

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.*

---

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

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Brief for the Respondent

## **Questions Presented**

- I. Whether, under Federal Rule of Evidence 701, a lay witness is permitted to testify as to his opinion regarding the meaning of words and phrases in conversations when he did not participate in the conversations, did not contemporaneously observe the conversations, and the only documents that he relied on could be made available to the jury for its review.
  
- II. Whether, under Federal Rule of Evidence 804(b)(6), the forfeiture by wrongdoing exception's specific intent standard requires more than the foreseeability needed to impute liability based on a co-conspirator's actions when the defendant had no intention of making the witness unavailable and the co-conspirator disobeyed the defendant's express instructions to not harm the witness.
  
- III. Whether, under Federal Rule of Evidence 501, a journalist may claim an absolute journalist privilege to withhold both the identity of a source who requested confidentiality and the video recording of his interview, where the information was gathered for a journalistic investigation and the state has subpoenaed the information.

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## Statement of the Case

William Barnes is the sole proprietor of Big Top Circus (Big Top), a small business he inherited in 2000. (R. at 1.) To promote business, Barnes invited two nearby circuses to join Big Top in producing a month of holiday performances featuring elephants. (R. at 1, 2.) Both circuses agreed to participate and anticipated bringing ten elephants to be quartered at Big Top beginning on December 2, 2011. (R. at 1, 2.)

In an attempt to publicize the elephant show, Barnes contacted Kara Crawley, a reporter for the Boerum Times, to inform her of the show. (R. at 9.) She agreed to provide publicity, and in September of 2011, she spent two weeks observing the circus. (R. at 9.) While touring the facilities an employee approached her with information about a conversation he allegedly overheard Barnes have with another party regarding hunting the elephants at Big Top for ivory. (R. at 10.) Concerned with his safety, the employee required assurances of confidentiality before revealing the details. (R. at 10, 12, 22.) Specifically, he requested that a pseudonym be used instead of his real name in the article and that he not be identified as an employee at Big Top. Although the employee agreed to allow Crawley to videotape the conversation for her notes, it was only meant for Crawley to view. (R. at 10, 22.)

At the end of July, Barnes contacted Alfred Anderson regarding an opportunity to go on a hunt. (R. at 2.) Anderson agreed to go hunting, and in early November 2011 he invited an acquaintance, James Reardon, to join. (R. at 2, 7, 21.) On October 2, 2011, Barnes contacted Weapons Unlimited to inquire about purchasing rifles. (R. at 2, 13, 22.) Unbeknownst to Barnes, the employee he spoke with at Weapons Unlimited was an undercover Bureau of Alcohol, Tobacco, and Firearms agent, Jason Lamberti. (R. at 2, 22.) The agent suggested that Barnes consider buying the rifles under the table and Barnes agreed to do so. (R. at 2, 23.) After

accepting Lamberti's offer, the FBI obtained a warrant permitting the interception of Barnes's calls. (R. at 2, 6, 23.)

Between October 4, 2011 and December 1, 2011, the government recorded numerous telephone conversations between Barnes, Anderson, and Reardon. (R. at 3.) Agent Narvel Blackstock was originally assigned to the case. (R. at 12, 23.) He listened to the conversations contemporaneously and transcribed them. (R. at 13, 23.) Several of the recorded conversations revealed that by mid-November, 2011, Reardon began expressing second thoughts about joining Anderson and Barnes on the hunt. (R. at 7, 24.) In response, Anderson called Barnes to say that Reardon was a security risk and suggested that they "get rid of him". (R. at 7, 18.) Barnes replied, "...well, don't do anything". (R. at 19.) On another occasion, Anderson contacted Barnes exclaiming that Reardon should be put "out of the picture," but Barnes told him to "hold off" on doing anything. (R. at 7, 8, 19, 24.)

Thereafter, Agent Thomas Simandy was assigned to the case to replace Agent Blackstock. (R. at 12-13, 23.) He reviewed transcripts of the recorded telephone conversations and conducted two interviews. (R. at 13, 23.) Following his review, Agent Simandy hypothesized that several words and phrases used in the recorded conversations were codes. (R. at 13-14, 23.) At the hearing on whether to admit his testimony under Rule 701, Simandy asserted that "[t]he context of the conversations made it apparent what the defendant and his co-conspirators were discussing." (R. at 14.)

On November 28, 2011, Reardon contacted his friend, Daniel Best, and expressed his concern with the hunting plan, and that Anderson might harm him. (R. at 8, 24.) He further explained his intention to invite Anderson to his home the next day to talk. (R. at 8, 24.) The following evening Best drove to Reardon's home where he observed Anderson running out of

the front door, and found Reardon dead inside of the house. (R. at 8, 24.) Anderson was arrested shortly thereafter and admitted to killing Reardon. (R. at 8, 24.)

Only a few days later on December 1, 2011, Crawley published an exposé. Based on the information from the unidentified Big Top employee, she claimed that Barnes planned to kill the elephants. (R. at 3, 22.) Barnes was taken into federal custody later that day. (R. at 3.) On December 4, 2011, a federal grand jury for the United States District Court for the Southern District of Boerum indicted Barnes for conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922, conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. (R. at 3.)

The district court heard three pre-trial motions: 1) the government's motion to admit Daniel Best's conversation with James Reardon; 2) Barnes's motion to quash the government's subpoena seeking journalist Crawley's source; and 3) the government's motion to admit lay witness opinion testimony of Agent Simandi. (R. at 6-7, 16-17, 25.) The court ruled for Barnes on each motion. (R. at 17, 25.) The government appealed to the Fourteenth Circuit and that court affirmed the rulings. (R. at 20, 25.) The government petitioned for certiorari, and this Court granted certiorari. (R. at 36.)

## Summary of Argument

### Rule 701 Issue

As to the exclusion of Agent Simandy's lay witness opinions, the circuit court properly applied Rule 701 for three reasons. First, Simandy's opinion fails under Federal Rule of Evidence 701(a). Rule 701(a) requires that a lay witness base his opinions on a first-hand observation. That requirement exists to ensure that lay witnesses are providing the jury with the best information available. Where the facts in a given situation adequately inform the jury of what occurred, the need for opinion evidence is eliminated entirely. By requiring that witnesses base their opinions on first-hand observations, the rule ensures that opinions are not offered as to matters that the jury should properly decide for itself. Here, Simandy relied exclusively on second-hand information. The only data that he relied upon were transcripts of recorded conversations that were prepared by his predecessor and interviews with people who had not participated in the conversations that Simandy intended to opine about. As a result, Simandy lacked the first-hand observations that Rule 701(a) requires in order for a lay witness to testify as to his opinion.

