

Docket No. 12-23

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IN THE  
SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,  
PETITIONER,

v.

WILLIAM BARNES,  
RESPONDENT.

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

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**BRIEF FOR THE PETITIONER**

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## **QUESTIONS PRESENTED**

1. Whether a hearsay declaration from a murder victim can be admitted into evidence under the forfeiture-by-wrongdoing exception to the hearsay rule when the murder of the declarant by Defendant's co-conspirator was a foreseeable consequence of the conspiracy?
  
2. Whether it is appropriate for federal courts to recognize a common law evidentiary privilege for journalists under Federal Rule of Evidence 501 and whether such a privilege, if recognized by this Court, can shield a reporter from disclosing highly probative evidence acquired from an informant, on videotape and with consent, that speaks directly to the existence of Defendant's conspiracy and cannot be obtained from another source?
  
3. Does Federal Rule of Evidence 701 permit an FBI agent to give lay opinion testimony where the testimony is based on the agent's personal review of transcripts of Defendant's conversations with his co-conspirators, interviews with an undercover agent and sales representative who had agreed to provide materials for the furtherance of Defendant's conspiracy, and is not otherwise based on expert knowledge?

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### **OPINIONS BELOW**

The opinion of the United States District Court for the Southern District of Boerum on pre-trial motions was entered on May 2, 2012 in the case Cr. No. 11-76. (R. at 5). The decision can be found in the Record. (R. at 5-19). The opinion of the United States Court of Appeals for the Fourteenth Circuit was entered on July 12, 2012 in the case Cr. No. 12-647, which is also provided in the Record. (R. at 20-35).

### **STATUTORY PROVISIONS**

The statutory provisions referenced herein are Federal Rules of Evidence 804(B)(6), 501, and 701.

## STATEMENT OF THE CASE

### **Statement of Facts**

Since May 2000, William Barnes (“Defendant”) has been the sole proprietor of Big Top Circus (“Big Top”) located on over one hundred acres of land in Boerum. (R. at 1). Despite being nationally known for its twenty elephants, on July 10, 2011, Defendant was informed that Big Top was headed towards financial ruin. (R. at 1). Two days later, Defendant invited Boerum City Circus and Flying Feats Circus to join Big Top in staging the “greatest elephant show on earth” to avoid a financial collapse. (R. at 1-2).

The plan was for Boerum City Circus and Flying Feats Circus to each bring ten elephants to Big Top on December 2, 2011, to be quartered on Big Top’s acreage. (R. at 2). However, on July 30, 2011, Defendant contacted Alfred Anderson and offered him the opportunity to hunt elephants on Big Top’s property and share the profits of the elephants’ ivory tusks. (R. at 2). Anderson accepted Defendant’s offer. (R. at 2). One month later, on September 1, 2011, Defendant and Anderson agreed that James Reardon, a resident in a neighboring state, would also participate in the hunt. (R. at 2).

In order to generate publicity for the elephant show, Defendant contacted Kara Crawley on August 30, 2011. Crawley, a reporter at the Boerum Times, was provided unrestricted access to the circus in exchange for an article on the planned elephant show. (R. at 2).

In September 2011, Defendant recommended to Anderson that the three men use a helicopter and assault rifles for the hunt. (R. at 2). On October 1, 2011, Anderson accepted Defendant’s offer on behalf of himself and Reardon, contingent on Defendant providing the materials. (R. at 2). The next day, Defendant contacted Weapons Unlimited, located in the neighboring state of Texas, to purchase three assault rifles. (R. at 2). Unbeknownst to

Defendant, Jason Lamberti, an undercover agent for the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) was working at Weapons Unlimited. (R. at 2). Defendant negotiated a deal with Agent Lamberti to acquire three unregistered, fully automatic AK-47s. (R. at 2). Defendant paid in full using his credit card and scheduled to have the weapons delivered on December 5, 2011. (R. at 2). The Federal Bureau of Investigation (“FBI”) used the information provided by Agent Lamberti to obtain a warrant permitting the interception of Defendant’s telephone communications. (R. at 2).

On October 6, 2011, Defendant arranged the one-day rental of a helicopter for December 15, 2011, from Alan Klestadt at Copters Corporation. (R. at 3). Nine days later, Defendant and Anderson finalized the deal, agreeing that the hunt would take place on December 15, 2011. (R. at 3). Anderson paid Defendant \$1,000 on behalf of himself and Reardon as reimbursement for the cost of the weapons. (R. at 3).

On November 15, 2011, the FBI intercepted a phone call between Defendant and Anderson, wherein Anderson told Defendant that it was a mistake to include Reardon in the hunt, suggesting to Defendant that they “get rid of him.” (R. at 18). Defendant agreed to confront Reardon to ensure the hunt would go forward as planned. (R. at 18). Two weeks later, on November 29, 2011 at 2:00 a.m., Anderson called Defendant to confirm his belief that Reardon needed to be excluded from the hunt. (R. at 19). During this phone call, Anderson said to Defendant, “I’m gonna take care of [Reardon].” (R. at 19).

Later that day, at approximately 7:30 p.m., Daniel Best (“Best”) observed Anderson running from Reardon’s apartment, prompting Best to enter Reardon’s apartment to find Reardon dead on the floor. (R. at 7:47-49). The preceding evening, Reardon had called Best and informed him of the hunting scheme. (R. at 8:61-62). Reardon described his conversation with

Defendant earlier that day in which Defendant described how the three co-conspirators were going to kill the elephants and split the profits from the ivory. (R. at 8:63-66). Anderson was arrested that evening and confessed to killing Reardon in order to prevent him from exposing the hunting scheme. (R. at 7:49-50).

On December 1, 2011, Crawley published details of Defendant's plan to kill the elephants in The Boerum Times. (R. at 3, 10:141-45). Although Crawley's source, a Big Top employee, requested anonymity for fear of retaliation from Defendant, he or she had allowed Crawley to videotape the conversation. (R. at 10:148-50). Defendant was arrested later that day based on evidence obtained from the wiretapped conversations regarding the conspiracy and illegal firearms dealings. (R. at 3).

Two weeks after Defendant's arrest and shortly after a grand jury issued a five-count indictment against Defendant, FBI Agent Thomas Simandy was assigned to Defendant's case after Agent Narvel Blackstock died. (R. at 12:206-12). Agent Simandy reviewed the transcripts of approximately one dozen conversations between Defendant and Anderson, which Agent Blackstock had transcribed as he contemporaneously listened to them. (R. at 13:214-18). Agent Simandy also interviewed Agent Lamberti of the ATF and Klestadt of Copters Corporation. (R. at 13:219-26). After conducting an investigation into Defendant's actions, Agent Simandy concluded that Defendant and his co-conspirators used "blood diamonds" to refer to the elephant's tusks; "Charlie tango" to identify the helicopter the Defendant planned to use in the hunt; and "black cat was arranged" to refer to the three AK-47s purchased from Agent Lamberti. (R. at 13:229-37). Agent Simandy's conclusions were based on his experiences during the investigation of Defendant and not on any specialized knowledge or expertise. (R. at 14:265-67).

