

No. 12-23

**In The
Supreme Court of the United States**

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM BARNES,

Respondent.

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

- I. Whether as a matter of law a trial court may admit into evidence against the defendant in a criminal case the hearsay declaration of a murder victim under the doctrine of forfeiture-by-wrongdoing codified in Federal Rules 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 a journalist privilege applies to the confidential disclosure of a source to a news reporter where the source could be revealed through the journalist's videotaped notes but the journalist agreed not to reveal the source out of safety concerns?
- III. Can testimony of a federal agent explaining coded language contained in transcripts created by a fellow agent's contemporaneous transcription of a third party conversation be admissible as opinion testimony by lay witnesses under Rule 701 where the testifying federal agent did not contemporaneously listen to the conversation?

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OPINIONS BELOW

The United States District Court, Southern District of Boerum (“District Court”) ruled on three motions against the Petitioner. First, it denied Petitioner's evidentiary motion to introduce out-of-court statements made by the late James Reardon to Daniel Best as an exception under the hearsay rule under Federal Rules of Evidence 804(b)(6). Second, it granted news reporter Kara Crawley's motion to quash the subpoena to testify for the Petitioner citing the journalist's privilege under Federal Rules of Evidence 501. Finally, the District Court denied the Petitioner's motion in limine seeking to introduce the testimony of federal agent Thomas Simandy as lay witness opinion under Federal Rules of Evidence 701.

The United States Court of Appeals for the Fourteenth Circuit affirmed all three rulings. Both opinions are found in the record.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2009), stating that the Supreme Court may review any case in the federal courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case."

CONSTITUTIONAL PROVISIONS AND STATUTES

The following federal statutes are relevant to the determination of the present case:

Jurisdiction: 28 U.S.C. § 1254(1) (2009).

U.S. Constitution: amend. VI.

Federal Rules of Evidence: 501, 701, 804

STATEMENT OF THE CASE

A. Co-Conspirator Statements

Respondent, William Barnes (Barnes), owned Big Top Circus and was co-owner of the unregistered charity “Boerum 4 Animals.” R. 1. “Boerum 4 Animals” was co-founded by Barnes and Alfred Anderson (Anderson). R. 1. Anderson was convicted in 2010 of fraud for soliciting donations on behalf on an unregistered charity and using the donations to fund bear-hunting trips. R. 1.

The government alleges that Barnes contacted other local circus businesses to stage a large elephant show. R. 2. The government also alleges Barnes contacted Anderson offering him an opportunity to hunt elephants and sell the ivory for profit. R.2. Anderson invited his friend James Reardon (Reardon) to participate in the alleged hunting scheme. R. 2. Barnes allegedly made contact with an undercover ATF agent in order to purchase weapons for the hunt and purchased three fully automatic assault rifles “under the table”. R. 2. The government obtained warrants to tap Barnes' phone. R. 2. In two recorded phone conversations between Barnes and Anderson, Anderson voiced his concern about Reardon backing out of the hunting scheme. In one conversation, Anderson suggested to Barnes that they “get rid of him (Reardon)”. R. 7. Barnes told Anderson not to do anything. R. 18. In a subsequent phone conversation, Anderson stated to Barnes, “We're out of time.” R. 7. Barnes responded, “Hold off. Just shut him up for a while,” and “I don't want anything to do with this.” R. 19. Reardon was later found dead in his apartment. R. 7. Anderson confessed to the murder of Reardon. R. 7. Barnes was subsequently arrested. R. 3.

At the pre-trial motion hearing for Barnes, the government sought to introduce hearsay testimony of Daniel Best, who allegedly spoke with Reardon about the elephant hunt scheme

before he died. R. 8. The government argued that the statements could be introduced under Federal Rule of Evidence 804(b)(6). R. 8. The government argued that conspiracy liability was applicable to Rule 804(b)(6). R. 8. The motion was denied and the judge held as a matter of law, that Rule 804(b)(6) only applies when the defendant intended to prevent the witness from testifying. R. 16.

