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No. 12-23

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IN THE  
SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,  
Petitioner,

-- against --

WILLIAM BARNES,  
Respondent.

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

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BRIEF FOR RESPONDENT

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Counsel for Respondent

## QUESTIONS PRESENTED

- I. Whether as a matter of law a trial court may admit into evidence against a defendant in a criminal case the hearsay declaration of a murder victim under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), where there is no evidence that the defendant intended to procure the unavailability of the declarant, and the government relies on evidence that the defendant could reasonably have foreseen that his co-conspirator would murder the declarant in order to silence him.
  
- II. Whether under Federal Rule of Evidence 501 an evidentiary privilege for information gathered in a journalistic investigation should be recognized, and if so, whether the privilege should be absolute or qualified.
  
- III. Whether as a matter of law, under Federal Rule of Evidence 701 governing lay witness opinion testimony, a witness may testify to alleged code words and phrases in conversations, when the witness neither participated in nor observed the conversations, but merely read transcripts of them and reviewed the investigatory work of other law-enforcement personnel.

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## STATEMENT OF THE CASE

This case is an appeal over three evidentiary issues from the Fourteenth Circuit. On December 4, 2011, defendant-respondent William Barnes was indicted and charged with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922, two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and one count of conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. A summary of the facts and procedural history, drawn from the allegations in the indictment and the record, follows.

### I. Forfeiture-by-wrongdoing in Rule 804(b)(6)

The government contends that Mr. Barnes conspired with Mr. James Reardon and Mr. Alfred Anderson to kill forty Asian elephants that belonged to Big Top Circus, Boerum City Circus, and Flying Feats Circus. (R. 7) Mr. Barnes inherited Big Top Circus from his father in May 2000. (R. 21). The circus was very profitable for decades before Barnes gained control, largely because of its one-of-a-kind elephant show. *Id.* By July 2011, Big Top Circus faced imminent and inevitable bankruptcy. *Id.*

The government contends that Mr. Barnes concocted a scheme to kill the elephants for profit and conspired with his longtime business partner, Mr. Anderson. (R. 7) Mr. Anderson then allegedly solicited Mr. Reardon to assist them in carrying out the scheme. *Id.* On November 15, 2011, the first recorded phone call between Mr. Barnes and Mr. Anderson, Mr. Anderson voiced concerns that Reardon was having second thought about going through with their plan. (R. 18). Mr. Anderson said to Mr. Barnes, “Let’s get rid of him.” Mr. Barnes responded, and said “don’t do anything” and told Mr. Anderson that he was “worried over nothing.” *Id.*

On November 28, 2011, Mr. Reardon allegedly called his friend Mr. Daniel Best and described the scheme to kill the elephants and split the ivory. (R. 8). Mr. Reardon also expressed

his concerns that Mr. Anderson might harm him. *Id.* On November 29, 2011, during the second recorded call between Mr. Barnes and Mr. Anderson, Mr. Anderson again expressed concerns over Mr. Reardon and said, “We need to get him out of the picture.”(R. 19). Mr. Barnes responded, “Just tell him we called it off and not to worry about it.” Mr. Anderson said, “He might buy that,” but then continued to express concerns. Finally, Mr. Barnes told Mr. Anderson to “Hold off” and said “I don’t want anything to do with this.” (R. 19). Later that evening, Mr. Best saw Mr. Anderson running from Mr. Reardon’s apartment. (R. 7). Mr. Best subsequently found Mr. Reardon lying dead on the floor of the apartment. *Id.* Law enforcement apprehended Mr. Anderson later that night and Mr. Anderson confessed to killing Mr. Reardon. *Id.*

The government seeks to admit hearsay statements made by Mr. Reardon to Mr. Best. The district court denied the government’s motion to introduce Mr. Best’s testimony on the grounds that the forfeiture-by-wrongdoing exception only applies when the defendant intends to prevent the witness from testifying and Mr. Barnes did not intend for Mr. Anderson to kill Mr. Reardon. (R. 20). The circuit court, using the same reasoning, also denied the government’s motion to admit the hearsay statements. (R. 25-28).

## II. Journalist’s Privilege in Rule 501

At the time the alleged conspiracy was developing, Mr. Barnes invited Ms. Kara Crawley, a journalist, to visit his circus, tour the facilities, and get to know the trainers and animals. (R. 22). He granted Ms. Crawley this access in the hopes that she would write an article that would increase publicity for the December 2011 event that would combine elephants from three circuses. (R. 1–2, 9).

During the approximately two weeks that Ms. Crawley spent on the circus grounds, an employee spoke with her about sensitive and incriminating evidence relating to Mr. Barnes’

alleged conspiracy. (R. 10, 22). The employee said that he or she overheard Mr. Barnes planning to kill the circus Asian elephants for their ivory. (R. 10). The employee asked Ms. Crawley to keep his or her name confidential while he or she worked at the circus. (R. 10). Further, the employee asked that Ms. Crawley use a pseudonym instead of his or her name in her newspaper article. *Id.* Ms. Crawley videotaped the employee's conversations and did not cover up his or her face during the taping. *Id.* However, the employee allowed Ms. Crawley to do so with the understanding that the video was only for Ms. Crawley's personal use. *Id.* Ms. Crawley printed an article about Mr. Barnes' alleged criminal activities. (R. 22). The article contained material from her anonymous source.

The government filed a subpoena to obtain information about Ms. Crawley's confidential sources. (R. 6). Ms. Crawley filed a motion to quash the subpoena citing journalist's privilege. *Id.* The district court recognized journalist's privilege and granted Ms. Crawley's motion. The circuit court also recognized journalist's privilege and granted the motion to quash the subpoena.

### III. Lay Witness Testimony under Rule 501

Between October 3, 2011 and December 1, 2011, Agent Narvel Blackstock, an agent with the Federal Bureau of Investigation, contemporaneously listened to and transcribed about a dozen telephone conversations between Mr. Barnes and Mr. Anderson and Mr. Reardon relating to the alleged conspiracy. (R. 13, 22). Additionally, Mr. Barnes contacted Agent Jason Lamberti from the Bureau of Alcohol, Tobacco, and Firearms who worked undercover at a weapons store, on October 2, 2011 to inquire about the cost of three, AK-47 assault rifles. (R. 13). Finally, Mr. Barnes also spoke to Mr. Alan Klestadt who worked at a helicopter rental company to arrange a one-day helicopter rental. *Id.*

Agent Thomas Simandy, another FBI agent, was assigned to the case on December 15, 2011, two weeks after the last relevant telephone conversation, when Mr. Blackstock died on December 14, 2011 in unrelated events. (R. 23). Subsequent to being assigned to the case, Agent Simandy reviewed the transcripts of the telephone conversations and interviewed Agent Lamberti and Mr. Klestadt. (R. 13). Based exclusively on his findings, he concluded that Mr. Barnes and his alleged co-conspirators used coded phrases to refer to various elements of the alleged conspiracy. *Id.* Specifically, he claimed that “blood diamonds” meant elephant ivory tusks, “Charlie tango” meant helicopter (Mr. Barnes said “Charlie tango is ready” two days after he contacted Mr. Klestadt), and “black cat” meant AK-47s (Mr. Barnes said “black cat was arranged” the day after he contacted Agent Lamberti). *Id.*

The government seeks to introduce, as lay testimony, Agent Simandy’s opinion regarding the alleged code phrases used during the intercepted telephone conversations. The district court denied the government’s motion on the ground that Agent Simandy did not fulfill the lay testimony requirement of rational perception because he did not have first-hand knowledge of the information about which he sought to testify. The circuit court upheld the district court’s decision for the same reasons.