## **Procedural History**

On December 4, 2011, a grand jury for the United States District Court for the Southern District of Boerum issued a five-count indictment against the defendant: counts one and two for conspiracy to deal unlawfully in firearms in violation of 18 U.S.C.A §§ 371 and 922(a)(1)(a); counts three and four for conspiracy to commit a crime of violence against an animal enterprise in violation of 18 U.S.C.A. §§ 43 and 371; and count five for conspiracy to commit unlawful takings under the Endangered Species Act in violation of 16 U.S.C.A. §§ 371 and 1538. (R. at 3-4). Three pre-trial motions were filed with the district court. (R. at 6:6). The first was the government's motion in limine seeking to introduce out-of-court statements made by Reardon to Best, under the forfeiture-by-wrongdoing exception to Federal Rule of Evidence codified in 804(B)(6). (R. at 6:7-8). The second was a motion filed by Crawley, citing a reporter's privilege, to quash the government's subpoena compelling her to testify. (R. at 6:24-26). The third was the government's motion to introduce the lay opinion testimony of Agent Simandy under Rule 701. (R. at 6:29-30).

On May 1, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions, and on May 2, 2012, the district court denied the government's motion seeking to introduce the testimony of Best, granted Crawley's motion to quash the subpoena in recognition of a journalist's absolute privilege, and denied the government's motion to introduce the lay opinion testimony of Agent Simandy. (R. at 16:325 – 17:346). The United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit pursuant to 18 U.S.C. § 3731. (R. at 20). On July 12, 2012, the circuit court affirmed the decision of the district court with respect to all three issues, holding that: (1) conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis; (2) an absolute

journalist's privilege exists; and (3) under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where the agent neither participated in the conversation nor observed it." (R. at 20). The Government filed a petition for writ of certiorari, which this Court granted on October 1, 2012. (R. at 36).

### **SUMMARY OF THE ARGUMENT**

In the present case, both the United States District Court, Southern District of Boerum and the United States Court of Appeals for the Fourteenth Circuit incorrectly ruled that: (1) the out-of-court statements made by Reardon to Best were inadmissible; (2) Crawley was entitled to a journalist's privilege, and (3) Agent Simandy's lay opinion testimony as to Defendant's use of code words is inadmissible under Rule 701. Their decisions, therefore, must be reversed.

First, this Court should overturn the circuit court and hold that Defendant's involvement in the conspiracy renders him subject to the forfeiture-by-wrongdoing hearsay exception codified in 804(B)(6) of the Federal Rules of Evidence. The court below mischaracterized the statement at issue before this Court as testimonial evidence, thereby subjecting it to the Giles standard. However, the statement is not testimonial and must only satisfy the Cherry standard, which it does because Defendant clearly acquiesced to Anderson's murdering of Reardon in furtherance of the elephant hunting conspiracy. Since the statement is not testimonial, as it was made by Reardon to an acquaintance, and the Cherry standard requires only that Defendant acquiesced to the murder and that said murder was committed in furtherance of the conspiracy, this Court must admit Reardon's hearsay statement.

Second, this Court should overturn the circuit court and reject Crawley's motion to quash because no reporter's privilege exists. The courts below erroneously recognized a journalist's privilege against testifying at a criminal trial despite this Court's explicit rejection that such a

privilege exists. Neither the common law nor the United States Constitution recognizes the privilege, and reason and experience should prevent this Court from recognizing a new privilege under Rule 501. Alternatively, if a privilege is deemed to exist, it should be recognized as a qualified privilege that does not protect Crawley because the public and private interests are better served by compelling the disclosure of information in her possession rather than in maintaining confidentiality of this particular source.

Finally, this Court should overturn the circuit court and permit Agent Simandy's lay opinion testimony as to Defendant's use of code words in furtherance of his conspiracies under Rule 701. First, Agent Simandy's testimony is based on his rational perception of the transcripts of Defendant's conversations. Second, Agent Simandy's testimony is helpful to the jury in its determination of a material fact because the jury is unlikely to be familiar with the use of code words used to disguise criminal activity. Lastly, the testimony should be admitted because it is not based on scientific, technical, or other specialized knowledge that would render it expert testimony under Rule 702.

### ARGUMENT

**I. THE FORFEITURE-BY-WRONGDOING EXCEPTION CODIFIED IN FEDERAL RULE OF EVIDENCE 804(B)(6) EXTENDS TO CRIMES COMMITTED BY CO-CONSPIRATORS BECAUSE THE DRAFTERS OF THE RULES INTENDED TO ADDRESS REPUGNANT BEHAVIOR, SUCH AS THAT OF DEFENDANT IN HIS INVOLVEMENT IN THE MURDER OF REARDON TO PREVENT REARDON FROM EXPOSING THEIR CONSPIRACY.**

This Court should overturn the lower court's decision and admit the hearsay testimony of Reardon because Defendant clearly acquiesced to the murder in an effort to prevent the declarant, Reardon, from exposing the conspiracy. The forfeiture-by-wrongdoing doctrine extends to conspiratorial liability, as articulated in Pinkerton v. United States, because the drafters of the Federal Rules of Evidence, when codifying the common law exception to hearsay

known as forfeiture-by-wrongdoing in 804(B)(6), intended the doctrine to be broadly applied in an effort to prevent wrongdoers from benefiting from their criminal deeds. 328 U.S. 640, 646-47 (1946). Conspiratorial liability and the forfeiture-by-wrongdoing exception to the hearsay rule share an intent requirement and courts have followed the reasoning of the drafters of the Federal Rules of Evidence by finding that when there is a conspiracy, the co-conspirators expose themselves to imputed liability. See United States v. Thomson, 286 F.3d 950, 963 (7<sup>th</sup> Cir. 2002). Therefore, the undisputed actions of Anderson in murdering Reardon are imputed to Defendant.

Pinkerton liability allows for conspirators to share responsibility for any crime committed while in the conspiracy, so long as it was reasonably foreseeable, or in furtherance of the goals of the conspiracy. See Pinkerton, 328 U.S. at 646–47 (1946). The theory behind this doctrine stems from the belief that all co-conspirators act together and in agreement to achieve the end goal. Id. This theory has been carried into the forfeiture-by-wrongdoing exception to hearsay. See United States v. Cherry, 217 F.3d 811 (10<sup>th</sup> Cir. 2000), Giles v. California, 554 U.S. 353 (2008). Where a conspiracy exists, and the murder was reasonably foreseeable, within the scope of, and in furtherance of, the conspiracy, the conspirator waives his right to confront the witness under the Confrontation Clause. Thus, in the present case, Defendant, as a co-conspirator with Anderson, waived his protection from hearsay statements in court because of his involvement in the underlying conspiracy.