B. The Journalist's Privilege

On August 30, 2011, Barnes contacted Boerum Times news reporter Kara Crawley ("Crawley") about news publicity for the upcoming elephant show promising to give Crawley unlimited access to Big Top. R. 9. Crawley agreed to write the article as she was interested in animal rights and wanted inside information on how the animals were treated at Big Top. R. 9.

On September 15, 2011, Crawley asked Barnes to sign a standard release form which provided that Barnes retained no legal control over Crawley's final written product. R. 9. Crawley visited the press and ticket sales offices, met with trainers, and saw the animals. R. 9.

Over the next two weeks, Crawley watched the animals train and met trainers and other employees at the circus. R. 10. One day, Crawley asked an employee where the elephants were kept. R. 10. The employee knew Crawley was working on a news story about the circus. R. 10.

The employee brought Crawley to a private caging area where she spoke in hushed tones about a sensitive matter. R. 10. The employee revealed overhearing a conversation between Barnes and another party about a plan to kill elephants for their ivory. R. 10. The employee requested that Crawley not reveal the employee's identity and requested a pseudonym be used in the article out of concern that Barnes would learn who leaked the information while the employee was employed at the circus. R. 10. Although the employee permitted Crawley to videotape the conversation with the employee's face visible in the videotape, this was a result of

Crawley's assurances that the videotape was for her notes and for her eyes only. R. 10.

On December 1, 2011, Crawley published a story in the Boerum Times revealing the elephant poaching plan at Big Top. R. 11.

C. Agent Simandy's Lay Opinion Testimony

Agent Thomas Simandy ("Simandy") of the Federal Bureau of Investigation ("FBI") began investigating Barnes on December 15, 2011. R. 12. Simandy reviewed about a dozen transcripts of conversations between Barnes, Anderson, and Reardon; and interviewed Agent Jason Lamberti ("Lamberti") of the Bureau of Alcohol, Tobacco, Firearms, and Explosives and Alan Kledstat ("Kledstat") at Copters Corporation. R. 13.

According to Lamberti, on October 2, 2011, Barnes contacted Weapons Unlimited, a registered and licensed firearms dealer in Texas. R. 13. Lamberti claimed Barnes was unaware that Lamberti was an undercover agent and was interested in unregistered and fully automatic weapons. R. 22-23. Lamberti initially said there was a legal three-month waiting period for an AK-47 at \$1,000 each with fees. R. 2. Lamberti then proposed a deal under the table, for \$500 up front for each AK-47 with a delivery date of December 5, 2011. R. 2. Lamberti said Barnes accepted the latter offer and provided his credit card information. R. 23. According to Kledstat, on October 6, 2011, Barnes arranged for a one-day rental of a helicopter. R. 13.

Based on Lamberti's interview, the FBI obtained and executed a warrant to tap Barnes's telephone line intercepting calls from October 4, 2011 and December 1, 2011. R. 23. FBI Agent Narvel Blackstock ("Blackstock") contemporaneously listened to and transcribed the calls. R. 13. Simandy was assigned to the case when Blackstock died in unrelated events. R. 12. Prior to this case, Simandy did not investigate animal poaching cases. R. 14.

Simandy explained code words like "blood diamonds" was elephant ivory tusks, "Charlie

tango" was helicopter, and "black cat" was AK-47s, by putting dates of arrangements and the conversations into context. R. 13. Simandy concluded there was a plan to poach animals. R. 14.

On May 1, 2012, Simandy testified to these facts before Judge Jennifer Wu of the United States District Court, Southern District of Boerum. R. 12-16.

D. Nature of the Proceedings

Barnes was arrested on December 1, 2011, and charged with violations of 18 U.S.C. §§ 43, 371 and 922(a)(1)(A); and 16 U.S.C. § 1538.

