome the journalistic privilege. By doing so, Respondent seeks to use Justice Powell’s concurrence to elevate the *Branzburg* dissent. This strains the elasticity of the English language. However if the *actual language* of Justice Powell’s concurrence is controlling, the government has presented more than a sufficient case to compel disclosure of Ms. Crawley’s source.

First, Ms. Crawley knows the identity of an individual who was a first-hand witness to a conspiracy to commit a federal offense. (R. 10.) The government has a legitimate interest in

ensuring its duly enacted laws are obeyed. Further, though the witness sought confidentiality while an employee, the bankruptcy of the circus has ended that employer-employee relationship. (R. 10.) However, the source may still have a justifiable fear of violent retaliation making them unlikely to voluntarily come forward. (R. 10.) As discussed above, however, society has an interest in “every man’s evidence” when seeking the truth. *See Trammel*, 445 U.S. at 50. Finally, although it is claimed that the videotape was for Ms. Crawley’s eyes only, the witness appeared on videotape without altering their appearance or voice. (R. 10.) Such behavior is not the hallmark of a source with a subjectively high expectation of anonymity. It is clear that if this Court balances the interests at issue here, it will find that the government has more than met the burden necessary to overcome a qualified privilege.

For the foregoing reasons, this Court should reverse the Fourteenth Circuit’s holding that Rule 501 extends a testimonial privilege to journalists. As a matter of law, Respondent fails to make a convincing case for the privilege and the particular facts of this case’s merit a reversal of the decision below.

III. THIS COURT SHOULD REVERSE THE HOLDING OF THE FOURTEENTH CIRCUIT AND HOLD THAT FEDERAL RULE OF EVIDENCE 701 DOES NOT REQUIRE A LAY WITNESS TO BE A PARTICIPANT IN OR CONTEMPORANEOUS OBSERVER OF A CONVERSATION TO TESTIFY

The contemporaneous experience of a conversation by the witness, in code word interpretation cases, should not be the determinative question for admissibility. The text of Rule 701, coupled with judicial oversight and cross-examination function as adequate protections. Applying a fact neutral analysis in conspiracy cases involving code word interpretation under Rule 701 ignores the unique characteristics of the investigation. Many circuit courts have eschewed such an approach. Particularly the discretionary test crafted by the Eleventh Circuit in *United States v. Albertelli*, 687 F.3d 439, 449-50 (1st Cir. 2012) provides an appropriate standard

for determining the admissibility of code interpretation testimony. The lay witness must be able to point to the specific basis for their opinion and not rely on the entirety of the investigation or previous experience. All factors present in this case.

Further the witness's testimony must be helpful the jury. Fed. R. Evid 701(b). Here, Agent Simandy's testimony undoubtedly provides essential context to Respondent's ambiguous speech without being cumulative. Thus, this Court, should reverse the holding of the Fourteenth Circuit.

A. There Is No Contemporaneous Requirement In The Text Of Rule 701.

Agent Simandy's opinion testimony interpreting respondent's use of code words was within the parameters of Rule 701(a). In this case, it is uncontested that Agent Simandy testified from his own "perception" of the record based on his months of investigation. Specifically, his testimony was founded upon his first-hand review of intercepted phone conversations transcribed by the late Agent Blackstock as well interviews he personally conducted. Instead, Respondent maintain this is an insufficient basis for lay testimony and that Agent Simandy must have either personally participated in or contemporaneously observed the intercepted conversations to proffer admissible lay testimony.

Respondent's position finds no support in the text or commentary of Rule 701. Nothing in the text of Rule 701 specifically prohibited Agent Simandy from offering lay opinions about the meaning of coded words when based on first-hand knowledge gained from his investigation this particular case; including his post hoc review of word-for-word intercept transcripts. Fed R. 701(a). Nowhere does 701 define "perception" as requiring a witness to have personally participated in or contemporaneously observed the conversation as Respondent contends. Fed. R. 701(a). "Perception" is defined as "[a]n observation, awareness, or realization, usu[ally] based on physical sensation or experience; appreciation or cognition." Black's Law Dictionary (9th ed.

2009). Here, there is no doubt that the foundation of Agent Simandy's testimony was rooted in his "observation" or "perception" of the investigatory record and interviews, and that his opinions as to the meaning of code words were based on those perceptions. Thus, based on a common sense reading of the Rule 701's text, Agent Simandy's lay testimony was admissible.