Second, Simandy's opinions are unhelpful within the meaning of Rule 701(b). Rule 701(b) requires that lay witness opinions be helpful to the jury in resolving issues of fact. Where a lay witness simply tells a jury how to decide, as is the case here, he is not being helpful. That proposition especially makes sense when the witness relies entirely on data that could be introduced to the jury without an opinion. For instance, in this case the jury could be presented with the exact same transcripts that Simandy relied on. Alternatively, Simandy could just tell the jury what the transcripts said. But the government intended for Simandy to tell the jury what conclusions to reach from that evidence. To allow lay witnesses to reach conclusions for the jury

would be to usurp the jury's fact finding function. Because Simandy cannot offer anything original to the jury other than his interpretation of facts that are before the jury, his testimony would not be helpful.

Third, even in the event that Simandy's opinion was helpful, it necessarily would have been impermissible under Rule 701(c). Rule 701(c) disallows lay opinion evidence that relies on specialized knowledge within the scope of Rule 702. Specialized knowledge is that knowledge that can only be utilized by an expert in the field. In contrast, ordinary knowledge is that knowledge that is utilized by laymen. Given that Simandy only relied upon data that could have been presented to the jury, his opinion would only have been helpful if he utilized specialized knowledge that he acquired in the course of his career. By doing so, however, Rule 701(c) would require that the opinion be excluded. Thus, Agent Simandy's opinions must either be unhelpful or based on specialized knowledge within the scope of Rule 702 and were properly excluded.

#### Rule 804(b)(6) Issue

As to the Rule 804(b)(6) inquiry, conspiratorial liability cannot be used to impute responsibility for the unavailability of a witness onto a defendant who did not intend to procure that witness's unavailability. The government's attempt to fit Best's statement within the forfeiture by wrongdoing exception under Federal Rule of Evidence 804(b)(6) fails because the intent requirement set forth by this Court with regard to forfeiture by wrongdoing is inconsistent with the conspiratorial liability standard suggested by the government. The forfeiture by wrongdoing exception only applies when the defendant has engaged in conduct designed to prevent the witness from testifying. More directly, the intent behind that conduct must be

specific. Merely causing the witness's unavailability without specifically intending to prevent testimony does not satisfy the rule.

The foreseeability needed for conspiratorial liability is inadequate to meet the forfeiture by wrongdoing standard. The fact that a defendant could have foreseen that a co-conspirator might prevent a witness from testifying is not sufficient to support a conclusion that the prevention was "designed" by the defendant. Therefore, conspiratorial liability alone can never be sufficient for rule 804(b)(6) to apply.

Even if conspiratorial liability could satisfy the requirements of forfeiture by wrongdoing, the government has failed to allege facts sufficient to reach such a conclusion. Accordingly, the government has not met its burden in proving that Barnes had the required intent to trigger the forfeiture by wrongdoing exception.

#### Rule 501 Issue

As to the Rule 501 inquiry, this Court's decision in *Jaffee* mandates recognition of a journalist's privilege. In *Jaffee*, this Court applied Rule 501 to recognize a psychotherapist's privilege by articulating three requisite factors that must be present to develop a new privilege: 1) the privilege serves a significant public interest; 2) the weight of those interests outweighs the burden on truth-seeking that might be imposed by the privilege; and 3) the privilege is widely recognized by the states.

That analysis directly applies to this case and compels recognition of a journalist's privilege. First, the press functions as the political and social watchdog for society by acting as its eyes and ears, and in doing so fulfills an important public need. Failing to recognize a journalist's privilege would certainly impair a journalist's ability to collect and disseminate news by dissuading informants from coming forward. Second, the burden on evidentiary collection is

modest when compared with the societal interest served by the journalist's privilege. In the absence of the privilege, sources wishing to maintain confidentiality would be discouraged from disclosing important information. That information, if left unspoken, would have no greater evidentiary purpose than if it had been spoken and privileged. Third, 49 states have enacted into law or recognized by common law some form of a journalist's privilege. Such an overwhelming consensus among the states indicates that reason and experience support the recognition of a journalist's privilege.

Moreover, sound public policy compels the recognition of an absolute journalist's privilege as opposed to a qualified privilege. If there were only a qualified privilege, sources likely would be just as reluctant to provide full and frank disclosures as they would without the privilege, because it still would not provide assurances of confidentiality. An uncertain privilege undermines the effectiveness and underlying purpose of the privilege and thus impairs the journalist's ability to collect news. As such, the journalist's privilege should be absolute.

## Argument

### **I. Federal Rule of Evidence 701 precludes the introduction of lay witness opinions as to the hidden meaning of words where the lay witness has only reviewed transcripts of the statements in which the words appear and did not contemporaneously observe the communication**

Rule 701 bars the admission of Agent Simandy's lay opinion testimony. First, Agent Simandy's review of transcripts that detailed conversations that had already taken place and that were transcribed by another officer did not constitute sufficient personal knowledge as required by Rule 701(a). Second, Agent Simandy's opinion as to the hidden meaning of words contained within those conversations failed to satisfy the helpfulness requirement of Rule 701(b) and, if permitted, would have threatened to usurp the fact finding function of the jury. Third, even if both (a) and (b) were satisfied, the opinion would fail under Rule 701(c) for relying on specialized knowledge within the scope of Rule 702. Because this issue presents questions of first impression for this Court, this argument draws from the Federal Rules of Evidence and the advisory committee notes thereto, the decisions of the several circuits, the works of commentators, and public policy considerations.

#### **A. Rule 701(a) precludes Agent Simandy's opinions because his review of the conversations was second-hand**

As to a conversation, Rule 701(a) can only be satisfied when the witness has participated in the conversation or listened to the conversation while contemporaneously observing the speaker. Rule 701(a) requires that lay witness opinions be "rationally based on the witness's perception." Fed. R. Evid. 701. That requirement has been glossed by the Advisory Committee on Rules to mean that lay witness opinions may only be offered as to those observations that are rationally based on a first hand observation of the witness. *See* Fed. R. Evid. 701 advisory

committee's note. Given that gloss, the determinative inquiry as to Rule 701(a) is whether an opinion is based on first-hand observations.