On May 1, 2012, the District Court heard pretrial motions by the government which included (1) an evidentiary motion to introduce out-of-court statements made by the late James Reardon to Daniel Best as an exception under the hearsay rule under Federal Rules of Evidence 804(b)(6); (2) an opposition to Crawley's motion to quash the subpoena to testify for the Petitioner citing the journalist's privilege under Federal Rules of Evidence 501; and (3) a motion in limine seeking to introduce the testimony of federal agent Thomas Simandy as lay witness opinion under Federal Rules of Evidence 701.

On May 2, 2012, the Honorable Jennifer Wu ruled against the government on all three motions. The government petitioned for an interlocutory appeal to the Fourteenth Circuit.

On July 12, 2012, the Honorable Circuit Judge Rodriguez issued an opinion affirming the District Court's ruling. The government petitioned for writ of certiorari to this Court.

On October 1, 2012, this Court granted writ of certiorari to hear this case.

SUMMARY OF THE ARGUMENT

I.

The District Court properly excluded inadmissible hearsay evidence by applying the intent standard for the forfeiture-by-wrongdoing doctrine to Rule 804(b)(6) and holding, as a matter of law, conspiracy liability inapplicable to Rule 804(b)(6). The common-law forfeiture doctrine, as examined by the lower courts, has required evidence that the defendant intended to procure the absence of the witness in order to forfeit his Confrontation rights. This Court made the intent requirement law in its holding in Giles. The Giles intent requirement to show forfeiture of a defendant's Confrontation right also applies to Rule 804(b)(6), making conspiracy liability inconsistent with the rule. The language of Rule 804(b)(6) and the advisory committee notes on 804(b)(6) suggest that an intent requirement is contemplated by the rule. Furthermore, an intent requirement strikes the proper balance between protecting Constitutional rights and preserving the integrity of the justice system. In the alternative, if this Court holds that conspiracy liability is applicable to Rule 804(b)(6), Barnes does not forfeit his Confrontation right or his hearsay objections, because the murder of Reardon, by Anderson, was not a reasonably foreseeable consequence of the alleged conspiracy.

II.

The journalist's privilege is an evidentiary privilege recognized by courts and Congress has given courts the broad discretion to recognize the privilege. Where information is divulged in confidence to a reporter as here, the privilege should be absolute as it affects the employee's safety concerns should Crawley be compelled to disclose her source. Should the Court find a qualified privilege, the Branzburg balancing test applied by this Court would favor non-disclosure of Crawley's source. The Fourteenth Circuit also applied this balancing test and

concluded that the District Court properly granted Crawley's Motion to Quash. Thus, the Circuit Court's ruling should be upheld.

III.

The District Court has broad discretion in deciding whether testimony is proper as lay or expert witness testimony. Agent Simandy lacked personal knowledge of the coded language from conversations he reviewed in transcripts during a brief investigation. Federal Rules of Evidence 701 requires that lay opinion testimony be based on the rational perception of the witness, be helpful to the jury in understanding the witness's testimony or a fact in issue, and not be based on scientific, technical or specialized knowledge under Federal Rules of Evidence Rule 702 governing expert testimony. As Agent Simandy's testimony is based on his investigation of the case after the fact and was not within his personal knowledge, it does not satisfy the Rule 701 criteria. Therefore, this Court should uphold the Fourteenth Circuit's decision affirming the District Court's ruling.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXCLUDED THE HEARSAY EVIDENCE OF REARDON BECAUSE A DEFENDANT FORFEITS HEARSAY AND CONFRONTATION CLAUSE RIGHTS UNDER FEDERAL RULE 804 (b)(6) ONLY IF HE ENGAGED IN CONDUCT DESIGNED OR INTENDED TO PREVENT THE DECLARANT FROM TESTIFYING

A trial court's legal conclusions about the Federal Rules of Evidence and Confrontation Clause are subject to *de novo* review. A trial court's decision to exclude testimony as hearsay is reviewed for abuse of discretion. United States v. Cherry, 217 F.3d 811, 814 (10th Cir. 2000).