The test for determining whether an out-of-court statement can be admitted against a defendant for 804(B)(6) purposes has developed over a long and sordid history of case law, but has ultimately resulted in a two part test: that the defendant “wrongfully caused or acquiesced in wrongfully causing the declarant’s unavailability,” Fed. R. Evid. 804(B)(6), and that either the

“defendant participated directly in planning or procuring the declarant’s unavailability or the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.” U.S. v. Dinkins, 691 F.3d 358, 385 (4<sup>th</sup> Cir. 2012). In this case, Defendant possessed actual knowledge of Anderson’s plot to murder Reardon and thus acquiesced to the murder, which the record indicates was intended to prevent the witness from exposing the plot and subsequently testifying against Anderson and Defendant. Therefore, Defendant has forfeited his right to confront the witness because of his involvement in the conspiracy, and Reardon’s statement to Best is subject to the hearsay exception under 804(B)(6) because of the imputed liability of Anderson’s actions onto Defendant.

**A. The Proper Test to Apply to the Hearsay Evidence at Issue is the Cherry Standard, not Giles, because Giles Applies Only to Testimonial Evidence, Whereas the Hearsay Evidence Before this Court is Non-Testimonial in Nature and Subject to a Lower Standard.**

This Court should overturn the lower court’s decision and allow Reardon’s hearsay statement into evidence because the lower court mischaracterized the statement as testimonial, thereby subjecting it to the Giles standard when it is actually non-testimonial and a lower threshold articulated in Cherry applies. Therefore, the lower court erred in applying the Giles standard, which is reserved for testimonial statements.

In Crawford v. Washington, this Court held that where non-testimonial statements are involved, a court may use its discretion to determine the reliability of the statement and whether it satisfies any of the hearsay exceptions, such as 804(B)(6). 541 U.S. 36, 68 (2004). However, this is the extent of guidance the Court gives on non-testimonial evidence. The only other decision of this Court which remotely deals with the question of statements admitted under hearsay is Giles v. California, but the analysis was limited to testimonial evidence. In fact, this

Court specifically stated that non-testimonial evidence was not subject to the Confrontation Clause analysis articulated in Giles. 554 U.S. 353.

Neither Giles nor Crawford creates a framework by which to evaluate non-testimonial evidence under a hearsay exception, but the circuit courts provide an understanding of how to reconcile non-testimonial statements and hearsay exceptions. In fact, Giles did not change any law – rather, it clarified what was already established law in United States v. Gray. 405 F.3d 227, 241 (4th Cir. 2005) (emphasis in original). In Gray, the defendant was convicted of wire fraud and mail fraud regarding insurance payouts from her deceased husband. The court considered four statements made by her late husband, two in official criminal complaints, one verbal complaint to a police office, and one verbal statement made to a lay person. The defendant in Gray, who killed her husband, argued that she had not intended to cause her husband’s unavailability at this particular trial. However, the court found that “the text [of the exception] does not require that the declarant would otherwise be a witness at any *particular* trial, nor does it limit the subject matter of admissible statements to events distinct from the events at issue in the trial in which the statements are offered.” Id. Rather, the exception applies whenever the defendant intended to make the declarant unavailable for any proceedings.

Here, the statements the Government seeks to admit are not testimonial in nature because they were made to a friend of the decedent. According to Crawford, testimonial evidence is a formal statement of some sort, traditionally to a government officer, distinguishing it from the type of statement a person would make to a personal acquaintance. 541 U.S. at 52. Examples of testimonial evidence include affidavits, custodial examinations, pre-trial statements, or any other ex-parte in-court testimony or its functional equivalent. Id. Clearly, a statement merely made to an acquaintance who was certainly not in any way the functional equivalent to a taker of

testimony falls outside the definition of testimonial evidence and the type of statements to which this Court has extended Confrontation Clause protection.

Therefore, this Court should apply the proper standard as articulated in Cherry, which is better suited to address non-testimonial statements seeking to be admitted under the forfeiture-by-wrongdoing exception to hearsay and thereby admit Reardon's hearsay statement.

**B. The Forfeiture-by-Wrongdoing Exception to 804(B)(6) Applies Because Reardon's Murder was Reasonably Foreseeable to Defendant and was in Furtherance of the Underlying Conspiracy.**

Reardon's statements can be admitted against Defendant because the murder of Reardon was reasonably foreseeable and was committed in furtherance of the conspiracy. Under the standard articulated by the court in United States v. Cherry, 217 F.3d 811, Defendant's actions clearly subject him to the hearsay exception articulated in the forfeiture-by-wrongdoing clause of 804(B)(6) because he acquiesced to the murder of Reardon by co-conspirator Anderson, which was committed in furtherance of the underlying conspiracy. This Court should reverse and apply the proper standard articulated in Cherry, thereby admitting the hearsay statement.

Cherry set forth a very careful analysis of conspiratorial responsibility and acquiescence under 804(B)(6)<sup>1</sup>, finding that 804(B)(6) extends to include Pinkerton liability because it appropriately addresses imputed liability for waiver of hearsay. 217 F.3d at 818. In Cherry, the court held that where the government can show that the elements of Pinkerton liability are established and satisfied, the co-conspirator may be found to have acquiesced in the wrongful procurement of a witness's unavailability under the forfeiture-by-wrongdoing statute. Id. at 820. To satisfy Pinkerton, the act must have been done in furtherance of the conspiracy - either as the

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<sup>1</sup> While Cherry was decided four years prior to Crawford and eight years prior to Giles, the substantive law from Cherry does not change because of Crawford or Giles and is only strengthened provided intent can be proven. This is because Crawford and Giles was specifically speaking testimonial evidence, which is not at issue in the case at bar.

goal of the conspiracy or in facilitating the end result of the conspiracy. United States v. Mothersill, 87 F.3d 1214, 1218 (11<sup>th</sup> Cir. 1996); Cherry, 217 F.3d at 817. In this regard, Defendant's involvement in the underlying conspiracy that Anderson was attempting to cover-up with the murder means Defendant waived his right to confront the decedent "just as if he had killed the witness himself." Thompson, 286 F.3d at 963.

Government Exhibit A establishes that Defendant was concerned with Reardon's potential to expose the conspiracy between the three men. At the end of the first phone conversation, Defendant agreed to confront Reardon in an effort to prevent him from testifying against the other two men. (R. at 18). The beginning of the second phone conversation confirms that Defendant took steps to intimidate and prevent Reardon from exposing the conspiracy. (R. at 19). Since Defendant acknowledged and acquiesced in Reardon's murder, there can be no finding rooted in fact other than the imputed liability for purposes of hearsay exception 804(B)(6), forfeiture-by-wrongdoing. The murder of Reardon by Anderson was clearly foreseeable to Defendant as a result of the phone conversation between Defendant and Anderson and was committed in an effort to maintain the conspiracy agreed to by all three men. Defendant foresaw that Anderson intended to murder Reardon in an attempt to silence him in furtherance of the conspiracy. The plain language of 804(B)(6) is to be interpreted broadly, as is indicated in the commentary to the Federal Rules of Evidence. Notes of Advisory Committee (1997). This broad construction prevents individuals from profiting from their own despicable behavior, such as murdering a witness to prevent him another from testifying in court. Id. Therefore, Reardon's statements should be admitted.