B. Lay Testimony Concerning Code Word Interpretation is Admissible Under Rule 701 When Based on an Agent's Review of Case Materials.

1. Circuit courts are split in allowing lay testimony in conspiracy cases based on an agent's review of the investigation records

Reading in a contemporaneous requirement is particularly problematic in code word interpretation cases. Indeed, there is a recognition by some circuit courts that conspiracy cases require greater judicial discretion in admitting lay opinion testimony where the witness provides a basis, grounded in his or her participation in that particular case, for their specific interpretations. In this case, Agent Simandy provided such a basis and thus the broader definition of "perception", to include the agent's review of case materials, should apply here as well.

The Government's position is supported by several circuit court decisions admitting the kind of lay testimony proffered by Agent Simandy. These circuits have held the "perception" requirement of 701(a) is met when law enforcement agents proffer lay testimony based on a first-hand review of investigatory materials. In *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011) the agent's code word interpretation testimony was deemed rationally based on his perception derived from his investigation of the case by reading wiretap summaries, verbatim transcripts, faxes, publications, and speeches and listening non-contemporaneously to intercepted calls in English and Arabic. The Eleventh Circuit further noted they "have never held that a lay witness must be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation." *Id. See also; United States v. Albertelli*,

687 F.3d 439, 449-50 (1st Cir. 2012) (admitting ATF agent's opinion regarding meaning of code words based on agent's post hoc interpretation of conversations intercepted by wiretaps); *United States v. El-Mezain*, 664 F.3d 467, 513-14 (5th Cir. 2011) (admitting agent's lay testimony identifying individuals and code word interpretation based on after-the-fact investigation).

Other circuits have upheld admission of proffered law enforcement lay opinion regarding the meaning of ambiguous words when grounded in a combination of first-hand and second-hand knowledge, recognizing that such "opinion" "approaches the line dividing lay opinion testimony from expert opinion testimony." *United States v. Rollins*, 544 F.3d 820, 827-33 (7th Cir. 2008)(FBI agent's code word testimony rationally based on his first-hand perception of the intercepted phone calls, listened to non-contemporaneously); *United States v. Freeman*, 498 F.3d 893, 904-905 (9th Cir. 2007)(admitting detective lay opinion regarding "ambiguous conversations" he did not participate in based on review of intercepted conversations coupled with direct observation of the defendants). Thus, the essential inquiry in determining the admissibility of the proffered lay opinion in the cases above was whether the witness's testimony was properly based on first-hand knowledge of the particular investigation.

Here, as in the cases above, Agent Simandy's interpretations were based on his immersion in *this* particular case. At the pretrial hearing Agent Simandy testified thusly: "I came to these conclusions by thoroughly reviewing the transcript transcribed by Agent Blackstock and becoming familiar with the various discussions between parties...the context of the conversations allowed me to decipher the meaning of the words and phrases used. ***Everything that I have learned by extensively investigating this case allowed me to come to these conclusions.***" (R. 13.) (emphasis added). Thus, the record makes clear that Agent Simandy's opinions were drawn from specific sources - first-hand review of investigation materials and personal interviews -

particular to this case and were not vaguely based on inferences drawn from the totality of the investigation. *See United States v. Grinage*, 390 F.3d 746, 749–51 (2d Cir.2004) (excluding the lay testimony where the witness said it was based on knowledge of “the entire investigation”).

Indeed, the facts of this case, and Agent Simandy’s testimony, are distinguishable from circuit decisions holding proffered lay testimony inadmissible. For example, in *United States v. Johnson*, 617 F.3d 286 (4th 2010) the Fourth Circuit held Rule 701 did not permit an agent to interpret telephone calls based on his “training and experience” or his familiarity with the “street terms typically used by those involved in the drug trade” - without being qualified as an expert witness. *Id.* at 292-293. Similarly in *United States v. Peoples*, the Eight Circuit held the agent’s testimony exceeded the bounds of lay opinion when the agent’s testimony included her “opinions about what the defendants were thinking during the conversations, phrased as contentions supporting her conclusion, repeated throughout her testimony” 250 F.3d 630, 640 (8th Cir. 2001). The Government agrees that in the preceding cases the witness strayed beyond Rule 701. However, here, Agent Simandy did not testify about his credentials or training. Agent Simandy’s testimony was based solely on his first-hand review his review of the materials particular to this case and offered no opinions about culpability. At no point in his testimony did Agent Simandy reference past investigations or rely on his general experience as an F.B.I. investigator. Further, Agent Simandy never offered testimony on any matter he did not personally observe and never veered into speculative opinions concerning the cognitions or culpability of Respondent.