The Confrontation Clause of the United States Constitution provides an accused with the right to cross examine any witness who gives testimony against him unless there is a common law exception to the right of cross examination that was recognized during the founding. U.S. Const. amend. VI; Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Federal Rules of Evidence 804 (b)(6)¹ states that “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”, is not excluded by the rule against hearsay. FED. R. EVID. 804(b)(6). This Court analyzed Rule 804(b)(6) and held that the rule codified the common-law forfeiture-by-wrongdoing exception to the Confrontation Clause, an exception that has existed since the founding of the Constitution. Davis v. Washington, 547 U.S. 813, 833 (2006).

The principle of conspiratorial liability, first pronounced by this Court in Pinkerton v. United States, states that an overt act committed by one member of a conspiracy, done in furtherance of and within the scope of the conspiracy is attributed to all members of the conspiracy. 328 U.S. 640, 647-648 (1946). A co-conspirator, under Pinkerton, can be held vicariously liable for the crimes of his co-conspirators as long as those crimes were reasonably foreseeable as a natural consequence of the unlawful agreement. Id.

¹ Subsequent references to the "Rule" is to the Federal Rules of Evidence.

Two circuit court of appeals have applied Pinkerton conspiracy liability to the forfeiture doctrine and held a defendant waives their Confrontation Clause rights (and hearsay objections under Rule 804(b)(6)) if he participated directly in procuring the witness's unavailability through wrongdoing and this “. . . procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an on-going conspiracy.” United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000); *see also* United States v. Thompson, 286 F.3d 950, 965-966 (7th Cir. 2002) (Adopting the holding from Cherry).

This Court's opinion in Giles added another layer to the analysis of the forfeiture doctrine. This Court held that the founding era forfeiture-by-wrongdoing exception contained a requirement that the defendant intended the witness's absence. Giles v. California, 554 U.S. 353, 361 (2008). This Court reasoned that in order for a defendant to forfeit the constitutional right of confrontation, the defendant's conduct must have been designed to prevent the witness from testifying and mere knowledge that an act will make the witness unavailable is not enough. Id. at 359. Although this Court in Giles did not specifically rule on whether the intent standard for the constitutional forfeiture doctrine applied to the intent standard in Rule 804(b)(6), the language from this Court's decision indicates they are the same.² Id. at 365 (noting the Confrontation Clause and the evidentiary hearsay rules stem from the same roots.); *see also* 5 Mueller and Kirkpatrick, Federal Evidence § 8:134 (3d. ed. 2012).

Applying this Court's language in Giles, a defendant forfeits his right to exclude hearsay and forfeits his Confrontation Clause rights only if he engaged in conduct designed or intended to prevent the declarant from testifying. This Court should hold that the district court and the appellate court below properly excluded the hearsay testimony of Reardon because admission of

² “. . .[S]atisfying the exception means also satisfying the confrontation clause in the typical setting in which a prosecutor offers testimonial hearsay against a defendant on the theory that he acted wrongfully to make the declarant unavailable.” 5 Mueller and Kirkpatrick, Federal Evidence § 8:134 (3d. ed. 2012).

hearsay statements against a defendant under the reasonable foreseeability test of conspiracy liability does not show the defendant engaged in conduct designed or intended to prevent the declarant from testifying. Alternatively, even if this Court holds that a defendant may forfeit their hearsay objections and their Confrontation rights under a theory of conspiracy liability, there is no evidence that the murder of Reardon was in furtherance of and within the scope of the alleged conspiracy between Barnes and Anderson and that the murder was reasonably foreseeable as a natural consequence of the conspiracy.

A. Federal Rule 804(b)(6) Codified the Common Law Forfeiture-By-Wrongdoing Exception, Which Required The Defendant Purposely Intend to Procure the Absence of the Witness, Making The Reasonable Foreseeability Test of Conspiracy Liability Inapplicable as a Matter of Law.

The District Court properly excluded the hearsay testimony of Reardon, holding as a matter of law, that conspiracy liability is inapplicable to Rule 804(b)(6). Conspiracy liability is inapplicable to Rule 804(b)(6) because a defendant must intend to procure the absence of the witness and reasonable foreseeability does not meet that standard. This Court should uphold the District Court's ruling because the common-law forfeiture doctrine required the defendant intend to procure the absence of the witness, the intent requirement announced by this Court in Giles applies to Rule 804(b)(6), and the intent requirement strikes the proper balance between safeguarding Constitutional rights with protecting the integrity of the justice system.