The language of 804(B)(6) makes clear that in order for the hearsay exception to apply, Defendant must have either caused or acquiesced to causing the unavailability of the witness.<sup>2</sup> “At its core, acquiescence means agreement.” James Flanagan: *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(B)(6)*, 51 Drake L. Red. 459, 501 (2003). There are two prevailing views as to what constitutes acquiescence. The first, set forth in United States v. Mastrangelo, is a minimal standard of “knowledge, complicity, planning or in any other way.” 693 F.2d 272, 273-74 (2d Cir. 1982). This creates an affirmative duty to report the impending crime. Flanagan, *supra*, at 502. Alternatively, “[p]rior to Mastrangelo, courts generally required evidence of the defendant’s direct and substantial participation in intimidating or murdering the potential witnesses or those clearly acting on the defendant’s behalf.” *Id.* at 507. Under Pinkerton, liability can be imputed unto co-conspirators as long as the action was foreseeable or in furtherance of the agreed to conspiracy. 328 U.S. at 646–47. Defendant foresaw Anderson murdering Reardon because of the conversations transcribed in Government Exhibit A. (R. at 18). Furthermore, the murder was done in furtherance of the conspiracy to slaughter the elephants. Intent for the conspiratorial relationship is satisfied.

While actual knowledge is not necessary to satisfy the standard articulated in Cherry, 217 F.3d at 820, in this case, Defendant did, in fact, have knowledge of Anderson’s plan to “take care” of Reardon. Not only did Defendant have actual knowledge of Anderson’s plans to murder Reardon in cold blood, but Defendant himself confronted Reardon, as mentioned in the

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<sup>2</sup> Furthermore, the text of 804(B)(6) “does not require the declarant would otherwise be a witness at any *particular* trial.” United States v. Stewart, 485 F.3d 666, 672 (2d Cir. 2007) citing to Gray, 405 F.3d at 241, 242 (emphasis in original). Furthermore, the forfeiture principal even applies where there is no ongoing or immediate proceeding. *Id.* Therefore, that there was no investigation or trial into the conspiracy at the time co-conspirators Defendant and Mr. Anderson murdered Mr. Reardon is of no issue to the imputed liability of the murder to Defendant for forfeiture purposes.

beginning of the second phone conversation included in Government Exhibit A. (R. at 18). This demonstrates a clear intent to prevent Reardon from revealing or subsequently testifying about the ongoing conspiracy. The record contains two discussions between Defendant and Anderson regarding how to handle Reardon's potential deflection from the conspiracy and his threat as a witness. (R. at 18-19). This establishes that Reardon's murder was intended to preserve and protect the co-conspirators, thereby falling within the necessary framework established under Cherry to admit the statement under the forfeiture-by-wrongdoing exception to the hearsay rule. Therefore, the lower court erred, and this Court should find that conspiratorial liability imputes the forfeiture-by-wrongdoing exception to the hearsay rule and admit Reardon's statement.

**C. Declarant's Hearsay Statement Must be Admitted Against Defendant Because the Forfeiture-by-Wrongdoing Exception to Hearsay is Rooted in Preventing Individuals from Benefiting from Their Own Heinous Actions.**

Defendant's conduct goes to the heart of the reasoning behind the codification of the common law doctrine of forfeiture-by-wrongdoing, in that Defendant's planning of the conspiracy is exactly the kind of behavior that the drafters of the rules of evidence intended 804(B)(6) to address. According to the drafter's commentary, "This recognizes the need for a prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself." United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984)." Notes of Advisory Committee (1997) (internal citations in original). Defendant's behavior, including the intimidation of Reardon and his continuous conversations with Anderson regarding how to handle Reardon defecting from the group, strongly supports a finding by this Court that the hearsay should be admitted.

It is a natural extension of the Pinkerton doctrine to include 804(B)(6) not only because other courts have done so, but also because there are safeguards in place to prevent the doctrine

from becoming too expansive. Courts have been careful to limit the Pinkerton doctrine by requiring the act in question to be connected to the actual crime which forfeited the right to confrontation. The Pinkerton liability theory is used in enough other circumstances that it is a logical progression to extend it to include 804(B)(6) waiver. Flanagan, *supra*, at 517. Since the case law has created sufficient enough precautions to ensure proper imputation of liability, it furthers the underlying purpose of preventing criminals from benefiting from their own wrongdoing.

Being that Defendant's actions clearly satisfy the standard for co-conspiratorial liability articulated in Pinkerton, the standard for forfeiture-by-wrongdoing is also satisfied. In United States v. Houlihan, the First Circuit found that where co-conspirator liability is satisfied, so, too, is any standard for forfeiture-by-wrongdoing. 92 F.3d 1271, 1280 (1st Cir. 1912). Thompson, a 2011 Seventh Circuit case, extended the application of the Cherry doctrine to a situation in which it was clear that the co-conspirators had no actual knowledge of a murder. In the spirit of co-conspirator liability under Pinkerton, the court held that imputed waiver is a rational risk one undertakes when he or she enter into a conspiracy. 286 F.3d at 956. This is consistent with the reasoning of 804(B)(6), as well as with the theory that the satisfaction of Pinkerton is sufficient to satisfy the forfeiture-by-wrongdoing exception to the hearsay rule where it was foreseeable to Defendant that the event may occur. Id. Since Defendant had actual knowledge of Anderson's intent and plan to murder Reardon, and because actual knowledge satisfies foreseeability under Cherry, Reardon's statements to Best should be admitted against Defendant under 804(B)(6).

**II. CRAWLEY’S MOTION TO QUASH SHOULD BE DENIED BECAUSE A JOURNALIST’S PRIVILEGE IS NOT RECOGNIZED BY EITHER COMMON LAW OR THE UNITED STATES CONSTITUTION; HOWEVER, IF THIS COURT RECOGNIZES A JOURNALIST’S PRIVILEGE, THEN IT IS QUALIFIED, NOT ABSOLUTE, AND DOES NOT SHIELD CRAWLEY FROM TESTIFYING AT DEFENDANT’S CRIMINAL TRIAL.**

Crawley is not entitled to a journalist’s privilege against testifying in a criminal court because no right exists in either the common law or United States Constitution, and no such right should be created by this Court. Pursuant to the Federal Rules of Evidence, “The common law...governs a claim of privilege unless ... the United States Constitution, a federal statute, or rules prescribed by the Supreme Court” provide otherwise. Fed. R. Evid. 501. As such, Crawley must show that a reporter’s privilege is either recognized in federal common law or the United States Constitution. This Court should affirm that neither the common law nor the Constitution provide a reporter’s privilege, overturn the court below, and deny Crawley’s motion to quash.

Notwithstanding the fact that recognizing a qualified reporter’s privilege would be as far of a deviation from this Court’s jurisprudence as would recognizing an absolute privilege, if the Court does find a common law privilege, then that privilege should be qualified. While some federal courts recognize a privilege can shield information that a reporter obtained through a non-confidential source, see Gonzales v. National Broadcasting Co., 194 F.3d 29, 36 n.2 (2d Cir. 1999), a majority of the courts require the source to be confidential before the information possessed by a reporter is protected by the privilege. Storer Communs. Inc. v. Giovan (In re Grand Jury Proceedings), 810 F.2d 580, 584-85 (6th Cir. 1987). Regardless, if a qualified privilege is recognized, it should require a case-by-case balancing of interests, see Branzburg, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring), which in this case would result in the denial of Crawley’s motion to quash.