Here, Agent Simandy admits that his investigation only consisted of two things: conducting interviews and reading through transcripts of Barnes's conversations. (R. at 13.) The two people who were interviewed took no part in the relevant conversations, and the transcripts of the conversations had been prepared by another agent. (R. at 13.) Simandy was not involved in recording or transcribing the conversations that he relied upon, and he did not contemporaneously observe the speakers as the conversations took place. (R. at 14.) In fact, the agent was not even involved in the investigation until after all of the conversations had taken place and were transcribed. (R. at 14.)

Given the facts concerning Simandy's investigation, the first-hand observation inquiry does not seem as though it should be a particularly difficult one. No part of Simandy's investigation involved first-hand observations in the literal sense of the phrase. His review of transcripts of conversations was second-hand in that he read about the first-hand observations of another; his interviews did not even involve people that were aware of the contents of the relevant conversations and thus cannot possibly be conceived of as first-hand observations of the relevant conversations. In each instance, Simandy was at least one step removed from a first-hand observation. That said, the circuits have split on how to apply Rule 701(a) to a situation such as the one in this case.

The Second, Third, and Fourth Circuits have all resolved the question in a way that is consistent with the language used in the rule and by the advisory committee by holding that lay witness opinions require first-hand observation. *See United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (holding a DEA Agent's review of recorded conversations insufficient to satisfy

the perception requirement of Rule 701); *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 225-26 (3d Cir. 2008) (disallowing opinion evidence where the witness acquired his information second-hand); *United States v. Garcia*, 413 F.3d 201, 212-13 (2d Cir. 2005) (holding that a DEA agent's opinion was inadmissible because a review of the totality of the investigation did not satisfy the perception requirement of Rule 701). The Eighth Circuit has reached the same conclusion and authored an opinion based on facts virtually indistinguishable from the case at bar. In *United States v. Peoples* the Eighth Circuit held inadmissible the opinion of an FBI agent as to the meaning of words and phrases used by the defendants in that case. 250 F.3d 630, 641 (8th Cir. 2001). The agent there had listened to recordings of conversations between the defendants, but the court found those observations to be insufficient because the agent had not “personally observe[d] the events and activities discussed in the recordings, nor did she hear or observe the conversations as they occurred.” *Id.* at 640-41.

Moreover, the Seventh and Ninth Circuits have adopted rules that require witnesses to at least partially rely upon first-hand observations. For instance, in *United States v. Rollins*, the Seventh Circuit held that a DEA agent's testimony as to the meaning of a conversation was admissible, but the agent in that case relied on first-hand observation of the defendants to inform the recorded conversations. 544 F.3d 820, 831-32 (7th Cir. 2008). The *Rollins* court even recognized that the agent's testimony “approache[d] the line dividing lay opinion testimony from expert opinion testimony.” *Id.* at 833. The Ninth Circuit came to a similar result in *United States v. Freeman*, wherein the court deemed a detective's opinions as to the meaning of conversations to be admissible due in part to the fact that the detective had directly observed the speakers as they were engaging in many of those conversations. 498 F.3d 893, 904-05 (9th Cir. 2007). The court also announced a rule that “[i]t is necessary that a lay witness's opinions are

based upon . . . direct perception of the event . . . .” *Id.* at 905 (citing *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985)).

In contrast, the Fifth and Eleventh Circuits have permitted lay witness opinions even when the only basis for the opinions is second-hand information. *See United States v. El-Mezain*, 664 F.3d 467, 513-14 (5th Cir. 2011) (holding admissible opinions that were based on reviews of records and telephone conversations); *United States v. Jayyousi*, 657 F.3d 1085, 1102, 1104 (11th Cir. 2011) (deeming an FBI agent to have satisfied the perception requirement of Rule 701 by reviewing wiretap summaries, transcripts, faxes, publications, and speeches). In *Jayyousi*, the Eleventh Circuit reasoned that based off of that court’s precedent “simply review[ing] and summarize[ing] . . . documents” can be sufficient to satisfy the perception requirement of Rule 701. *Id.* at 1102.

Given that Agent Simandy relied only on second-hand information, both the Eighth Circuit’s approach requiring first-hand observation and the Seventh Circuit’s approach requiring at least some degree of first-hand observation counsel in favor of the exclusion of the opinion. Only the Eleventh Circuit’s approach allowing opinions based on nothing but second-hand observation would call for the admission of Simandy’s opinion testimony. Commentators have suggested that the usefulness of the lay witness opinion is that it, through rationally based inferences, puts the jury in as close a position as possible to having all of the facts and circumstances in front of them. *See, e.g.*, 1 Kenneth S. Broun et al., *McCormick on Evidence* § 11 (6th ed. 2006) (discussing the preference for opinions in the situation where the reasoning underlying the opinion cannot be expressed through a recitation of facts by a first-hand observer). When an inference is required in order to put the jury in that position, Rule 701 permits its admission, but the fundamental principle is that “the more concrete description is

preferred to the more abstract.” *Id.* That principle only yields where it is impractical for the witness to testify to that data that supports a given inference. *Id.* Here, all of the data relied upon by Simandy could have been made available to the jury through testimony or through the introduction of documentary or audiotape evidence, rendering the opinion entirely unnecessary.

Given the literal words of Rule 701, the advisory committee notes thereto, and the learned opinion of commentators, it seems clear that the purpose of Rule 701(a) is to ensure that the opining witness had some first-hand observation which uniquely enables the witness to put the jury in as close a position as possible to that of a first-hand observer. The Eighth Circuit’s approach does exactly that; it only permits lay witness opinions when the witness has a unique first-hand observation as the basis of the witness’s opinion. The Seventh Circuit’s approach could conceivably satisfy the purpose of the rule as well, by at least ensuring that some degree of first-hand observation forms the basis of the opinions rendered. The Eleventh Circuit’s approach, however, falls far short.

As the district court judge correctly noted, applying the Eleventh Circuit’s test would allow witnesses to “read[] a book and then assert[] first-hand knowledge [of] the events the book describes.” (R. at 15.) When evidence, such as recorded conversations, can be made available to the jury, there is no policy reason that supports allowing a lay witness to give his opinion as to that evidence. Accordingly, the circuit court’s holding that lay witness opinions as to the meaning of words in a conversation require first-hand knowledge as a participant in the conversation or as a contemporaneously observing listener should be affirmed.