1. The common-law forfeiture doctrine required the defendant intend to procure the absence of the witness.

Before this Court's ruling in Giles and before Rule 804(b)(6) was enacted, lower courts have interpreted the common-law forfeiture-by-wrongdoing doctrine as having an intent requirement on the part of the defendant to procure the unavailability of witness in order for a defendant to forfeit his Confrontation rights. Olson v. Green, 668 F.2d 421, 429-430 (8th Cir.

1982); United States v. White, 838 F.Supp.618, 623 (D.D.C. 1993); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); *see also* United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976). *But see* United States v. Mastrangelo, 693 F.2d 269, 273 (2nd Cir. 1982).

In Olson, the court held that a defendant does not waive his Confrontation right simply because they participate in a crime. 668 F.2d at 430. Participation in a crime can form the basis for forfeiture of a defendant's right to confront witnesses “. . . [o]nly if the evidence indicates that the defendant directed the crime against the witness or otherwise procured the witness' absence.” Id.

Similarly the courts in White and Houlihan both held that a defendant must commit an affirmative act with the intent of preventing the witness from testifying to forfeit the right of Confrontation. In White, the court held that the government must show the particular defendant actively participated in some manner in planning or executing the witness' unavailability for forfeiture to occur. 838 F.Supp. at 623. In Houlihan, the First Circuit held that a defendant forfeits his right to object on Confrontation grounds when he “(1) [C]auses a potential witness's unavailability (2) by a wrongful act (3) *undertaken with the intention* of preventing the potential witness from testifying at a future trial. . . .”. 92 F.3d at 1280 (emphasis added).

The Second Circuit applied a contrary standard under the forfeiture-by-wrongdoing exception. In Mastrangelo, the court held that mere knowledge of a plot to kill a witness and failure to notify the authorities was sufficient to constitute a forfeiture of a defendant's Confrontation rights. 693 F.2d at 273-274. This broad standard articulated by the Second Circuit is inconsistent with the common-law requirement that the defendant intend to procure the witness's unavailability and has been criticized by other courts.³ *See* White, 838 F.Supp. at 623.

³ “Mere failure to prevent the murder, or mere participation in the alleged drug conspiracy at the heart of this case, must surely be insufficient to constitute a waiver of a defendant's constitutional confrontation rights. The Court

Similar to White and Houlihan, where the courts held that there must be a showing of an act by the defendant with the intent to procure the absence of a witness for forfeiture to occur, the District Court here properly interpreted Rule 804(b)(6) to require proof that the defendant intended to procure the unavailability of the witness before a defendant forfeits their hearsay objections. This intent requirement is necessary to protect a defendant's fundamental constitutional right of confrontation, a right which is derived from the same source as the hearsay rules.⁴ Requiring the defendant intend to procure the absence of the witness for forfeiture to apply follows the common law approach to the forfeiture doctrine and protects the fundamental right of Confrontation under the Constitution.

2. This Court's intent requirement for the forfeiture-by-wrongdoing doctrine, announced in Giles, applies to Rule 804 (b)(6)

Consistent with the language articulated by the lower courts interpreting the common-law forfeiture doctrine, this Court in Giles, held that in order for a defendant to forfeit his Confrontation rights under the common-law forfeiture-by-wrongdoing exception, he must intend, at the time of the wrongful act against the witness, to make the witness unavailable to testify. 554 U.S. at 367. Courts that have applied the reasonable foreseeability test from conspiracy liability to 804(b)(6) were not guided by this Court's holding in Giles and misapplied the language of 804(b)(6). Giles, 554 U.S. at 367; Cherry, 217 F.3d at 820-821; Thompson, 286 F.3d at 964; United States v. Taylor, 622 F. Supp. 2d 693, 698 (E.D. Tenn. 2008).