**A. Crawley is Not Entitled to a Reporter’s Privilege Because this Court has Rejected the Existence of a Reporter’s Privilege at Common Law and as Existing Under the First Amendment.**

This Court has expressly rejected the existence of a reporter’s common law privilege stemming from the First Amendment. Branzburg, 408 U.S. 665. In Branzburg, the issue before the Court was “whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment.” Id. at 667. Although addressing a privilege in the context of a grand jury’s subpoena power, the Court was steadfast in rejecting the existence of the privilege in any circumstance. Id. at 685-90. This Court should follow the decision in Branzburg and hold that Crawley is required to testify because a reporter’s privilege does not exist.

Branzburg consisted of four consolidated cases involving three reporters<sup>3</sup> who collectively asserted a First Amendment right not to disclose confidential information acquired during a reporter’s investigation. Id. at 679-80. The Court, without “question[ing]” the significance of free speech, press, or assembly to the country’s welfare,” Id. at 681, rejected the argument: “[N]either the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.” Id. at 682. A privilege should not be created merely because the revelation of confidential material to a grand jury might result in incidental burdens to the press:

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<sup>3</sup> In the first two cases, Petitioner Paul Branzburg was a reporter who wrote an article about his observations of people manufacturing and using hashish. Branzburg, 408 U.S. at 668-69. He was subpoenaed by a grand jury but he refused to identify the names of his sources. Id. at 669. In the third case, petitioner Paul Pappas was a television newsman who received permission to enter a barricaded area to cover a Black Panthers news conference, where he expected a police raid to occur, though it never did. Id. at 672. Pappas was subpoenaed by a grand jury, but he refused to answer any questions about what had taken place, claiming a privilege under the First Amendment to protect confidential informants and their information. Id. at 673. In the fourth case, Respondent Earl Caldwell was a New York Times reporter who covered the Black Panther party. Id. at 675. After being subpoenaed to testify before a grand jury about the Black Panthers’ involvement in crime, he argued that appearing in court would suppress his First Amendment freedoms absent any compelling government interest in his appearance. Id. at 677.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

Id. at 682-83. Indeed, “the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.” Id. at 685. The distinction that Branzburg addressed a privilege against testifying before a grand jury while this case addresses the assertion of the privilege against testifying at a criminal trial is trivial. “Until now 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 685-90 (emphasis added). Thus, the Court refused to “create another [privilege] by interpreting the First Amendment to grant newsman a testimonial privilege that other citizens do not enjoy.” Id. at 690.

There has been disagreement on the precedential value of Branzburg because some circuits follow Justice Powell’s concurring opinion and recognize a privilege. “A large number of cases conclude, rather surprisingly in light of Branzburg, that there is a reporter’s privilege, though they do not agree on its scope.” McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003); see e.g. In re Madden, 151 F.3d 125 (3d Cir. 1998); United States v. Smith, 125 F.3d 963, 968 (5th Cir. 1998). Such an interpretation ignores the fact that the Court’s majority opinion rejected such a privilege. “[The] Constitution does not, as it never has, exempt the newsman from performing the citizens normal duty of appearing and furnishing information relevant to the grand jury’s task.” Branzburg, 408 U.S. at 689-91. Justice Powell agreed with the majority’s holding that there was no journalist’s privilege and merely wrote his concurring opinion to clarify the safeguards already in place to protect reporters from being forced to give unnecessary

testimony or otherwise being the victim of a grand jury that is abusing its subpoena power. See Branzburg, 408 U.S. at 710 (Powell, J., concurring). In fact, Justice Stewart, in a dissenting opinion, deplored the majority for refusing to recognize a qualified privilege. Branzburg, 408 U.S. at 743 (Stewart, J., dissenting). The dissent highlights that Justice Powell’s concurrence did not speak against the holding that no journalist’s privilege exists. Justice Powell’s opinion “neither limits nor expands” the majority opinion. In re Grand Jury, 810 F.2d 585. Rather, Justice Powell’s concurring opinion responds to Justice Stewart’s dissenting opinion and uses the term “privilege” to refer to the power of the courts to exclude evidence that is unreliable or calculated to mislead or cause prejudice. Id. at 585-86. However, “this balancing of interests should not be then elevated on the basis of semantical confusion, to the status of a first amendment constitutional privilege.” Id. at 586. Instead, courts can strike a proper balance between freedom of the press and the obligation to give relevant testimony. Id. A constitutional privilege is not required. Id.

Here, the Court should provide finality and hold that reporters do not have a privilege, absolute or qualified, against testifying before either a grand jury or at a criminal trial. The court below erred by failing to acknowledge Branzburg and its binding effect. (R. at 28-30). Therefore, this Court should reverse the lower court by denying Crawley’s motion to quash.

**B. A New Common Law Privilege Should Not Be Created Because Reason and Experience Compel a Rejection of the Privilege.**

In addition to affirming Branzburg, this Court should abstain from creating a new common law reporter’s privilege under Federal Rule of Evidence 501. Both reason and experience weigh against the recognition of a new privilege because doing so is needless, as the federal rules already provide protections to any witness subpoenaed to testify, Fed. R. Evid. 17(c)(2), and also because the regular exercise of a court’s subpoena power does not infringe on

any asserted First Amendment interest. See Branzburg, 408 U.S. at 691. Although Congress adopted Rule 501 to provide courts with the flexibility to adopt common law privileges on a case-by-case basis, the Court does not exercise the authority expansively. Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990). This Court is even less willing to create new privileges where Congress has considered, but not provided, the privilege. Id. Considering this is an issue Congress has considered, and is free to consider at any time, this Court should refrain from exercising its authority under Rule 501 to create a new common law reporter’s privilege.

The seminal case on the creation of new privileges under Rule 501 is Jaffee v. Redmond, 518 U.S. 1 (1996). In Jaffee, a police officer had received extensive counseling from a licensed clinical social worker after a traumatic accident in which she shot and killed a man. Id. at 3. The issue before this Court was whether it is appropriate for federal courts to recognize a psychotherapist privilege under Rule 501. Id. The Court of Appeals for the Seventh Circuit had concluded that “‘reason and experience,’ the touchstones for acceptance of a privilege under Rule 501 . . . compelled recognition of a psychotherapist-patient privilege.” Id. at 6 (quotations in original) (citations omitted). The Seventh Circuit, however, qualified the privilege in that it would not apply if “the evidentiary need for the disclosure of the contents of a patient’s counseling sessions outweighs that patient’s privacy interests.” Id. (citation omitted).