**B. Rule 701(b) precludes Agent Simandy's opinions because they are unhelpful and would function to usurp the role of the jury**

Agent Simandy's opinions were also properly excluded because they are not helpful to the jury within the meaning of Rule 701(b). *See* Fed. R. Evid. 701(b) (requiring that an opinion be "helpful to clearly understanding the witness's testimony or to determining a fact in issue"). The helpfulness requirement has also been interpreted as precluding opinions that do nothing more than summarize a party's case or tell the jury what it should conclude based on a set of facts. *See* Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 Pepp. L. Rev. 551, 564 (2012). Similarly, when a witness uses evidence that is available to the jury and applies ordinary reasoning to that evidence, the opinion is unhelpful. *Id.* In such a situation, a lay witness, who by definition utilizes only ordinary reasoning, is likely to be no better situated to make the conclusion than the triers of fact themselves. *See Id.* (citing *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993)). In this case, Agent Simandy only relied on information that could be presented to the jury. When asked at the trial court hearing how he came to the opinions that he intended to testify to, Agent Simandy replied that he reached his conclusions based on "everything that [he] learned in the investigation" and that "[t]he context of the conversations made it apparent what the defendant and his co-conspirators were discussing." (R. at 14.)

In considering the helpfulness requirement, the Second Circuit has held that when a lay witness stops testifying as to facts and circumstances and instead gives opinions based on those facts and circumstances, his testimony becomes unhelpful. *See United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (holding that a DEA agent's opinion as to culpability was unhelpful when the basis for his opinion was before the jury). That court went on to hold that jurors are not helped within the meaning of Rule 701 by opinion testimony that tells them what inferences

to draw from facts. *Id.* at 214 (internal citation omitted). Additionally, *Garcia* held that “if such broadly based opinion testimony . . . were admissible . . . there would be no need for the trial jury to review personally any evidence at all.” *Id.* (internal citation omitted). Finally, the court noted that Rule 701(b) exists to provide “assurance against the admission of opinions which would merely tell the jury what result to reach.” *Id.* (internal citation omitted); *see also* Fed. R. Evid. 704 advisory committee’s note (identifying that the Rule 701 helpfulness requirement is part of a system of provisions designed to prevent the admission of opinions which would tell the jury what result to reach).

In contrast, the Eleventh Circuit summarily held that an agent’s testimony as to the meaning of “code words” is admissible when the meaning of those words is not perfectly clear as pursuant to Eleventh Circuit precedent. *United States v. Jayyousi*, 657 F.3d 1085, 1103 (11th Cir. 2011) (citing *United States v. Awan*, 966 F.2d 1415, 1430-31 (11th Cir. 1992)). Dissenting in *Jayyousi*, Judge Barkett argued that simply giving one side’s understanding of the evidence is not helpful within the meaning of Rule 701. *Id.* at 1125 (citing Fed. R. Evid. 701 advisory committee’s note (“meaningless assertions which amount to little more than choosing up sides [are to be] exclu[ded] for lack of helpfulness . . . .”)). Judge Barkett also points out conflicting Eleventh Circuit precedent that “a witness’s testimony about the meaning of facts already before the jury is inadmissible lay opinion specifically because [such] testimony “merely deliver[s] a jury argument from the witness stand.” *Id.* at 1125-26 (citing *United States v. Cano*, 289 F.3d 1354, 1363 (11th Cir. 2002)) (internal quotation marks omitted).

Here, Agent Simandy’s testimony should be excluded as unhelpful. The advisory committee notes in Rules 701 and 704 demonstrate the intent that statements be excluded when they only tell the jury what result to reach or simply amount to choosing up sides. Even without

looking to the case law, that intent would compel the exclusion of Simandy's opinions. The meaning of potentially ambiguous statements made by the defendants is a quintessential jury argument. The opinion sought to be offered would not have been offered in an expert capacity; rather it would be a lay person telling other lay people how to interpret information that is, or should be, available to them. Given that factual determinations are exclusively in the province of the jury, a lay person's "assistance" is entirely unhelpful. *See Cavazos v. Smith*, 132 S. Ct. 2, 3, 181 L. Ed. 2d 311, 313 (2011) ("[I]t is the responsibility of the jury . . . to decide what conclusions should be drawn from evidence admitted at trial.").

In looking to commentators and cases, the approach that is most in line with the intent of the rule is clearly that of the Second Circuit. Consistent with the Rule 701(a) requirement, the Second Circuit's approach to Rule 701(b) helpfulness would ensure that those witnesses that do have the requisite first-hand observations actually use those observations in coming to their opinions. The Eleventh Circuit, on the other hand, has conflicting precedent as to helpfulness. The precedent pointed to by Judge Barkett in dissent in *Jayyousi* suggests that Simandy's testimony would fail the helpfulness inquiry. Even under the test invoked by the majority in *Jayyousi*, an opinion is only helpful as to interpretation when the meaning is not clear. Here, Simandy himself conceded that "[t]he context of the conversations made it apparent what the defendant and his co-conspirators were discussing." As such, even under the most lenient standard, Simandy's testimony is insufficient.

**C. Rule 701(c) precludes Agent Simandy's opinions in the event that 701(a) and 701(b) do not because Agent Simandy could only have satisfied the helpfulness requirement by relying on specialized knowledge within the scope of Rule 702**

Even if Agent Simandy's opinions were found to be helpful, the opinions were properly excluded because Agent Simandy necessarily would have had to rely on specialized knowledge.

Under Rule 701(c), lay opinions cannot be based on scientific, technical or other specialized knowledge within the scope of Rule 702. Fed. R. Evid. 701(c). Rule 701(c) was added to the rules in the 2000 update to “eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Fed. R. Evid. 701 advisory committee’s note. The rule also functions to ensure that experts are not offered as lay witnesses so as to circumvent the *Daubert* reliability analysis or mandatory disclosures under procedural rules. *See* Fed. R. Evid. 701 advisory committee’s note (discussing the desire to combat the evasion of expert disclosures); *see generally Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1992).