Subsequent to the Fourteenth Circuit’s ruling, the Government filed a petition for writ of certiorari, and on October 1, 2012, the United States Supreme Court granted certiorari. (R. 36.)

### **SUMMARY OF THE ARGUMENT**

The Supreme Court should affirm the Fourteenth Circuit on the three issues before it today. Specifically at issue are: (1) whether *Pinkerton* conspiratorial liability is applicable to forfeiture-by-wrongdoing under Federal Rule of Evidence 804(b)(6); (2) whether there is a journalist’s privilege under Rule 501, and if so, whether it is absolute or qualified; and (3)

whether, under Rule 701, a law-enforcement agent may provide lay opinion testimony concerning the meaning of code words and phrases based on a review of intercepted and transcribed telephone conversations.

I. Conspiratorial Liability under *Pinkerton*

First, this Court should affirm the Fourteenth Circuit and hold that conspiratorial liability is not applicable to the forfeiture-by-wrongdoing exception in this case. Reardon's hearsay statements should not be admitted against Barnes because *Giles v. California*, the controlling case on this matter, requires that the defendant engage in or acquiesce to conduct designed to silence a witness. In this case, there is no evidence that Barnes intended to cause Reardon's unavailability. His words demonstrate that he neither engaged in nor acquiesced to misconduct. He told Anderson not to do anything about Reardon, and when Anderson persisted, Barnes told him to hold off. As he did not intend for Reardon be harmed, he cannot be held to have forfeited his rights under the *Giles*.

Further, although *Pinkerton* has been traditionally held to impute forfeiture-by-wrongdoing through conspiratorial liability, the holding in *Giles* requires evidence of intent to silence a witness before hearsay can be introduced against a defendant. Thus, even though Anderson intended to harm Reardon with the intent to silence him, the government would need to show more than simply involvement in a conspiracy with Anderson to impute a waiver of hearsay objections against Barnes. The evidence indicates that not only did Barnes not intend Anderson's actions but that Barnes instructed Anderson not to harm Reardon.

Under controlling case law, because Barnes did not engage in or acquiesce to misconduct, conspiratorial liability cannot be used to impute another's misconduct to him, and therefore the forfeiture-by-wrongdoing exception does not apply in this case. Circuit Courts have

interpreted *Giles* consistent with this view, holding that to impute conspiratorial liability, there must be evidence of intent on the part of the conspirators. Further, it would be unfair to waive Barnes's right to confrontation and to hearsay objections because of Anderson's misconduct. Therefore, both the existing law and sound policy indicate that Reardon's hearsay statements should not be admitted against Barnes.

## II. Journalist's Privilege

Second, this Court should affirm the Fourteenth Circuit and hold that a journalist's privilege exists and that it is absolute. In this case, Kara Crawley has an absolute evidentiary privilege because the government cannot show that there is probable cause that Ms. Crawley has material that is relevant to alleged criminal activity, that Ms. Crawley's evidence cannot be obtained through other avenues that do not destroy First Amendment rights, and that there is a compelling interest in overriding the journalist's privilege.

The government cannot show that there is probable cause that Ms. Crawley has evidence that is related to criminal activity. Ms. Crawley disclosed the information that she received from her confidential source and published this information in her newspaper article. Further, the information about her source is not related to criminal activity because her source was not engaged in the revealed criminal activity. Next, the evidence that the government wants can be obtained through other ways that do not violate First Amendment rights. For example, the government can conduct depositions of other Big Top Circus employees, the helicopter company, Mr. Alfred Anderson, and Daniel Best. Furthermore, the evidence that the government needs is already disclosed in Ms. Crawley's newspaper article, and therefore, having Ms. Crawley testify would be merely cumulative evidence. Finally, the government cannot show a "compelling and overriding interest" in Ms. Crawley's confidential information. Ms. Crawley's

information is not compelling because her information is already public. Forcing Ms. Crawley to testify would stifle the free flow of information that the press gathers and disseminates.

Ms. Crawley's journalist's privilege should be absolute. An absolute privilege would encourage people to report criminal activity and help in prosecuting crime. If the court cannot find that the privilege is absolute then the court should find that the privilege is qualified.

### III. Lay Opinion Testimony

Third, this Court should affirm the Fourteenth Circuit and hold that under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where, as here, the agent neither participated in the conversation nor observed it. Agent Simandy's opinion does not fall within the legal scope of lay witness testimony under Federal Rule of Evidence 701, which requires an opinion to be (a) rationally based on the witness' 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.

This case directly implicates and fails to comply with the first requirement, which is primarily interpreted to require first-hand, personal knowledge or observation of at least part of the events in question. Here, Agent Simandy neither observed nor participated in any of the relevant conversations but reviewed transcripts weeks after the events took place. Because his rational perception was based merely in ex post facto review of transcripts, rather than actual events, Agent Simandy's opinion fails to qualify as lay testimony.

## ARGUMENT

### **I. THE FOURTEENTH CIRCUIT CORRECTLY CONCLUDED THAT THE HEARDSAY DECLARATIONS SHOULD NOT BE ADMITTED AGAINST BARNES UNDER THE FORFEITURE-BY-WRONGDOING EXCEPTION BECAUSE BARNES DID NOT ENGAGE OR ACQUIESCE IN MISCONDUCT THAT LED TO THE UNAVAILABILITY OF REARDON AND COULD NOT**

**HAVE REASONABLY FORESEEN THAT ANDERSON WOULD MURDER REARDON.**

Courts have held that a criminal defendant may be deemed to have waived his or her Confrontation Clause rights and hearsay objections to out-of-court statements of an unavailable witness if a preponderance of the evidences establishes one of the following: (A) he or she engages or acquiesces in wrongdoing with the intent of rendering the witness unavailable; or (B) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. *Giles v. California*, 54 U.S. 353, 359 (2008); *United States v. Cherry*, 217 F.3d 811, 821 (10th Cir. 2000); U.S. CONST. amend. VI. Neither of these is met in this case.