This Court affirmed the existence of a nearly-absolute psychotherapist-patient privilege under Rule 501, but rejected any balancing test because it would imperil judges by requiring careful, case-by-case analyses each time the privilege was asserted. Id. at 17-18. In doing so, this Court crafted a test to be used in creating federal common law privileges. Id. at 9-14. “The test requires an analysis of the importance of the public and private interests served by the privilege, measured against the public interest in forcing disclosure of evidence, and

consideration of the extent to which the states [have] adopted a similar privilege through common or statutory law.” Anthony L. Fargo and Paul McAdoo, *Common Law or Shield Law? How Rule 501 Could Solve the Journalist’s Privilege Problem*, 33 Wm. Mitchell L. Rev. 1347, 1367 (2007). The Jaffee test conclusively shows that a reporter’s privilege should not be recognized.

The psychotherapist-patient privilege, like the spousal and attorney-client privileges, are rooted in the imperative need for confidence and trust. Jaffee, 518 U.S. at 10. The disclosure of confidential communications made during counseling sessions, or the mere possibility of disclosure, may impede successful treatment. Id. Thus, “There is wide agreement that confidentiality is a *sine quo non* for successful psychiatric treatment.” Id. Protecting the confidential communications between a patient and psychotherapist serves important private interests as it promotes successful treatment. Id. at 11. The privilege also serves an important public interest by facilitating the appropriate treatment for individuals suffering a mental or emotional problem, and “mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” Id. at 11. In contrast,

The likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence ... is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

Id. at 11-12.

Finally, this Court deemed it appropriate for the federal courts to recognize a psychotherapist privilege because all fifty states and the District of Columbia had enacted into law some form of the privilege. Id. at 12. The consensus of the states indicated that “reason and

experience” supported federal recognition of the privilege. Id. at 13. The judgment of the states was “reinforced by the fact that a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules.” Id. at 14. These factors that weighed in favor of the psychotherapist privilege weigh against the recognition of a reporters privilege.

The court below erred in finding that, under Jaffee, the federal common law recognizes a journalist’s privilege. (R. at 29). The only factor weighing in favor of the reporters privilege is that thirty-two of the states recognize a reporter’s privilege through statute or formal court rules. Fargo and McAdoo, *supra*, at 1386. However, the strongest criticism of Jaffee was its reliance on state action to justify recognizing a new federal common law privilege. Fargo and McAdoo, *supra*, at 1385. The fact that so many states had acted is indicative that the privilege is not grounded in common law and that the privilege is better suited to the flexibility of legislation. See Jaffee, 518 U.S. at 26 (Scalia, J., dissenting). Assuming that state action remains a factor of consideration would only show that “experience” is on the side of journalists and reporters – but not “reason.” Fargo and McAdoo, *supra*, at 1386.

“Reason” is a much larger obstacle to the recognition of a reporter’s privilege than “experience” because a substantial weight of legal authority shows that only Congress can recognize the privilege at a federal level. Congress twice considered the issue in 2005 when the Free Flow of Information Act of 2005 was introduced in both the House of Representatives and Senate. H.R. 581 (2005); S. 349 (2005). Thus, the Court should be reluctant to recognize the privilege. EEOC, 493 U.S. at 189. Additionally, the reporter’s privilege was not one of the nine specific privileges recommended before Rule 501 was adopted. Some commentators contend that this fact alone would require Rule 501 to be amended to explicitly recognize a reporter’s

privilege because no federal court can properly recognize the privilege under common law in light of Branzburg. Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 Gonz. L. Rev. 445, 447-48, 500 (2002).

Branzburg dismissed the public and private interests served by a reporter's privilege as trivial and found that the public's interest in forcing the disclosure of evidence was compelling, 408 U.S. at 698-99, reaffirming the longstanding principle that the First Amendment confers no special treatment to the members of the press, and that laws regularly enforced may limit the press' ability to access or publish information. Id. at 682-83. The press has flourished without constitutional or common law protection, and the mere development of new forms of media is not a compelling reason to recognize a new privilege. Id. at 698-99.

From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. . . . It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources. . . . These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.

Branzburg, 408 U.S. at 698-99. Therefore, "reason" compels this Court to reject a journalist's privilege.

Finally, there is no need to create a reporter's privilege because safeguards already exist to protect reporters from needlessly testifying. A reporter or journalist may file, in response to a subpoena to testify or produce evidence in a criminal trial, a motion to "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). The Seventh Circuit contends this protective rule is sufficient and reiterates the logic of Branzburg,

It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for

judicial review of subpoenas. We do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.

Pallasch, 339 F.3d at 533 (7th Cir. 2003) (citations omitted). The existing rules are sufficient safeguards to ensure that reporters are only subject to reasonable subpoenas, and that such subpoenas do not function as an infringement of any First Amendment right.

This Court should follow Branzburg and allow the existing rules of criminal procedure, as approved by Congress, to dictate the relationship between reporters and the criminal process. There is no need to create a new privilege. This Court should reverse the lower court and deny Crawley's motion to quash.

**C. Even if This Court Recognizes a Reporter's Privilege, Then Such Privilege is Qualified and the Public and Private Interests Weigh in Favor of Compelled Disclosure.**

If this Court decides to recognize a new reporter's privilege under Rule 501, then the privilege should be qualified because certain situations, such as the case at bar, require compelling the disclosure of information. Although Justice Powell's concurring opinion did not recognize the privilege, it is helpful in determining the contours of a qualified privilege because it is the genesis for many circuits' recognition of the privilege, see supra at 17. Additionally, it complies with Supreme Court jurisprudence calling for a case-by-case development of common law privileges. EEOC, 493 U.S. at 189.

The privilege should strike a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Branzburg, 408 U.S. at 710 (Powell, J., concurring). In fact, many courts have held that an exception to the privilege exists for reporters who observed or participated in criminal conduct and that the public's interest in compelling disclosure outweighs the interests served by the

privilege. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, Boston College of Law School Faculty Paper 167, at 587 (2007), <http://lawdigitalcommons.bc.edu/lfp/167>. Synthesizing the variations in state shield laws and federal courts' recognitions of a qualified privilege results in the following legal formulation:

A qualified privilege can be overcome by showing (1) the desired information is critical to the maintenance of a party claim, defense, or proof of an issue; (2) the information sought cannot be obtained by alternative means; and (3) there is a compelling interest in the information that outweighs the public's interest in the free flow of information.

Papandrea, *supra*, at 584. Following this approach, Crawley's qualified privilege would be overcome in this case.

First, the desired information is critical to the Government proving its claim against Defendant. The videotape in Crawley's possession describes what a particular employee knew of Defendant's conspiracy. (R. at 10:137-49). Importantly, the employee witnessed a conversation Defendant had with another party concerning a plan to kill elephants for their ivory. (R. at 10:136-38). This evidence is highly probative and speaks directly to whether Defendant was engaged in the conspiracies named herein. Second, the information sought cannot be obtained by alternative means. Certainly, the article published by Crawley contains some, if not all, of the material contained on her videotape of the confidential employee. (R. at 11:153-56). That does not mean that the article is admissible as evidence. Since the name of the employee is not known, he or she is not available as a witness. (R. at 10:141-45). Consequently, the information sought cannot be obtained for use in trial through alternative means.