It is true that the Eight Circuit in *Peoples* held that “testimony is admissible as lay opinion “only when [the 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.” *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). However, this Court should refrain from holding

Rule 701 demands a real-time component in code-word interpretation cases. Instead, this Court should hold that a determination of admissibility in code word interpretation testimony under Rule 701 should involve all relevant aspects particular to each individual case.

Additionally, Respondent is not without recourse to challenge the proffered lay testimony of a law enforcement agent's code word interpretation. In addition to judicial supervision, the witness is subject to cross-examination. Agent Simandy was open to cross-examination about his perceptive ability, the reliability of transcripts he did not transcribe, etc. Under Rule 701, defense counsel is free to interrogate the probity of any inference drawn by an officer's review of investigation records. Indeed, Rule 701 assumes cross-examination will be employed to "point up the weakness" in a lay witness's testimony. Fed. R. Evid. 701 Committee Note.

Thus, because Agent Simandy's testimony only encompassed first-hand knowledge based on his personal perceptions; because the substance of the testimony did not exceed the limits of Rule 701 and; because cross-examination provided an adequate mechanism to opposing counsel, there was an admissible basis for his lay opinion under Rule 701(a).

2. A contemporaneous requirement for Rule 701 in all circumstances leads to absurd and arbitrary results

Respondent's limited definition of admissible testimony under Rule 701 is overbroad and obtains absurd and arbitrary results. Following Respondent's logic, Agent Simandy's testimony would be admissible had he sat in a van contemporaneously listening to the intercepted conversations. However, he may not testify if he listened to the same recording two days after the conversation. In this case, there is nothing substantive to be gained by requiring Agent Simandy participation in or contemporaneous observance of the conversations. He reviewed transcripts, comprised of the exact words spoken by Respondent, as recorded by Agent Blackstock. Additionally, in this case, there was no obstacle to Agent Simandy's understanding

Respondent and his co-conspirators because the communications were in English. Thus, there existed an exceedingly minimal chance of confusion or misunderstanding.

A further absurdity obtained by Respondent's definition of Rule 701 is that it makes no concession for the unavailability of potential witnesses. Here, there is no doubt that Agent Blackstock was qualified to testify under Rule 701(a) because he did listen to the intercepted conversations contemporaneously. However, Agent Blackstone's death has rendered him permanently unavailable. According to Respondent, Agent Simandy is not permitted to opine as to the meaning of code words as transcribed, verbatim, by Agent Blackstock even when his opinions are derived from the exact same source as Agent Blackstock's would-be testimony. Thus, by following Respondent's proposed interpretation of Rule 701, no other agent, even if involved in the same investigation and having reviewed identical materials, will be permitted to proffer lay testimony unless they perceived the conversation in real time. This definition makes no exception for exigent circumstances and forecloses trial courts from even considering the facts of a particular case. Therefore, the Court should not impose an absolute requirement for contemporaneous observation on a trial court determining the admissibility of lay testimony concerning code word interpretation under Rule 701.

C. Agent Simandy's Lay Testimony Was Clearly Helpful To The Jury Under Rule 701(B).

1. Agent Simandy's testimony provided essential context to the alleged conspirator's statements and were admissible because his inferences were drawn from this investigation only

Agent Simandy's understanding of the oblique statements communicated by Respondent was clearly helpful to the jury. Given Agent Simandy's unique position to help the jury in their factual determination, Respondent's restrictive interpretation belies the intent of Rule 701(b). Agent Simandy investigated this case for months, reviewing transcripts and conducting witness

interviews forming the basis of his interpretation testimony. Clearly, the basis for Agent Simandy's opinion was not rooted in a mere review of intercept transcripts. He was able to deduce the meaning of code words by establishing context based on personally interviewing Agent Lamberti and Klestadt. Providing the jury with such essential context is the very definition of helpful, and thus should have been admitted by the circuit court.