**A. This Court should hold that Reardon’s hearsay statements to Best should be excluded because Barnes did not engage in or acquiesce to misconduct designed to silence a witness.**

Reardon’s hearsay statements to Best should be excluded from evidence against Barnes because the forfeiture-by-wrongdoing doctrine of the Federal Rules of Evidence is inapplicable. The forfeiture-by-wrongdoing exception to the hearsay rule is inapplicable where a defendant does not engage in or acquiesce to wrongdoing with the intent of rendering the witness unavailable. *Giles v. California*, 554 U.S. 353, 359, 367 (2008).

The Confrontation Clause guarantees that a criminal defendant will have the opportunity “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. The common law forfeiture-by-wrongdoing doctrine is an exception to the Confrontation Clause and the general bar against hearsay evidence. It is recognized by all circuit courts and codified in Rule 804(b)(6). Specifically, rule 804(b)(6) says that “[a] statement offered against a party that has engaged or acquiesced in wrong-doing that was intended to, and did procure the unavailability of the declarant as a witness” is admissible at trial. The purpose of the forfeiture-by-wrongdoing

exception is to prevent “abhorrent behavior which strikes at the heart of the system of justice itself.” FED. R. EVID. 804(b)(6) advisory committee note (citation and internal quotation marks omitted). As this is an exception to a constitutional right, it is to be interpreted narrowly. *See generally Giles v. California*, 544 U.S. 353 (articulating a narrow interpretation of the forfeiture-by-wrongdoing doctrine and stating that “abridging the constitutional rights of criminal defendants is not in the State's arsenal.”).

To apply the forfeiture-by-wrongdoing exception, the district court must find by a preponderance of the evidence that (1) the defendant engaged or acquiesced in wrongdoing (2) that the wrongdoing was intended to render the declarant unavailable as a witness, and (3) that it did, in fact, render the declarant unavailable as a witness. *See United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005). Wrongful conduct includes but is not limited to murdering a witness. *U.S. v. Jackson*, 2013 U.S. App. LEXIS 1374 (4th Cir. 2013). Looking to the plain language of the rule, the use of the words “engaged or acquiesced in wrongdoing” lends support to the assertion that waiver can be imputed under an agency theory of responsibility to a defendant who “acquiesced” in the wrongful procurement of a witness’s unavailability but did not actually engage in wrongdoing apart from the conspiracy itself. Fed. R. Evid. 804(b)(6)

Pursuant to the forfeiture-by-wrongdoing doctrine, this Court previously held in *Reynolds v. United States* that “[t]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the defendant’s] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” 98 U.S. 145, 158 (1878).

In *Crawford v. Washington*, the Supreme Court reaffirmed that the Confrontation Clause bars admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S. 36, 68 (2004). The admission of unconfrosted testimony should be rare because the Court held that confrontation is essential to determining the truth and promoting real and apparent fairness in the process. *Id.* at 74. Four years after *Crawford*, the Court made clear that the forfeiture-by-wrongdoing exception still applies, but only when the defendant actually intended to prevent the witness from testifying. *Giles*, 544 U.S. 353 (2008).

In *Giles v. California*, the Supreme Court vacated the lower court's ruling and remanded, directing the court to consider the defendant's intent. *Id.* at 359. The Court held that California's version of the forfeiture-by-wrongdoing exception violated the Confrontation Clause because while California required that the defendant commit a wrongful act that procured the witness's unavailability, there was no requirement that the defendant *intended* the witness's absence. *Id.* at 358, 366. The Court in *Giles* concluded that the forfeiture-by-wrongdoing only applies "when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 359. The Court noted that the exception is based on the maxim "that no one should be permitted to take advantage of his wrong" and stated that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Id.* at 366. (quoting *Reynolds*, 98 U.S. at 158).

The Court did not discuss whether the defendant's desire to silence the witness needed to be a sole or primary motivation for his wrongdoing, but it is clear that the intent must exist. *Id.* at 359. In *United States v. Jackson*, the Fourth Circuit held that it was sufficient that a "precipitating and substantial reason why [the defendant] murdered [the victim]" was to prevent

him from testifying, even if it was not the sole reason. 2013 U.S. App. LEXIS 1374.

Accordingly, unfronted testimony is only admissible into evidence when the witness's unavailability is the result *and* the intent of the defendant's misconduct; in other words, the forfeiture-by-wrongdoing exception applies only when the defendant engaged in conduct specifically designed to prevent witnesses from testifying.

In the case at hand, *Giles* requires that Barnes, the defendant, must have intended the unavailability of the witness. While it is stipulated that the witness is unavailable in this case because he was murdered by Anderson, (R. 24), Barnes himself did not engage or acquiesce in wrongdoing that was intended to render the declarant unavailable as a witness. Prior to killing Reardon, Anderson stated that he wanted to "get rid of him" and stated that he "needed him out of the picture." (R. 7). Clearly, the forfeiture-by-wrongdoing rule would apply to Anderson as he intended to silence Reardon and confessed to killing him to prevent him from talking about the alleged conspiracy. (R. 24).

The evidence indicates, however, that Barnes did not have the requisite intent. Barnes was not present at and did not cause Reardon's murder, and thus he did not engage in conduct designed to prevent Reardon from testifying. (R. 24). Further, Barnes did not acquiesce to the conduct. He did not order, encourage, or agree to let Anderson kill Reardon. (R. 24). Indeed, Barnes told Anderson to "Just tell him we called it off" and said "don't do anything." As Barnes did not engage in or acquiesce to conduct that was designed to prevent the witness from testifying, under *Giles*, the Court should hold that the forfeiture-by-wrongdoing exception does not apply to him in this case.

Solely under *Reynolds* and circuit court rulings, an interpretation of the forfeiture-by-wrongdoing exception might have permitted the hearsay statements to be used against Barnes,

but as per the Court's clarification in *Giles*, absent intent on the part of the defendant to procure the unavailability of the witness, the hearsay evidence should not be allowed. Textually, the plain meaning of *Giles* requires such a result: Barnes did not engage or acquiesce in conduct designed to prevent Reardon from testifying; indeed, Barnes engaged in conduct designed to protect Reardon by instructing Anderson to leave him alone; thus Barnes did not waive his rights under the forfeiture-by-wrongdoing exception.