The distinction between lay and expert witness testimony is that lay testimony results from ordinary reasoning whereas expert testimony results from extraordinary reasoning. *See* Fed. R. Evid 701 advisory committee’s note (distinguishing between “reasoning familiar in everyday life” and reasoning which can only be arrived at by “specialists in the field”). Because the only evidence that Simandy relied on is evidence that could be made available to the jury without a lay witness opinion, the only way that Simandy could have been helpful to the finders of fact within the meaning of Rule 701(b) would be to have utilized reasoning specific to those who are experienced investigators; otherwise, the jurors would have been able to come to the same conclusion through the use of their own ordinary reasoning. In doing so, however, Simandy necessarily would have employed extraordinary reasoning in contravention of Rule 701(c). If Simandy does have the knowledge, skill, training, experience, or education sufficient to be an expert and made use of that expertise, he should have been proffered as an expert, been subject to mandatory disclosures, and had his opinions analyzed under *Daubert*. Because he was

not proffered as an expert, however, his opinions must either fail for being unhelpful or for relying on specialized knowledge within the scope of Rule 702.

**II. The intent requirement of forfeiture by wrongdoing under Federal Rule of Evidence 804(b)(6) cannot be satisfied by conspiratorial liability because the rule requires a specific intent that cannot be met by the mere foreseeability of a co-conspirator's actions**

Rule 804(b)(6) does not apply to Daniel Best's statement because conspiratorial liability is insufficient to satisfy the intent requirement of the forfeiture by wrongdoing exception. As a general matter, hearsay is inadmissible unless the party seeking its admission can prove that the evidence fits within an enumerated hearsay exception. Fed. R. Evid. 802. The government argues that Best's statement falls under the forfeiture by wrongdoing exception in Federal Rule of Evidence 804(b)(6). In order to invoke that exception, the government must prove by a preponderance of the evidence that the declarant is unavailable and that the defendant engaged or acquiesced in wrongdoing that was intended to render the declarant unavailable as a witness and that did, in fact, render the declarant unavailable as a witness. *See United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). That Reardon is dead and unavailable as a witness is a matter of public record, but the government cannot make an adequate showing that Barnes engaged in or acquiesced in the wrongdoing that caused the unavailability of Reardon.

**A. Rule 804(b)(6) requires that the defendant acted with specific intent to procure the unavailability of the witness**

Implicating the forfeiture by wrongdoing exception, as a matter of law, requires the specific intent of the defendant to procure the unavailability of a witness. Forfeiture by wrongdoing was recognized at common law as an exception to the general rule against hearsay. *Reynolds v. United States*, 98 U.S. 145, 158, 25 L. Ed. 244, 247 (1878). The foundation of the exception is the principle that no one should be permitted to take advantage of his wrongful

conduct. *Giles v. California*, 554 U.S. 353, 366, 128 S. Ct. 2678, 2687, 171 L. Ed. 2d 488, 499-500 (2008) (citing *Reynolds*, 98 U.S. at 158, 25 L. Ed. at 247). This Court has recognized Rule 804(b)(6) as the codification of the common law forfeiture by wrongdoing rule. *Giles*, 554 U.S. at 367, 128 S. Ct. at 2687, 171 L. Ed. 2d at 500 (2008) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 126 S. Ct. 2266, 2280 165 L. Ed. 2d 224, 244 (2006)). The exception applies only when a defendant “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the witness.” Fed. R. Evid. 804(b)(6). In *Giles*, this Court stated that the forfeiture by wrongdoing exception requires a showing that the defendant “engaged in conduct *designed* to prevent the witness from testifying.” 554 U.S. at 359, 128 S. Ct. at 2683, 171 L. Ed. 2d at 495 (emphasis in original). The Court rejected the proposition that “knowledge is sufficient to show intent.” 554 U.S. at 368, 128 S. Ct. at 2688, 171 L. Ed. 2d 500-501.

Interpreting *Giles*, the Fourth Circuit explained, “it is not enough, for example, that a defendant murdered a victim with the *effect* of preventing her testimony; rather, the defendant must have murdered the victim with the *intent* of preventing her testimony.” *United States v. Hanna*, 353 F. App'x 806, 808 (4th Cir. 2009) (emphasis in original) (citing *Giles*, 554 U.S. at 363-65, 128 S. Ct. at 2686, 171 L. Ed. 2d at 499-500 (referencing numerous cases where courts “did not even consider admitting” hearsay evidence on forfeiture by wrongdoing grounds despite “overwhelming” evidence that the defendant’s crime had caused the unavailability of the witness)). Specific intent to prevent the witness from testifying must be shown. While the *Giles* case was decided in the context of the Confrontation Clause, this interpretation of the forfeiture by wrongdoing doctrine is applicable anytime Rule 804(b)(6) is implicated. *See United States v. Leal-Del Carmen*, 697 F.3d 964, 974 (9th Cir. 2012) (applying the *Giles* intent requirement to a non-confrontation clause context); 5 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 8:134, p.

11 (Supp. 2010) (declaring that the post-*Giles* forfeiture by wrongdoing doctrine requirements are the same in both the confrontation and non-confrontation contexts).

The importance of carefully controlling the forfeiture by wrongdoing doctrine cannot be overstated. Allowing statements of unavailable witnesses into trials can be prejudicial to defendants in a variety of ways. See Anthony Bocchino, David Sonenshein, *Rule 804(b)(6) - the Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 Mo. L. Rev. 41, 62-66 (2008) (arguing that overbroad application of the forfeiture by wrongdoing doctrine would produce fundamentally unfair results and convictions based on unreliable evidence). In considering whether the exception applies, the judge would have to decide in a preliminary hearing whether a reasonable juror could find that the defendant caused the witness's unavailability through wrongdoing by a preponderance of the evidence. Fed. R. Evid. 104(b). Since the defendant is often charged with the crime that caused the witness's unavailability, this preliminary hearing becomes a mini-trial where the defendant's guilt is decided without a jury and with a lowered burden of proof. Additionally, this mini trial is conducted without regard to traditionally evidence rules. Fed. R. Evid. 104(a). Once admitted and presented to a jury, the evidence would almost always be persuasive. Since defendants have no way to cross-examine or directly question the evidence, their ability to present a complete defense would be undermined. Because of its potential to prejudice defendants, allowing the forfeiture by wrongdoing exception to apply too broadly eviscerates bedrock principles of the American judicial system: the right to a fair trial by jury and the substantive requirement that guilt be proved beyond a reasonable doubt. For these reasons, this Court was correct in requiring specific intent in the forfeiture by wrongdoing framework.