Finally, there is a compelling public interest in forcing the disclosure of information in Crawley's possession that outweighs the public's interest in the free flow of information. Defendant asserts that forced disclosure "will dissuade people from talking to the press," (R. at

11:162-63), which in turn limits the flow of information. These fears were expressly rejected in Branzburg, 408 U.S. at 682-85, and they should be rejected here because it is doubtful that “the informer who prefers anonymity, but is sincerely interested in furnishing evidence of a crime, will be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.” Id. at 695. Further, this Court “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.” Id. Consequently, the public interest in prosecuting Defendant outweighs any threat to the flow of information.

The vast majority of states and jurisdictions recognize a qualified, not absolute, privilege because reporters have the same obligation of every other citizen to testify in criminal proceedings. See Branzburg, 408 U.S. at 674. For example, a reporter’s privilege is often not available where the reporter witnessed or participated in a crime. See e.g., COLO. REV. STAT. § 13-90-119(2)(d) (2005); FLA. STAT. § 90.5015(2) (2005). Some jurisdictions do not compel disclosure where the information in the reporter’s possession has only marginal relevance to the criminal proceeding, see Riley v. Chester, 612 F.2d 708 (3d Cir. 1979), whereas others look to whether the subpoena seeking to compel disclosure is reasonable under the circumstances. Pallasch, 339 F.3d at 533. Regardless, qualified privileges are more common and reasonable than those that are absolute, and this Court’s decision should reflect that trend.

Any privileged recognized by this Court should be qualified because a case-by-case development of common law privileges is consistent with the development of the doctrine. Moreover, there is no reason to recognize an absolute privilege in a situation where, as here, the

balancing of factors weighs in favor of forced disclosure. The court below found the privilege to be absolute because a qualified privilege would result in unpredictable decisions by trial judges that would erode the relationship between journalists and informants. (R. at 30). However, these concerns are unwarranted. This Court has expressly stated that the absence of a privilege does not affect the relationship between informants and reporters, Branzburg, 408 U.S. at 698-99. Likewise, a qualified privilege, subject to case-by-case analysis, will not hamper reporters' investigations. Regardless of whether this Court rejects the existence of the privilege or recognizes a qualified privilege, this Court should overturn the lower court and deny Crawley's motion to quash.

**III. AGENT SIMANDY'S LAY OPINION TESTIMONY AS TO THE DEFENDANT'S USE OF CODE WORDS IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 701 BECAUSE SUCH TESTIMONY IS BASED ON HIS RATIONAL PERCEPTION, HELPFUL TO THE JURY IN DETERMINING AN ISSUE OF FACT, AND IS NOT BASED ON SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WITHIN THE SCOPE OF RULE 702.**

Agent Simandy should be allowed to testify as to the Defendant's use of code words because he qualifies as a lay witness under Rule 701. Rule 701 provides that a witness not testifying as an expert may give testimony in the form of an opinion that is (1) rationally based on the witness's perception; (2) helpful to determining a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the ambit of Rule 702. Fed. R. Evid. 701. This Court provides little guidance for determining whether each element is satisfied; therefore, the trial judge retains considerable discretion in determining whether a witness is qualified to give lay opinion testimony. See United States v. Trenton Potteries Co., 273 U.S. 392 (1927). The circuit courts have offered varying interpretations of the rule as it pertains here to a police officer who reviewed conversation transcripts after they occurred. One position, adopted

by the First, Second, Third, Fourth and Eighth Circuits, is that lay opinion testimony is not admissible unless the witness personally participated in or contemporaneously observed the subject of the testimony. See Swajian v. General Motors Corp., 916 F.2d 31, 36 (1st Cir. 1990); United States v. Garcia, 413 F.3d 201, 212-13 (2d Cir. 2005); Hirst v. Inverness Hotel Corp., 544 F.3d 221, 224-28 (3d Cir. 2008); United States v. Johnson, 617 F.3d 286, 293 (4th Cir. 2010); United States v. Peoples, 250 F.3d 630, 640-41 (2001). Another position is held by the Seventh and Ninth Circuits, which permits lay opinion testimony where the witness has both first- and second-hand knowledge, such as when a police officer both observes or listens to a conversation as it occurs and later reads a transcript of the conversation. See United States v. Rollins, 544 F.3d 820, 831-32 (7th Cir. 2008); United States v. Freeman, 498 F.3d 893, 906 (9th Cir. 2007). However, the best interpretation is that lay opinion testimony is admissible even if it is based solely on information compiled after the investigation, see United States v. Jayyousi, 657 F.3d 1085, 1104 (11th Cir. 2011); United States v. El-Mezain, 664 F.3d 467, 513 (5th Cir. 2011); United States v. Zepeda-Lopez, 478 F.3d 1213, 1217 (10th Cir. 2007), because it most fully comports with the purpose and language of Rule 501. As such, Agent Simandy should be permitted to testify as to his lay opinion.

**A. Agent Simandy's Lay Opinion Testimony is Based on His Rational Perception of the Transcript of Defendant's Conversations.**

Agent Simandy's testimony is rationally based on his perception, and thus satisfies the first requirement of Rule 701. According to the rule, lay opinion testimony need only be based upon personal observation. See e.g. United States v. Beck, 418 F.3d 1008, 1015 (9th Cir. 2005). The context and duration of the observation are irrelevant because "the extent of a witness's opportunity to observe the defendant goes to the weight of the testimony, not to its admissibility." Id. (citation omitted); see also United States v. Allen, 787 F.2d 933, 936 (4th Cir.

1986); United States v. Jackson, 688 F.2d 1121, 1125 (7th Cir. 1982). Consistent with this precedent, this Court should hold that Rule 701(a) only requires lay opinion testimony to be based on personal observation, as indicated in the plain language of the rule.

The Eleventh Circuit's decision in Jayyousi is instructive because it is materially similar to the case at bar. In Jayyousi, the government presented the lay opinion testimony of an FBI agent who began working on an investigation of a terrorist cell after it had commenced. 657 F.3d at 1095. The agent reviewed the telephone intercepts of the defendants as well as other documents pertaining to the case. Id. The agent testified that based on his experience in the investigation, the defendant and his co-conspirators were using code words in their communications about terrorist activity. For example, the agent "noticed the use of code words such as 'football' and 'soccer' for jihad; 'tourism' for jihad; 'tourist' for mujahideen; 'sneakers for support; "going on the picnic" for travel to jihad; [and] 'married' for martyrdom. . . ." Id. at 1095. Id. The defendant argued "that the agent should not have been allowed to proffer his lay opinion because he was not present during all of the intercepted calls and he did not have a rationally based perception of what the individuals meant when they used code words." Id. at 1102. The Eleventh Circuit properly rejected such a claim.