**B. This Court should hold that the forfeiture-by-wrongdoing exception cannot be imputed through conspiratorial liability in this case because Barnes did not intend the misconduct and Anderson's actions were not reasonably foreseeable.**

Barnes should not be held responsible for the actions of co-conspirator Anderson under the doctrine of conspiratorial liability because he did not intend the misconduct and could not have foreseen it. *Giles* effectively limits conspiratorial liability by mandating a showing of intent to procure the unavailability of a witness by the defendant, in addition to being in furtherance of the conspiracy and reasonably foreseeable. *Giles v. California*, 554 U.S. 353, 359 (2008); *United States v. Cherry*, 217 F.3d 811, 821 (10th Cir. 2000)

Under the doctrine of conspiratorial liability, "the overt act of one partner in crime is attributable to all." *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). The *Pinkerton* Court stated that the substantive offense need only be shown to have been reasonably foreseeable as a natural and necessary consequence of the conspiracy. *Id.* at 647-648.

Prior to *Giles*, courts have held that a criminal defendant may be deemed to have waived his or her confrontation clause rights and hearsay objections to out-of-court statements of an unavailable witness if a preponderance of the evidences establishes that the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or

natural consequence of an ongoing conspiracy. *United States v. Cherry*, 217 F.3d 811, 821 (10th Cir. 2000); U.S.C.A. Const.amend. 6; FED.R. EVID. 804(b)(6).

*Giles*, however, promulgated a new rule that effectively limited the *Cherry* Doctrine, and thereby limited forfeiture-by-wrongdoing through conspiratorial liability, to when the defendant had intent to render the witness unavailable. Although the forfeiture-by-wrongdoing exception clearly existed prior to *Giles*, the Court had never held that the exception required proof of a specific intent to prevent testimony. *See, e.g. Reynolds v. United States*, 98 U.S. 145, (1878); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford*, 541 U.S. at 54.

A new rule is one “over which reasonable jurists could disagree.” *Ponce v. Fecker* 606 F.3d 596, (9th Cir. 2010) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 395 (1994)). When a dissent accompanies the articulation of a rule and there are conflicting decisions among other courts prior to the Court’s articulation of the rule, it weighs against the conclusion that precedent compelled a decision. *Ponce*, 606 F.3d at 603. In *Giles*, both of these occurred: The majority in *Giles* was accompanied by two dissents, indicating that there was dispute over the rule. Furthermore, prior to *Giles*, there was a split among lower courts, with the majority of courts holding that the forfeiture exception did *not* require intent to prevent testimony.<sup>1</sup> This demonstrates that *Giles* is more than a restatement of an old rule, and thus it is more likely that it affects existing case law than if it were a mere restatement of a rule.

*Giles* has limited the effect of the forfeiture-by-wrongdoing doctrine by preventing its application in cases where the defendant had the effect but not the intent of preventing testimony.

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<sup>1</sup> Compare *United States v. Garcia-Meza*, 403 F.3d 364, 370-71 (6th Cir.2005) (holding that forfeiture does not require proof of intent); *State v. Sanchez*, 177 P.3d 444, 456 (Mont.2008) (same); *People v. Giles* 152 P.3d 433, 443 (Cal.2007)(same), *vacated*, 554 U.S. 353 (2008); *State v. Mechling*, 633 S.E.2d 311, 326 (W.Va.2006) (same); *State v. Mason*, 162 P.3d 396, 404 (Wash.2007) (same); and *State v. Jensen*, 727 N.W.2d 518, 535 (2007) (same), with *People v. Moreno*, 160 P.3d 242, 247 (Colo.2007) (holding that forfeiture requires proof of intent); *People v. Stechly*, 870 N.E.2d 333, 353 (2007) (same); and *State v. Romero*, 156 P.3d 694, 703 (2007) (same).

For example, referencing the *Giles* holding, the Fourth Circuit in *United States v. Hanna* declined to admit evidence under the forfeiture-by-wrongdoing exception because it was undisputed that the defendant had killed Teresa for insurance proceeds, not with the purpose of making her unavailable to testify. 353 Fed. Appx. 806, 809 (2009). As it is clear that the *Giles* Court articulated a new rule—mandating a showing of intent before the forfeiture-by-wrongdoing rule can apply—this Court must decide whether *Giles* still permits the *Pinkerton* doctrine to encompass conspirators who did not intend the misconduct of their co-conspirators.

A narrow interpretation of *Pinkerton* liability clearly does not contradict *Giles*. In *United States v. Thompson*, the court disputed whether a conspiracy can even exist where one conspirator intended misconduct without the other co-conspirator's known agreement. 286 F.3d 950 (7th 2002). The *Thompson* court embraced forfeiture-by-wrongdoing through coconspirator liability, but held that it would not apply in situations where one co-conspirator engaged in conduct that left a witness unavailable without the other co-conspirator intending the result. The court stated that “[b]y limiting coconspirator waiver-by-misconduct to those acts that were reasonably foreseeable to each individual defendant, the rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct.” *Id.* at 965. The court thereby defined “a reasonably foreseeable act” as one that co-conspirators had acquiesced to either explicitly or implicitly.

The *Thompson* court's interpretation of reasonably foreseeable is fully compatible with the *Giles* doctrine because it requires either explicit or implicit intent on the part of each co-conspirator before allowing hearsay evidence against them. Under the *Thompson* doctrine, the hearsay evidence in the present case would be clearly inadmissible because Barnes did not acquiesce either explicitly or implicitly to the murder of Reardon; indeed, Barnes ordered

Anderson not to do anything to Reardon. (R. 18-19). Without Barnes's explicit or implicit intent, the *Thompson* interpretation of coconspirator liability would prevent the court from admitting hearsay evidence.

Some circuit courts have interpreted conspiratorial liability and "reasonably foreseeable" more broadly, holding that conspiratorial liability as articulated in *Pinkerton* still applies even without a showing of intent on the part of the defendant. *See, e.g. United States v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005). Even in *Cherry*, the court found that there was "absolutely no evidence [that the defendant Cherry] had actual knowledge of, agreed to or participated in the murder of [the witness]," but held that the court could impute a waiver of Cherry's confrontation rights based on reasonable foreseeability. *Cherry*, 217 F.3d at 814.

After *Giles*, circuit courts have recently held that the *Cherry* doctrine of imputed liability through reasonable foreseeability "must be supported by evidence that the defendant 'engaged in conduct *designed* to prevent the witness from testifying.'" *United States v. Dinkins*, 691 F.3d 358, 385 (4th Cir. 2012). Thus, *Giles* effectively limits the *Cherry* doctrine by permitting a forfeiture exception only "when the defendant engaged in conduct *designed* to prevent the witness from testifying," *Id.* at 358, and not solely when another co-conspirator engaged in misconduct. A plain meaning interpretation of *Giles* does not allow the conspiratorial forfeiture-by-misconduct exception set out in *Cherry* to be applied to a witness's testimonial statements if the defendant did not manifest sufficient intent to prevent a witness from testifying.