**B. The lesser foreseeability requirement used for conspiratorial liability is inconsistent with the heightened intent standard essential to Rule 804(b)(6)**

The specific intent requirement of rule 804(b)(6) cannot be met through the doctrine of conspiratorial liability. Co-conspirator liability was first laid out in *Pinkerton v. United States*. 328 U.S. 640, 647, 66 S. Ct. 1180, 1184, 90 L. Ed. 1489, 1496 (1946). Under *Pinkerton*, a defendant can be liable for the crime of a co-conspirator if the crime was reasonably foreseeable as a natural and necessary consequence of the conspiracy. *Id.* Thus, a showing of foreseeability could be sufficient to impute liability for possession of an illegal firearm or for robbing a bank.

However, the intent requirements for those crimes are far less stringent than the requirement set forth in *Giles*. For example, in order for an individual to be convicted of possession of an illegal firearm on an individual basis he must simply possess that firearm; no specific intent to possess the firearm is required. *See* 18 U.S.C. 922(g). The mens rea standard utilized in that case is the minimal strict liability standard. *Id.* In contrast, forfeiture by wrongdoing requires not only that the defendant make the witness unavailable, but also that the defendant do so with the specific intent of preventing the witness from testifying. *Giles*, 554 U.S. at 363-65, 128 S. Ct. at 2686, 171 L. Ed. 2d at 499-500 (citing to numerous cases where the forfeiture by wrongdoing exception did not allow admission of hearsay evidence despite the fact that the defendant had in fact caused the witness's unavailability).

*Giles* overturned California's version of the forfeiture by wrongdoing exception because of the California court's disregard for whether the defendant had specific intent. *Giles*, 554 U.S. at 377, 128 S. Ct. at 2693, 171 L. Ed. 2d at 506 (2008). Allowing conspiratorial liability to impute specific intent on members of an alleged conspiracy regardless of their personal intent or involvement in the actual crime runs counter to that holding and the due process limitations inherent in the *Pinkerton* doctrine. *See United States v. Cherry*, 217 F.3d 811, 818 (10th Cir.

2000) (expressing that the imputation of liability in the first-degree murder context would be inconsistent with *Pinkerton* in that first-degree murder has an intent requirement far more stringent than foreseeability). Indeed, allowing conspiratorial liability to satisfy the forfeiture by wrongdoing doctrine results in a perverse twist on the foundation of the forfeiture rule—it would punish Barnes for another’s wrongdoing. Specific intent must be found independently for each defendant. Thus, foreseeability does not satisfy the requirement of Rule 804(b)(6) that the defendant engage in acts designed to procure the unavailability of the witness.

This reading of *Pinkerton*’s limitations is consistent with pre-*Giles* cases where circuit courts held that conspiratorial liability did apply to Rule 804(b)(6). In *Cherry*, eight years prior to *Giles*, the Tenth Circuit held that conspiratorial liability could satisfy Rule 804(b)(6) as long as the crime making the witness unavailable was reasonably foreseeable and within the scope of the conspiracy. *Cherry*, 217 F.3d at 820. However, the reformulation of the forfeiture by wrongdoing requirement in *Giles* makes it clear that the *Cherry* court’s analysis now counsels in favor of excluding the hearsay evidence. Now that this Court has held that forfeiture by wrongdoing requires specific intent, the analysis is akin to that of imputing liability for first-degree murder, which *Cherry* would disallow. Thus, *Pinkerton* liability is entirely incompatible with the intent requirement of forfeiture by wrongdoing.

Only one circuit court has addressed the issue of conspiratorial liability and Rule 804(b)(6) post-*Giles*. In *United States v. Dinkins*, the Fourth Circuit held that Rule 804(b)(6) could be satisfied by principles of conspiratorial liability. 691 F.3d 358, 384 (4th Cir. 2012). The defendant was a hit man in a violent drug trafficking gang. *Id.* at 363. He had personally attempted to murder the declarant in 2005, after learning that the declarant was a government informant. *Id.* at 384. The defendant’s co-conspirators eventually murdered the declarant a year

later. *Id.* The facts were so strong in support of the defendant's involvement in the declarant's murder that the government charged the defendant with conspiracy to commit murder. *Id.* at 362. The court held that 804(b)(6) was satisfied through conspiratorial liability, but also pointed out that his co-conspirators had simply fulfilled the defendant's intention. *Id.*

Here, Barnes had no such intention. He specifically instructed Anderson not to harm Reardon on multiple occasions. (R. at 18, 19.) Additionally, the scope of the alleged conspiracy here would not encompass the kind of violence present in the *Dinkins* case in that the alleged conspiracy is for the sale of ivory. Homicide is not a natural consequence of a scheme to sell elephant ivory, but it was in *Dinkins*, where the defendant was a hit man in a violent drug trafficking ring. Moreover, Barnes was not charged with conspiracy to commit murder, further evidencing the fact that the government's claim of his involvement in Reardon's death is shaky at best. (R. at 3, 4.)

The *Dinkins* case could have been decided on the face of Rule 804(b)(6) alone without conspiratorial liability. It was clear that the defendant had engaged in acts designed to render the witness unavailable. Equally clear is that the defendant acquiesced to his co-conspirators working towards the same goal. Fed. R. Evid. 804(b)(6). The instant case is completely different. Not only did Barnes have no intention of procuring Reardon's unavailability, but Anderson's intention and actions fell far outside the scope of any alleged conspiracy.

Even if conspiratorial liability could satisfy the requirements of Rule 804(b)(6), forfeiture by wrongdoing would still not apply in this case. Either Anderson's actions were unforeseeable due to Barnes's repeated instructions to not harm the witness or Anderson's actions fell outside the scope of a non-violent conspiracy. Regardless, even if those elements were met, principles of equity dictate that in circumstances such as this—where the defendant was involved in a non-

violent conspiracy and gave express instructions to co-conspirators not to harm the witness—a narrow exception be crafted to preclude conspiratorial liability for such an extreme action.

Allowing the intent requirement of forfeiture by wrongdoing to be satisfied by conspiratorial liability would fly in the face of the notions of fair play and justice that are the cornerstones of the American judiciary. In order to preserve principles of fairness and due process, the Court should affirm the circuit court’s holding regarding conspiratorial liability and Rule 804(b)(6).