The Eleventh Circuit held that the FBI agent's testimony was rationally based on his perception, and therefore permissible lay opinion testimony under Rule 501. Id. The agent's investigation of the case included reading thousands of wiretap summaries and hundreds of verbatim transcripts, and a lay witness may base his or her opinion testimony on the "examination of documents even when the witness was not involved in the activity about which he testified." Id. All that is required is the testimony be rationally based on the witness'

perception – it is of no importance that the witness’ perception is of the transcript of a conversation, as opposed to the conversation itself.

Here, the court below erred in holding that Agent Simandy could not testify because he lacked first-hand knowledge of Defendant’s conversations. (R. at 31). Much like the agent in Jayyousi, Agent Simandy’s opinion testimony is based on his experiences in investigating the case at bar. Agent Simandy reviewed approximately one dozen conversations between Defendant and his co-conspirators, (R. at 13:216), interviewed Agent Lamberti of the ATF, who arranged to sell Defendant three unregistered, fully automatic AK-47 assault rifles, (R. at 13:223-25), and spoke to Klestadt, who arranged Defendant’s one-day rental of a helicopter. (R. at 13:225-26). By using what he learned from these interviews, including the dates and substance of Defendant’s conversations, Agent Simandy is qualified to give his lay opinion that Defendant was using code words, such as “blood diamonds,” to refer to the ivory tusks of the elephant and other critical aspects of the conspiracy. Jayyousi, 657 F.3d at 1102; (R. at 13:239 - 14:245). Agent Simandy’s testimony is based on his experience and observations – it is of no consequence that he was not present nor that he observed Defendant’s conversations as they happened. Therefore, Agent Simandy’s testimony is admissible under Rule 701(a).

**B. Agent Simandy’s Lay Opinion Testimony is Helpful to Determining a Fact in Issue.**

Agent Simandy’s testimony is admissible under Rule 701(b) because it is helpful to the jury in understanding the significance of the transcripts of Defendant’s conversations with his co-conspirators. Although Defendant may contend that the jury can read the transcript for itself, such an argument carries no merit. Testimony is not to be deemed “unhelpful merely because a jury might have the same opinion as the testifying witness.” United States v. Cruz-Rea, 626 F.3d

929, 935 (7th Cir. 2010). Agent Simandy's lay opinion testimony is admissible because it will help the jury understand what is not otherwise readily apparent.

Jayyousi also spoke to the issue of whether an FBI agent's testimony as to the meaning of code words was appropriate under Rule 701(b). 657 F.3d at 1103. The court held that such testimony is admissible because the "meaning of [certain] words is not perfectly clear without the witness's explanations." Id. (internal quotations and brackets omitted) (citation omitted). Specifically, the testimony helped the jury to understand the defendant's conversations as they related to the charges because the jury "would likely be unfamiliar with the complexities of terrorist activities." Id. (internal quotations omitted) (citation omitted). This decision is consistent with the Third Circuit, which permits lay opinion testimony by witnesses who interpret code-like conversations but rejects such testimony if it is offered to interpret clear statements. United States v. O'Grady, 280 Fed. Appx. 124, 130 (3d Cir. 2008).

The interpretations of the Eleventh and Third Circuits are consistent with the Advisory Committee's notes accompanying Rule 701(b), which provides,

The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415-417 (1952).

Advisory Committee's Notes (2000). In light of the foregoing authority, Agent Simandy's testimony should be admitted because his lay opinion complies with Rule 701(b) requirements.

Here, the court below erred in holding Agent Simandy's testimony to be inadmissible as it was unhelpful to the jury. (R. at 31). This decision is incorrect because Agent Simandy will not merely testify as to what the transcript says, which would be inadmissible, Cruz-Rea, 626 F.3d at 935, but rather will testify as to what the words in the transcript mean, which is

admissible. Id. The jury remains free to agree or disagree with Agent Simandy, but his insight as to how Defendant's code words relate directly to the furtherance of a conspiracy will help the jury determine a fact in issue. His testimony, therefore, should be permitted.

**C. Agent Simandy's Testimony is Not Based on Scientific, Technical, or Other Specialized Knowledge Within the Scope of Rule 702.**

Agent Simandy should be allowed to testify because he will give a lay opinion based on his experiences in the investigation of Defendant. Rule 701(c) requires that lay opinion testimony not be based on knowledge that would require the witness to be certified as an expert under Rule 702. In Jayyousi, the FBI agent's testimony about the meaning of code words was admissible because it was based "on his experience from [*that*] particular investigation," 657 F.3d at 1104 (emphasis added), not on the basis of any knowledge that would require his certification as an expert. Similarly, Agent Simandy's testimony is based on his experiences of investigating Defendant's case at bar and should be permitted.

The Advisory Committee's notes on the 2000 amendments illustrate that the rule is concerned with expert and lay testimony, not expert and lay witnesses; thus, a witness may give both expert and lay testimony. Advisory Committee Notes (2000). Additionally, the Advisory Committee explicitly stated that "[t]he amendment is not intended to affect the prototypical examples of the type of evidence contemplated by the adoption of Rule 701 relating to the appearance of persons or things..." Advisory Committee Notes (2000). For this reason, most courts allow the owner or officer of a business to testify to the value or projected profits of the business without having to first be certified as an expert. Advisory Committee Notes (2000). "Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to

change this analysis.” Advisory Committee Notes (2000). All that is required is that lay testimony “result from a process of reasoning familiar in everyday life.” Advisory Committee Notes (2000) (citation omitted). For example, the Ninth Circuit has held that law enforcement officers may testify that a defendant was acting suspiciously without first having been certified as an expert; however, the officers could not testify on the basis of extensive *prior* experience that the defendants were using code words to discuss drug quantities and prices. United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997).

The court below erred in finding that a witness who explains criminal jargon is necessarily using expertise within the scope of Rule 702 and is thus inadmissible opinion testimony. (R. at 31). However, Agent Simandy, who is experienced in drug related cases, (R. at 14:256), did not rely on prior experience in reaching the conclusions expressed in his lay testimony. The basis of Agent Simandy’s testimony is not subject to the rules governing expert opinion testimony and can properly be admitted by this Court. Jayyousi, 657 F.3d at 1104.

Having satisfied all of the requirements of Rule 701, Agent Simandy is qualified to give lay opinion testimony as to Defendant’s use of code words in furtherance of the conspiracy to kill the elephants and profit from their ivory tusks. Therefore, this Court should overturn the lower court, grant the Government’s motion in limine, and admit Agent Simandy’s lay opinion testimony.

### **CONCLUSION**

This Court should reverse the lower court on all three issues. First, Reardon’s statement should be deemed admissible under the forfeiture-by-wrongdoing exception codified in 804(B)(6) of the Federal Rules of Evidence because it is proper to extend the imputed liability found in Pinkerton to the hearsay exceptions. Second, Crawley’s motion to quash the subpoena

compelling her to appear at Defendant's criminal trial should be denied because there is no journalist's privilege. If this Court finds a privilege exists at common law, then it is qualified and does not protect Crawley from disclosing the information at issue. Finally, the lay opinion testimony of Agent Simandy should be admitted because it is based on his rational perception, helpful to the jury, and the foundation on which the testimony is based is not subject to Rule 702.