Therefore, in this case, before admitting the hearsay evidence through Rule 804(b)(6), this Court must find that Barnes engaged or acquiesced to conduct designed to prevent Reardon from testifying. Without a showing of intent on the part of Barnes in the present case, coconspirator liability cannot be imputed against him under *Giles*. Such an intent cannot be

shown. While it could be argued that Anderson's actions were in furtherance of the alleged conspiracy, Anderson's actions were not reasonably foreseeable and Barnes did not intend for them to happen. *Giles* requires more than a mere furtherance of a conspiracy, it requires intent.

Barnes's own words demonstrate that he did not intend for Anderson to harm Reardon. When Anderson called and insinuated that he might take action against Reardon, during the first recorded conversation, Barnes told Anderson "don't do anything" and that he was "worried over nothing." (R. 18). When Anderson persisted in his concerns, Barnes finally told him to "just tell him we called it off," referring to their plans. (R. 19). Barnes also told Anderson "Hold off." (R. 18) and said he did not "want anything to do with this." (R. 19). Barnes's words clearly demonstrate that he was trying to prevent Anderson from taking action, not acquiescing.

Further, by conveying his desire to not be involved, he demonstrated that any action Anderson took was no longer in furtherance of the conspiracy. Any action that Anderson then took was not contemplated by the conspiracy and was not the intent or design of Barnes. Because Anderson's actions were not Barnes's intent, the *Giles* holding prohibits the forfeiture-by-wrongdoing exception from waiving Barnes's rights. Furthermore, Anderson's actions were not foreseeable because the defendant unequivocally told him to "hold off." Unbeknownst to the defendant, Reardon invited Anderson to his home, where Anderson then killed him, (R. 24), despite previous instructions to the contrary from the defendant.

The *Giles* doctrine still permits co-conspirator liability when a co-conspirator intends or acquiesces to misconduct, but not when Barnes did not intend or acquiesce to the misconduct of his coconspirator. Barnes ordered his co-conspirator not to take action, and thus could not have foreseen it in furtherance of the conspiracy. Therefore, this Court should not admit into evidence the hearsay declarations under Rule 804(b)(6).

Even if this court were to hold that the *Giles* holding does not require evidence of Barnes's intent to procure Reardon's unavailability, this court should still find under the plain language of the Rule 804(b)(6) that such a result is required. The language of the rule requires that the party himself wrongfully cause or acquiesce in wrongfully causing the witness's unavailability, FED. R. EVID. 804(b)(6), and Barnes did not cause or acquiesce in wrongfully causing Reardon's unavailability. Indeed, Barnes told Anderson to "hold off" and cannot be held to have acquiesced. (R. 19). Additionally, as Barnes told Anderson not to act and told him he did not want anything to do with it, it should not be held under the *Pinkerton* doctrine that Anderson's actions were in furtherance of the conspiracy and reasonably foreseeable.

Furthermore, to impute the forfeiture-by-wrongdoing exception against Barnes would be bad policy. The purpose of Rule 804(b)(6) is to prevent abhorrent behavior by a party who, in hoping to avert justice, prevents testimony from coming forward in court. FED. R. EVID. 804(b)(6) advisory committee note (citation and internal quotation marks omitted). This Court has repeatedly stated that the purpose for the exception is that the "Constitution does not guarantee an accused person against the legitimate consequences of his *own* wrongful acts." *See e.g. Giles*, 544 at 366; *Reynolds*, 98 U.S. at 158. As Rule 804(b)(6) is an exception to a constitutional right, it should be interpreted narrowly. To impute a waiver of Barnes's constitutional rights based on the misconduct of Anderson when Barnes could not foresee or prevent the misconduct would be inconsistent with the very purpose of the rule. In this case it was not Barnes's own wrongful acts that led to the unavailability of the witness, it was Anderson's acts, and the exception should not be imputed to Barnes.

The district and appeals courts properly applied the law and good policy by holding that the forfeiture-by-wrongdoing exception in Rule 804(b)(6) does not apply in this case, and this Court should affirm.

**II. THE FOURTEENTH CIRCUIT PROPERLY HELD THAT MS. CRAWLEY IS ENTITLED TO JOURNALIST’S PRIVILEGE AND THAT THE PRIVILEGE IS ABSOLUTE.**

- A. This court should affirm the Fourteenth Circuit’s ruling that Ms. Crawley is entitled to journalist’s privilege because the government cannot show that there is probable cause that Ms. Crawley has material that is relevant to alleged criminal activity, that Ms. Crawley’s evidence cannot be obtained through other avenues that do not destroy First Amendment rights, and that there is a compelling interest in overriding the journalist’s privilege.**

This Court should grant Ms. Crawley’s motion to quash the subpoena that would require that she divulge confidential information. Under common law, Kara Crawley has an absolute evidentiary privilege because the government cannot show that there is probable cause that Ms. Crawley has material that is relevant to alleged criminal activity, that Ms. Crawley’s evidence cannot be obtained through other avenues that do not destroy First Amendment rights, and that there is a compelling interest in overriding the journalist’s privilege. When examining privileges, the Federal Rule of Evidence 501 governs. This rule states that “[c]ommon law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege . . . .” FED. R. EVID. 501. In other words, the federal courts to develop privileges that follow the tenets of common law. Courts must begin with a belief that everyone has a responsibility to provide testimony and that privileges that exist are rare. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). However, journalist privilege exceptions are warranted unless the government shows (1) that there is probable cause that the journalist has evidence that is plainly germane to criminal activity; (2) that the evidence cannot be acquired through other ways that do not destroy First Amendment rights; and (3) that there is a convincing and prevailing interest in the evidence.

*Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stevens, J., dissenting). Journalist’s privilege must be analyzed on a case-by-case basis. *Id.* at 710 (Powell, J. concurring).

In *Branzburg v. Hayes*, three journalists were held in contempt for not disclosing their confidential sources who were “synthesizing hashish from marihuana, an activity which, they asserted, earned them about \$5,000 in three weeks.” *Id.* at 667. The confidential sources were the individuals doing the criminal activity. *Id.* at 668. The Supreme Court, in a 5 to 4 opinion, held that the First Amendment did not grant journalists a privilege not to testify in state or federal grand juries. *Id.* at 709. However, Justice Powell’s concurrence in *Branzburg* states:

[I]f a newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

*Id.* at 709 (Powell, J., concurring).

Justice Powell also stated that the privilege claim should be balanced between the “freedom of the press” and citizens’ responsibility to testify to criminal activity. *Id.* at 710.

The dissent, stated by Justice Stewart in *Branzburg*, outlined a three-part balancing test relating to press privilege. The government must:

(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of the law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

*Id.* at 743 (Stevens, J., dissenting).