**III. Federal Rule of Evidence 501 recognizes an absolute evidentiary privilege for information gathered in a journalistic investigation because such a privilege meets the requisite criteria established by this Court**

“For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man’s evidence. *United States v. Bryan*, 399 U.S. 332, 331, 70 S. Ct. 724, 730, 94 L. Ed. 884, 891 (1950). That proposition is supported by the general rule that subpoenaed witnesses have a duty to testify. However, certain relationships based in confidentiality can create an exception to that duty. Federal Rule of Evidence 501 authorizes federal courts to create new privileges based on the interpretation of “common law principles ... in light of reason and experience.” Fed. R. Evid. 501. According to the Senate report that accompanied the rule when it was enacted in 1975, Congress intended for the recognition of privileges to be considered on a case-by-case basis. *Jaffee v. Redmond*, 518 U.S. 1, 8, 116 S. Ct. 1923, 1927, 135 L. Ed. 2d 337, 344 (1996) (internal citation omitted). Thus, the rule “did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to continue the evolutionary development of testimonial privileges.” *Id.*

**A. The journalist’s privilege satisfies all three elements enumerated by this Court in *Jaffee***

The Supreme Court first recognized a privilege under Rule 501 in *Jaffee*, where the Court recognized the psychotherapist’s privilege. *Id.* at 18, 116 S. Ct. at 1932, 135 L. Ed. 2d at 349. There, the Court established three parameters governing the recognition of a privilege: 1) the asserted privilege should promote the public interest; 2) the weight of the interests to be served by the privilege should outweigh the burden in truth-seeking that might be imposed by it; and 3) that the privilege is supported by reason and experience—demonstrated by the existence of consensus among the States that the privilege should be recognized. *See id.* at 11-15, 116 S. Ct. at 1929-30, 135 L. Ed. 2d at 345-347.

**i. A journalist’s privilege satisfies the first criteria of the *Jaffee* standard because it serves powerful public and private interests**

*Jaffee* makes it clear that an asserted privilege must serve a public end. In assessing the necessity of a psychotherapist’s privilege, this Court first recognized that “effective psychotherapy ... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of the facts.” *Id.* at 10, 116 S. Ct. at 1928, 135 L. Ed. 2d at 345. The Court held that trust is necessary for the development of the relationship needed for successful treatment. *Id.* Moreover, the Court emphasized that this confidential psychotherapist-patient relationship serves important interests by facilitating proper treatment for persons suffering from mental or emotional problems. Similarly, in *Goodyear Tire & Rubber Co. v. Chiles Power Supply*, the Sixth Circuit recognized the important role confidentiality plays in the context of settlement discussions. 332 F.3d 976, 980 (6th Cir. 2003). Where parties can be confident that the discussions will not be used against them, frank negotiations can be

conducted. *Id.* As a result, the privilege serves the public interest by lessening the case load of the judicial system.

The journalist-informant relationship is directly analogous to the psychotherapist-patient relationship as both rely on an atmosphere of confidentiality and trust. Additionally, just as full and frank settlement discussions serve the public interest by reducing the strain on the judicial system, so does the availability of confidential informants serve the public interest by giving the public access to otherwise inaccessible information. As the Supreme Court articulated, the “press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219, 86 S. Ct. 1434, 1437, 16 L. Ed. 2d 484, 488 (1966). Even more than being society’s political watchdog, the press provides the means for the public to remain educated on current events that might otherwise remain shrouded in obscurity.

**ii. The journalist’s privilege satisfies the second *Jaffee* consideration because the significant interest served by the privilege outweighs the modest evidentiary benefits the court might receive from compelled disclosure**

The second consideration under *Jaffee* is the relative weight of the interest served by the privilege with the likely evidentiary costs. *Jaffee*, 518 U.S. at 11, 116 S. Ct. at 1929, 135 L. Ed. 2d at 346. Here, the societal interest heavily outweighs the modest evidence costs. In *Jaffee*, the Supreme Court considered the potential effects of refusing to recognize a psychotherapist-patient privilege. In that consideration, this Court identified that the lack of such a privilege would chill the extent to which a patient would be candid with his psychotherapist, likely preventing patients who fear litigation from ever even making the statements that the government would want to elicit. *Id.* at 11-12, 116 S. Ct. at 1929, 135 L. Ed. 2d at 346. “This unspoken evidence w[ould]

therefore serve no greater truth-seeking function than if it had been spoken and privileged.” *Id.* at 12, 116 S. Ct. at 1929, 135 L. Ed. 2d at 346.

The Supreme Court continued to weigh the evidentiary costs against interests served in *Swidler & Berlin v. United States*. 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998). There, the Court applied Rule 501 to hold that the attorney-client privilege continues after the client’s death by reasoning that “knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel” and that “the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.” *Id.* at 407-08, 118 S. Ct. at 2086, 141 L. Ed. 2d at 386-87.

The same principles ring true with regard to a journalist’s privilege. Leaving information gathered during journalistic investigations unprotected would produce the same chilling effect the *Jaffee* Court feared would occur in the absence of a psychotherapist’s privilege. In *Jaffee*, the Supreme Court emphasized that the “mere possibility of disclosure may impede the confidential relationship necessary for successful treatment.” *Jaffee*, 518 U.S. at 10, 116 S. Ct. at 1928, 135 L. Ed. 2d at 345. The same is true with regard to the journalist’s privilege. As the Third Circuit observed in recognizing a reporter’s privilege under Rule 501, “a journalist’s inability to protect the confidentiality of sources she must use will jeopardize the journalist’s ability to obtain information on a confidential basis . . . [and] this in turn will seriously erode the essential role played by the press in the dissemination of information . . . to the public.” *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). That proposition is implicated by the facts of this case. Had the reporter not been able to promise Barnes’s employee that she would conceal his identity, he likely would not have shared information about his employer out of fear of

retribution. Moreover, had the employee not given an interview, his unspoken evidence would “therefore [have] serve[d] no greater truth-seeking function than if it had been spoken and privileged.” *Jaffee*, 518 U.S. at 10, 116 S. Ct. at 1929, 135 L. Ed. 2d at 346. Thus, the interests served by the journalist’s privilege outweigh the evidentiary costs because without the privilege sources seeking confidentiality would be deterred from disclosing any information to the press that could subsequently be compelled by a court of law.