Respondent argues that allowing law enforcement agents to testify as lay witnesses in this, or similar circumstances, constitutes an impermissible jury argument from the witness box under the imprimatur of law enforcement. However, this case does not feature the summary argument preview testimony held impermissible in *United States v. Meises*, 645 F.3d 5, 14 (1st Cir. 2011). In *Meises*, The First Circuit held the agent's testimony to be an improper preview of summary argument when the government began its case-in-chief with the lead investigator testifying to all of the steps in the investigation and concluding with the agent's opinion, based on the totality of the investigative steps described. *Id.* at 14-15. However, in this case, Agent Simandy was not featured as the opening or closing witness in the case. Further, Agent Simandy offered no opinions as to Respondent's role in the alleged conspiracy or opined on Respondent's culpability. He only gave his opinion of the meaning of the coded words.

The present case is also distinguishable from *United States v. Cano*, 289 F.3d 1354 (11th Cir. 2002) where the Eleventh Circuit held a Detective's lay testimony inadmissible because his "inferences were based on facts already in evidence". *Id.* at 1361-62. Here, the transcripts Agent Simandy testified to were not in evidence. Thus, his lay opinion as to the meaning of the coded language used by the conspirators was unquestionably helpful to the jury by providing essential context otherwise absent. However, if Respondent's interpretation of Rule 701 is affirmed, counsel for the Government would be forced to bombard the jury with unintelligible statements

without any context to explain their meaning before closing arguments. This is particularly unhelpful in cases like this one where the intercepts are not already in evidence.

Additionally, the witness is subject to judicial supervision and cross-examination. Not only is the judge in a superior position to reign in or exclude testimony straying from the confines of 701, opposing counsel is free to cross-examine any weak aspect of the testimony. Thus, trial judges faced with interpretive testimony, as in this case, ought to start by considering whether the testimony is meaningfully helpful to the jury, compared to the traditional division of saving the interpretive inferences for counsel in closing argument, and whether limitations of Rule 701 can sufficiently mitigate the potential dangers. See *United States v. Albertelli*, 687 F.3d 439, 449-450 (1st Cir. 2012). This more considered approach is more responsive to the unique facts of each case and is superior to predicating admissibility on temporal requirements alone.

2. Code words used by the alleged conspirators are not susceptible to expert analysis.

The code words used by Respondent and his co-conspirators do not fall within any conventional argot of poaching conspiracies, if such a thing even exists, rendering expert testimony inapplicable. Because of the peculiar, non-specialized, nature of the code words used in this case, Agent Simandy's lay testimony provided a common sense interpretation for the jury. Therefore, a case-by-case approach in determining the admissibility interpretive lay testimony is preferable to Respondent's limiting definition of Rule 701(a) requiring a contemporaneous observation. As the Eleventh Circuit noted, "[c]ode word interpretation goes beyond the traditional reason for allowing lay opinions—that many observations people make “every day in ordinary life cannot be adequately described in words confined to descriptions of observable phenomena.” *Albertelli*, at 446-47 (internal citations omitted). Still, Agent Simandy's testimony undoubtedly had potential to help the jury, which is all Rule 701 requires for lay opinion.

The same considerations, already present under Rule 701 for guiding admissibility analysis, guard against lay opinion based on impermissible sources. Additionally, requiring expert testimony for interpretation of respondent's code words in this case would likely lend undue credibility to such testimony by the jury when the data upon which "experts in the particular field would reasonably rely," Fed.R.Evid. 703, are merely the facts of the case. *See Albertelli*, at 446.

Agent Simandy's testimony hewed closely to the confines of Rule 701: it was based on his first-hand review of the case materials and interviews; it was not based on any other investigation besides *this* investigation and; his interpretive opinions were not based on knowledge of an established or recognizable argot used within criminal communities. Thus, the Fourteenth Circuit should have considered these factors when determining admissibility.

The rule adopted by this Court should be one that considers the unique nature of code word interpretation in proffered lay testimony. Thus, this Court should decline from holding that the "perception" requirement in Rule 701(a), when applied to code word interpretation, must meet a temporal requirement and reverse the holding of the Fourteenth Circuit

CONCLUSION

For the foregoing reasons this Court should reverse the opinion below and find: (1) Respondent's co-conspirator's actions forfeited his right under Rule 804(b)(6); (2) there is no absolute journalist privilege under Rule 501 and; (3) Agent Simandy's lay opinion testimony is admissible under Rule 701.

Respectfully Submitted,

February 20, 2013

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APPENDIX

Fed. R. Evid. 804(b)(6)

The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:....**(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

Fed. R. Evid. 701

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 501

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.