Many lower court judges have followed Justice Powell’s more speech protective concurrence and applied Justice Stewart’s balancing test outlined in his dissent rather than

Justice White’s majority opinion. In fact, at least nine out of thirteen circuit courts have used the concurring and dissenting opinions in *Branzburg* to decide if there is a journalist privilege.<sup>2</sup>

Since so many circuit courts use the concurring and dissenting opinion, this Court should decide that journalist’s privilege does exist unless the government can show that all three prongs of the Stewart dissent balancing test are met, subject to a case-by-case basis.

Furthermore, many state legislatures have implemented laws that protect journalist’s privilege.<sup>3</sup> The Supreme Court in *Jaffee v. Redmond* stated, “[O]nce a state legislature has enacted a privilege there is no longer an opportunity for common-law creation of the protection.” 518 U.S. 1,13 (1996).

In this case, none of the three prongs have been met. First, the government cannot show that there is probable cause that Ms. Crawley has evidence that is related to criminal activity. In *New York Times Company v. Gonzales*, a newspaper company tried to stop the government from obtaining reporters’ telephone records claiming the information was privileged. 459 F.3d 160, 162 (2006). The government had probable cause that the reporters’ telephone records would lead help uncover law violations. *Id.* at 170. The court held that because of the need to uncover criminal activity, there was no journalist’s privilege. *Id.* at 171.

Here, Ms. Crawley’s confidential source told Ms. Crawley what the criminal associates were planning. (R. 10). She used the employee’s information to write a story about the alleged

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<sup>2</sup> See *Bruno & Stillman Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594–597 (1st Cir. 1980), *U.S. v. Burke*, 700 F.2d 70, 76–77 (2d Cir. 1983), *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir.1980), *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986), *Miller v. Transamerican Press Inc.*, 621 F.2d 721, 725–726 (5th Cir. 1980), *Cervantes v. Time, Inc.*, 464 F.2d 986, 992–93 & n. 9 (8th Cir.1972), *Shoen v. Shoen*, 5 F.3d 1289, 1292–1293 (9th Cir. 1993), *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–438 (10th Cir.1977), *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C.Cir.1981).

<sup>3</sup> See ALA. CODE § 12-21-142, (1975), CAL. TESTIMONY GIVEN BY JOURNALIST UNDER SUBPOENA CODE § 1986.1 (West 2000), FLA. STAT. ANN. § 90.5015 (West 1998),735 ILL. COMP. STAT. 5/8-901 (1982), MICH. COMP. LAWS ANN. § 767A.6 (West 1995), MINN. STAT. § 595.022 (1973), N.Y. CIVIL RIGHTS LAW § 79-h (McKinney 1970), OKLA. STAT. ANN. tit.12, § 2506 (West 1978), TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 22.023 (West 2009), WIS. STAT. ANN. § 3.

criminal activity of Mr. Barnes and his associates. (R. 9). Her contact was not the person involved with criminal activity. Mr. Barnes and his associates were the people criminally implicated. The evidentiary value to society would be minimal at best since Ms. Crawley exposed the criminal behavior in her article.

Society's interests in stopping crime would be chilled if people were not allowed to speak confidentially to journalists about their concerns. Even though Ms. Crawley's source agreed to be videotaped, he or she only did this taping to assist Ms. Crawley in her investigation with the understanding that the tape and the source's identity would remain confidential. (R. 10). Society does not benefit when people who have confidential and sensitive information about criminal activity stop speaking in fear of having to come forward because journalists must divulge their confidential sources to the government.

Second, the evidence that the government wants can be obtained through other ways that do not violate First Amendment rights. In *United States v. Burke*, the defendant argued that he needed the confidential evidence that the journalist had in order to defend himself from the government's accusations. 700 F.2d 70, 77 (2d Cir. 1983). The court determined that the required evidence could be acquired through the court records and obtaining the journalist's information would be merely cumulative. *Id.* at 78. The Second Circuit Court concluded, "Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing." *Id.* at 77.

Here, like in *Burke*, the government can find alternative ways to acquire the evidence needed for Mr. Barnes' criminal trial. The government can depose all of the Big Top Circus employees to see if other employees knew about Mr. Barnes' plan to kill the elephants. The government can also depose the helicopter company, Copters Corporation, Mr. Alfred Anderson,

and Daniel Best. Also, Ms. Crawley's article disclosed all of the information that the confidential source gave her. (R. 11). There is minimal evidence that is not already disclosed, and, like *Burke*, it would be merely cumulative to require the journalist to disclose the confidential source. Therefore, the government cannot show that there is not an alternative way of acquiring the evidence needed.

Third, the government cannot show a "compelling and overriding interest" in Ms. Crawley's confidential information. In *Baker v. F & F Investments*, a journalist refused to reveal his source who had given him information on "blockbusting," which is a racially discriminatory procedure. 470 F.2d 778, 780 (2d Cir. 1972). The Second Circuit held, "[T]hough a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony." *Id.* at 784. The court did not compel the journalist's testimony. *Id.*

Like *Baker*, the non-disclosure of Ms. Crawley's confidential informant outweighs the societal interest in forcing her to testify. Ms. Crawley's investigation of the criminal activities of Mr. Barnes demonstrates that a free and unencumbered press can do to benefit society. Forcing journalists to divulge their confidential sources will chill speech and will stop people who have sensitive information from disclosing this information to the press. Ms. Crawley informed the public of the alleged criminal activity by publishing her story about the conspiracy of killing the Asian elephants. If Ms. Crawley's informant knew that he or she would be publically unveiled, he or she would most likely not have divulged information to Ms. Crawley. As Ms. Crawley has

revealed the necessary information from the informant to stop and prosecute the alleged criminal activity, the government cannot show that her evidence is “compelling.”

**B. This Court should find that the journalist’s privilege is absolute in order to protect freedom of the press.**

This Court should find that Ms. Crawley’s journalist’s privilege is absolute; in the alternative, if this Court finds that journalist’s privilege is not absolute, then the Court should find that there is a qualified privilege and that freedom of the press outweighs the responsibility of Ms. Crawley to give testimony. In *Ventura v. The Cincinnati Enquirer*, the court ruled that the reporter had an absolute privilege due to the state laws of Ohio. 396 F.3d 784, 792 (6th Cir. 2005). The court stated, “As a matter of public policy, extension of an absolute privilege under such circumstances will encourage the reporting of criminal activity by removing any threat of reprisal in the form of civil liability. This, in turn, will aid in the proper investigation of criminal activity and the prosecution of those responsible for the crime.” *Id.* at 791 (quoting *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505 (1994)).

In *Zerilli v. Smith*, a reporter declined to reveal confidential sources. The court stated:

[W]hen striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press. Efforts will be taken to minimize impingement upon the reporter's ability to gather news.