**iii. The journalist’s privilege satisfies the third *Jaffee* consideration concerning reason and experience because the overwhelming majority of the States recognize the privilege**

The third factor in *Jaffee* considers reason and experience, which this Court has held looks to whether there is a consensus among the states as to whether a given privilege exists. *Id.* at 12-13, 116 S. Ct. at 1929-30, 135 L. Ed. 2d at 346-47. Specifically, in *Jaffee* this Court relied on “the fact that all 50 States and the District of Columbia ha[d] enacted into law some form of psychotherapist privilege.” *Id.* at 12, 116 S. Ct. at 1929, 135 L. Ed. 2d at 346. The Court reasoned that a consensus among the states indicates that “reason and experience support the existence of the privilege.” *Id.* at 13, 116 S. Ct. at 1930, 135 L. Ed. 2d at 346. The Court also emphasized that denial of a federal privilege would undermine the purpose of the enacted state legislation to promote confidential communications. *Id.* at 12-13.

The “reason and experience” relied upon in support of the psychotherapist’s privilege parallels the support behind a journalist’s privilege. To date 49 states have recognized some sort of journalist’s privilege by statute or judicial decision. *See* Henry Cohen, Congressional Research Service, *Journalist’s Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes 2* (2007). Wyoming is the only state that has neither a common law nor statutory journalist’s privilege. *Id.* Such wide spread support for the

journalist's privilege, like the support which the *Jaffee* Court encountered for the psychotherapist's privilege, demonstrates that states are in consensus that such a privilege serves a necessary function. Additionally, the function of state legislation that supports a journalist's privilege would be frustrated if the reporter's source was aware that the privilege would not be honored in federal court.

In support of rejecting the existence of a common law journalist's privilege the government relies on *Branzburg v. Hayes*. 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 626 (1972). There, this Court declined to recognize a reporter's claimed right to conceal confidential sources when subpoenaed in front of a grand jury. *Id.* at 667, 92 S. Ct. at 2649, 33 L. Ed. at 631. Nevertheless, the government's reliance on this case is severely flawed. As the first sentence of the *Branzburg* opinion makes clear, the issue in that case 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.* That is not the issue here. Instead, the question before this Court pertains to whether a federal common law journalist's privilege exists under Federal Rule of Evidence 501, which was enacted three years *after* the *Branzburg* decision came down. Congress specifically enacted Rule 501 to provide federal courts an evolutionary mechanism to create common law privileges based on reason and privilege. *Jaffee*, 518 U.S. at 8, 116 S. Ct. at 1927, 135 L. Ed. 2d at 344. Thus, when the *Branzburg* Court decided to reject a journalist's privilege it was operating in a completely different legal context.

Additionally, *Branzburg* relied in part on the fact that only a minority of states had adopted a journalist's privilege. *Branzburg*, 408 U. S. at 685, 92 S. Ct. at 2659, 33 L. Ed. at 642. However, 40 years later that geography has changed as nearly every state, excluding only Wyoming, has since recognized a journalist's privilege either through common law or by statute.

This Court might not have had grounds to recognize a journalist's privilege under the legal landscape of 1972, but it certainly can and should do so now.

**B. The journalist's privilege should be absolute because the alternative qualified privilege compromises the confidential relationships the privilege seeks to foster**

Only an absolute journalist's privilege truly comports with sound public policy. The alternative, a qualified privilege, frustrates the confidential relationships the privilege seeks to encourage. The Supreme Court specifically wrangled with the issue of whether to make a privilege qualified or absolute in *Jaffee*. *Jaffee*, 518 U.S. at 17-18, 116 S. Ct. at 1932, 135 L. Ed. 2d at 349. There, the Court contemplated a balancing component that many states implemented as part of their psychotherapist-patient privilege. *Id.* Specifically, the Court considered the potential consequences to the psychotherapist's privilege if "its promise of confidentiality [was] contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy." *Id.* The Court decided that such an unreliable privacy promise would undermine the effectiveness of the privilege. *Id.*

Just as the *Jaffee* Court declined to make the psychotherapist privilege qualified due to concerns of effectiveness, so should this Court decline to make a journalist's privilege qualified. Here, the informant is akin to the patient who knows that the circumstances of his disclosures to a therapist might result in civil litigation or prosecution. Each would be reluctant to provide full and frank disclosures absent a certainty of confidentiality. As this Court articulated:

[I]f the purpose of the . . . privilege is to be served, the [participants in the confidential conversation] must be able to predict with some certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

*Upjohn Co. v. United States*, 449 U.S. 383, 393, 101 S. Ct. 677, 684, 66 L. Ed. 2d 584, 593 (1981).

The government contends that any recognition of a journalist's privilege should be qualified. In support of that proposition, the government argues that those circuit courts that have recognized a journalist's privilege, like the Second Circuit in *Von Bulow v. Von Bulow*, have recognized a qualified form of that privilege. 811 F.2d 136, 142, (2d Cir. 1987). Nevertheless, a qualified journalist's privilege impairs the reporter's ability to gather news. Instead, this Court should consider the reason and experience of the several states, which have largely adopted an absolute privilege. See Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 Ohio St. L. J. 469, 501-03 (2006).

Even if this Court was to only adopt a qualified privilege, the evidentiary interest to be gained by obtaining Crawley's interview video still would not overcome the interests of a qualified privilege. The circuit courts that recognize a qualified journalist's privilege require the party requesting the reporter's information to satisfy certain criteria before disclosure is compelled. In *Mark v. Shoen*, for instance, the Ninth Circuit held that the journalist's privilege can be overcome only if "the requested material is: 1) unavailable despite exhaustion of all reasonable alternative sources; 2) noncumulative; and 3) clearly relevant to an important issue in the case. 48 F.3d 416 (9th Cir. 1995). While Crawley's interview video may be relevant, it would certainly be cumulative evidence. Without the video, the government would still have the testimony of Anderson. As an alleged co-conspirator, Anderson can certainly testify to the specific details of any plans or arrangements that he and Barnes allegedly had. The content of Crawley's video recording would be duplicative in light of such testimony. The minimal benefit

that the videotape might contribute does not provide a convincing reason to compel the information.

### **Conclusion**

For the foregoing reasons this Court should affirm the circuit court on all three questions.

## Appendix A

### Federal Statutes

#### 18 U.S.C. § 922

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

**(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

**(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

**(9)** who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

## Appendix B

### **Federal Rules of Evidence**

#### **Federal Rule of Evidence 104**

**(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

**(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

#### **Federal Rule of Evidence 501**

The common law - as interpreted by the 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.

#### **Federal Rule of Evidence 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.

#### **Federal Rule of Evidence 802**

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

#### **Federal Rule of Evidence 804**

**(b) 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.