656 F.2d 705, 711 (D.C. Cir. 1981) (citing *Carey v. Hume*, 492 F.2d 631, 636 (D.C.Cir. 1974).

In this case, Ms. Crawley gathered investigative material for her news article that she shared with the public. Like *Ventura*, where the reporter had an absolute privilege, Ms. Crawley is not protecting people who act criminally; she uncovered a plot to destroy animals. (R. 9). She has an interest in helping animals and wanted to let the public know

what was happening at the Big Top Circus. *Id.* She spent two weeks just watching the animals train to make sure that the animals were treated humanely. (R. 10).

Like *Zerelli*, where the court applied a balancing test between free press and compelled testimony, Ms. Crawley protected society's interests of animal rights when she wrote her article, and her sources that enabled her to do this work should be protected. This freedom to disseminate ideas helps the public to know what is happening and creates a strong incentive to protect this right. Ms. Crawley exposed the criminal acts and any additional evidence acquired by forcing her to breach confidentiality would be minimal.

This Court should affirm the Fourteenth Circuit and hold that Ms. Crawley has a journalist's privilege and hold that this privilege is absolute or in the alternative, that the qualified privilege of freedom of the press outweighs the need for Ms. Crawley to testify.

**III. THE FOURTEENTH CIRCUIT PROPERLY CONCLUDED THAT AGENT SIMANDY'S OPINION REGARDING HIDDEN MEANINGS IN THE INTERCEPTED TELEPHONE CONVERSATIONS WAS INADMISSABLE AS LAY TESTIMONY BECAUSE THE OPINION FAILED TO MEET ALL THREE NECESSARY REQUIREMENTS OF RULE 701.**

Agent Simandy's opinion does not fall within the legal scope of lay witness testimony, as stipulated by Federal Rule of Evidence 701. For an opinion to be admissible lay testimony, Rule 701 imposes three requirements: the opinion must be "(a) rationally based on the witness' 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." FED. R. EVID. 701. If any one of the requirements is not met, the witness is legally barred from offering lay testimony. The first requirement is most directly implicated in this case.

- A. This Court should hold that Agent Simandy's opinion was not rationally based on his perception because he did not personally observe the conversations in question.**

This case fails to comply with the first requirement of Rule 701 which stipulates that a lay opinion must be rationally based on the perception of the witness. *Id.* at 701(a). Although the Supreme Court has not spoken specifically to this issue, the overall consensus at the circuit court level is clear: the requirement is met only when opinion is “based upon [the witness’s] personal observation and recollection of concrete facts.” *United States v. Peoples*, 250 F.3d 630, 639 (8th Cir. 2001) (quoting *Wactor v. Spartan Transp. Corp.*, 27 F. 3d 347, 350 (8th Cir. 1994).<sup>4</sup> This rule is based in longstanding common law and reflects the policy underlying the Federal Rules of Evidence.

In *United States v. Peoples*, a case about a murder in connection with four robberies in Omaha, Nebraska, the Eighth Circuit distinguished between the testimony of law enforcement officers who have first-hand knowledge based on observation of facts and those who have merely conducted ex post facto reviews of telephone and visitation conversations. *Peoples*, 250 F.3d at 639. The appeals court ruled that “the district court did not abuse its discretion in admitting [a police officer’s] opinions that were drawn from his personal observations regarding the robberies” during the ongoing investigation.<sup>5</sup> *Id.* Specifically, the police officer testified

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<sup>4</sup> The court in *United States v. Peoples* provided a non-exhaustive list of courts that have applied the rule: “*United States v. Parsee*, 178 F.3d 374, 379 (5th Cir.1999) (witness was a participant in the conversation); *United States v. Saulter*, 60 F.3d 270, 276 (7th Cir.1995) (witness had firsthand knowledge of the facts being related); *United States v. Awan*, 966 F.2d 1415, 1430 (11<sup>th</sup> Cir.1992) (undercover agent was a participant in the conversations and had personal knowledge of the facts being discussed).” *Peoples*, 250 F.3d at 641.

<sup>5</sup> The court did not offer an opinion as to whether or not the police officer’s opinion would be admissible under the 2000 revision to Rule 701(c), which stipulates that lay testimony may not be based on specialized knowledge within the scope of Rule 702. *Peoples*, 250 F.3d at 642. In the present case, even if this Court determines that Agent Simandy has met the requirement of rational perception, his specialized knowledge regarding code words used during criminal activities would require him to testify as an expert under Rule 702 and bar him from bringing forward lay testimony. He has specialized knowledge under 701(c) because of his training as an FBI agent and his experience in approximately 50 other criminal cases. (R. 14). Furthermore, Petitioner has conceded that a jury would not easily be able to discern the meaning of the code words and phrases. (R. 15). The 2000 amendments to Federal Rule of Evidence 701 were enacted to eliminate this risk of “proffering an expert in lay witness clothing.” FED. R. EVID. 701 advisory committee’s note. For these reasons, Agent Simandy’s opinion fails to meet Rule 701’s third requirement.

about the relationship between the robberies based on his first-hand knowledge of one of the robberies. *Id.* On the other hand, the court refused to admit an FBI Special Agent's conclusions regarding code words and phrases, some of which were unclear while others were written in plain English with purportedly hidden meanings. *Id.* at 640. The court stated that “[the FBI Special Agent] lacked first-hand knowledge of the matter about which she testified. Her opinions were based on her investigation after the fact, not on her perception of the facts.”<sup>6</sup> *Id.* at 641.

The court in *Peoples* cited multiple appellate cases from around the country that have applied the rule requiring law enforcement officers to have personally observed the conversation in order to offer lay testimony.<sup>7</sup> *Id.* The court pointed out that law enforcement officers may be, and often are, qualified as experts in order to put forward Rule 702 testimony regarding coded language, but that such expert testimony (that is not based on observed activity) “may not be admitted under the guise of lay opinions.” *Id.* Furthermore, the court stated that, because neither Rule 701 nor Rule 702 was met, the Agent's testimony constituted argument from the witness stand, not evidence. *Id.* at 640.

The common law rule articulated by the *Peoples* court reflects Federal Rule of Evidence 602's general prohibition on any witness testimony unless “evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter,” or unless the testimony is given by one who is qualified as an expert witness. FED. R. EVID. 602(b). The Advisory

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<sup>6</sup> Additionally, the court held that admission of the testimony did not constitute harmless error by the court. *Peoples*, 250 F.3d at 642. Pursuant to the rule in *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir.1996), the FBI Agent's testimony was erroneously admitted because there was a significant possibility that the testimony had a substantial impact on the jury. *Id.* This resulted in a judgment to reverse and remand. In the case at hand, Agent Simandy's testimony was also not harmless. His testimony regarding alleged code words, if admitted, would link the conversations of William Barnes to specific criminal acts. Furthermore, like in *Peoples*, “[other] testimony, however, was not so damaging to [the defendants] as to render [the agent's] testimony harmless.” *Id.* In other words, Agent Simandy's opinion tying specific words and phrases to criminal acts which have not been completely proved via other evidence in the case would constitute key information and almost certainly have a substantial impact on the jury. The opinion, were it to be admitted, would therefore similarly not qualify as harmless error.

<sup>7</sup> See *supra* note 1.

Committee’s Notes to Rule 701 provide additional clarification, emphasizing that part (a) is a “requirement of first-hand knowledge or observation.” FED. R. EVID. 701 advisory committee’s note.

The rules capture the overall purpose of lay testimony, which is to offer an inside perspective from those who were, in a personal way, part of the activity concerned. It is not designed to offer the opportunity to anyone who has useful information to take the witness stand.<sup>8</sup> This is a necessary limitation. If a candidate may offer valuable insights regarding a particular piece of evidence that is not self-explanatory but was not involved in the event in question, Rule 702 allows for that expert testimony, subject to the necessary disclosures and reporting requirements. FED. R. EVID. 702.

Some circuit courts send a conflicting message regarding the personal observation standard of Rule 701(a). For example, In *U.S. v. Novaton*, an Eleventh Circuit case, police officers who monitored wiretaps were allowed to provide lay testimony, along with their supervisors, relating to coded, narcotics-related terms. *United States v. Novaton*, 271 F.3d 968, 1007 (11th Cir. 2001). Because the supervisors were allowed to provide testimony, the court seems to give approval for a looser standard than personal observation. In this case, however, the appellant drug dealers did not dispute whether or not the supervisors had permission to testify under rational perception standard of 702(a) so the court explicitly stated that it was not taking up that legal question. *Id.* at 1008. The court instead spoke to a related question: whether or not all of the rational perception of a witness must be based on personal observation. It concluded

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<sup>8</sup> See FED. R. EVID. 701 advisory committee’s note (“[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact” is a “most pervasive manifestation” of the common law insistence upon “the most reliable sources of information.” (citation omitted) These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. (citation omitted)”).

that, “a witness does not fall outside of Rule 701 simply because his or her “rational[ ] ... perception” is based in part on the witness' past experiences.” *Id.* This reflects a realistic outlook of lay witness testimony by allowing the witness to testify through the prism of his or her experiences. However, it also reaffirms the critical importance that there is at least some rational perception of the events in question: lay testimony on the basis on experiences outside the events alone is not sufficient in order for the testimony to fall within Rule 701.

Other cases, such as the Eleventh Circuit case of *U.S. v. Jayyousi*, improperly applied the 701(a) standard of rational basis on the witness' perception. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). In *Jayyousi*, and FBI agent reviewed transcripts of communications between terrorists more than six months after the alleged terrorist activity occurred and was allowed to testify as to the meaning of coded words. *Id.* at 1095. The court reasoned:

Agent Kavanaugh's testimony was rationally based on his perception. While investigating this case for five years, Agent Kavanaugh read thousands of wiretap summaries plus hundreds of verbatim transcripts, as well as faxes, publications, and speeches. He listened to the intercepted calls in English and Arabic. . . . In the present case, Agent Kavanaugh testified about the meanings of code words that he learned through his examination of voluminous documents during a five-year investigation.

*Id.* at 1102-03.

Here, the court improperly conflates a perception of documents with perception of the actual events in question. In order to act as a lay witness, most courts have consistently imposed the first-hand knowledge or observation standard.<sup>9</sup> *Jayyousi* offers a much broader of interpretation of the applicability of lay testimony than was originally contemplated for the exception. FED. R. EVID. 701 advisory committee's note.

The argument that reviewing conversations ex post facto constitutes “first-hand knowledge” (See R. 15) is without merit. The *Peoples* Court flatly rejected this line of reasoning

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<sup>9</sup> See *supra* note 1.

based on the plain language of the rule. *Peoples*, 250 F.3d at 641. Such knowledge only constitutes familiarity with *materials*, not actual first-hand knowledge or observation of the *event* in question. *See Id.* Additionally, if this were permitted, nearly anyone who reviewed transcripts or recordings (subject to the other two requirements of Rule 702) would be qualified to offer lay testimony.

In the present case concerning Agent Simandy's opinion, *Peoples* speaks directly to the most salient legal issue. Like the federal agent who conducted analysis and made conclusions based on ex post fact review of recorded conversations, Agent Simandy was not even assigned the case until December 15, 2011, two weeks after the last conversation between the respondent and alleged co-conspirators took place. (R. 12-13).

Unlike in *Novaton*, where lay testimony was allowed when the witnesses' testimony was only partially based on observed experiences, Agent Simandy's rational perception was based entirely outside of the respondent's pertinent conversations. (R. 14) He did not even claim to participate in the smallest portion of the events in question. *Id.* His analysis and conclusions came only after reviewing transcripts of conversations dating from October 3, 2011 – December 1, 2011. (R. 13). Just like the agent's testimony in *Peoples*, Agent Simandy's expert opinion is being offered in the guise of a lay opinion and constitutes merely argument from the witness stand.

Although it is not specified in *Peoples*, it is likely that at least some of the recordings were audio recordings which would be far less subject to error than the transcript from which Agent Simandy drew conclusions, and yet the recordings were still rejected by the court. (R. 14-15). This highlights the importance of actual, first-hand, personal observation, regardless of the reliability of the media used in ex post facto research.

Additionally, although Agent Simandy’s testimony involved the interpretation of relatively oblique phrases (he interpreted “blood diamonds” to mean elephant ivory tusks, “Charlie tango” to mean helicopter, and “black cat” to mean AK-47s), (R. 13), the *Peoples* court found this to be irrelevant and did not make a distinction regarding whether or not the language needed to be obscured in some way for a lay testimony interpretation to be appropriate. (R. 13). Rather, the court focused solely on the strict construction of Rule 701(a) and looked to the testimony itself to determine whether or not it had a basis in personal observation. Likewise, this court should look to Barnes’ conversations and recognize that Agent Simandy’s rational perception is not based in either participating in or observing any of them. (R. 14). Agent Simandy’s involvement therefore does not reflect the personal, first-hand knowledge contemplated in the Federal Rules of Evidence.

In the case at hand, the district and appeals courts properly excluded Agent Simandy’s testimony by basing his perception on actual events rather than ex post facto review of transcripts. Because this appropriately in agreement with substantial case law and the underlying reasons for allowing lay testimony, this Court should affirm the lower court’s decision and find that the testimony does not fall within Rule 701.

### CONCLUSION

For the foregoing reasons, the decision of the Fourteenth Circuit should be affirmed.

Respectfully Submitted,

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Counsel for Respondent

## APPENDIX 1 OF 1

### **FRE 804(b)(6): Forfeiture-by-wrongdoing**

(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.

### **FRE 701: Opinion testimony by law witnesses**

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.

### **FRE 501: Privilege in general**

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.