In Giles, this Court held that California's application of the forfeiture by wrongdoing doctrine was not an exception to a defendant's Confrontation right because California's version of the doctrine did not contain a specific intent requirement on the part of the defendant to procure

believes a ruling to that effect would provide too little protection for so important a right.” White, 838 F. Supp. at 623.

⁴ Mueller and Kirkpatrick *Supra* note 1

the absence of the witness. 554 U.S. at 365. The Court reasoned that the exception to the Confrontation right, required the defendant intended the absence of the witness from trial, making California's version of the doctrine not an exception to the right of Confrontation. Id.

Similar to this Court's reasoning in Giles, the District Court here properly held, as a matter of law, that the reasonable foreseeability test under conspiracy liability does not apply to the forfeiture-by-wrongdoing analysis. To forfeit the right of Confrontation and the right to object to hearsay, a court must find that the defendant intends to procure the absence of the witness. Forfeiture based on reasonable foreseeability is inconsistent with this requirement articulated in Giles.

The two Circuit Court case that have analyzed Rule 804(b)(6) under a theory of conspiracy liability were decided pre-Giles and were based on an incorrect interpretation of 804(b)(6). In Cherry, the court held that a defendant forfeits his Confrontation rights and his hearsay objections if the defendant wrongfully procured the witness's unavailability in furtherance, within the scope, and reasonably foreseeable as a natural consequence of an ongoing conspiracy. 217 F.3d at 820; *see also* Thompson, 286 F.3d at 964. The court reasoned that this interpretation of the forfeiture-by-misconduct doctrine was consistent with 804(b)(6) because of the “acquiesced” prong of the rule. Id.

Unlike the District Court here, the Cherry and Thompson courts were not guided by this Court's interpretation of the forfeiture-by-wrongdoing doctrine under Giles. The District Court here properly applied the language of this Court to conclude that conspiracy liability is inapplicable to 804(b)(6) because a defendant must design or intend to prevent the witness from testifying. The fact that it may be reasonably foreseeable that a co-conspirator may prevent a witness from testifying is inconsistent with the intent requirement.

Furthermore, the “acquiesced” prong of 804(b)(6) does not lend support to the contention made in Cherry and raised by the government in the District Court below that waiver-by-misconduct can be established through conspiracy liability. The complete language of 804(b)(6) states: “The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: A statement offered against a party that wrongfully caused-or acquiesced in wrongfully causing-the declarant's unavailability as a witness, and did so *intending that result.*” FED. R. EVID. 804(b)(6) (emphasis added). 804(b)(6) was added to the hearsay exceptions for the purpose of forfeiting a party's right to object on hearsay grounds when that party's *deliberate* wrongdoing or acquiescence procured the unavailability of a witness. FED. R. EVID. 804 advisory committee's notes. Although a defendant may waive his Confrontation and hearsay objections by acquiescing to a wrongful act that makes the witness unavailable, he must deliberately acquiesce to the wrongful act with the intent to make the witness unavailable. The language of 804(b)(6) and notes from the advisory committee are consistent with this Court's holding in Giles.

In Taylor, the government put on evidence, and the defense did not contest, that the defendant killed the witness whose statements the government attempted to introduce into evidence. 622 F.Supp.2d at 698. The Court held that pre-Giles, the forfeiture rule would apply, but since Giles, the government must show that the defendant intended to prevent the witness from testifying. Id. Because the government could not show that the defendant killed the witness with the intent of procuring his absence from trial, the defendant had not waived his Confrontation rights. Id.

Similar to Taylor, which illustrates how a court applies the Giles intent analysis to the forfeiture-by-wrongdoing doctrine, the District Court below applied the intent analysis to Rule

804(b)(6) and determined that the government could not show that Barnes intended to procure the absence of the witness. The District Court properly held that the government could not show intent to procure the absence of the witness by attempting to show Barnes forfeited his Confrontation rights and hearsay objections because it was reasonably foreseeable under conspiracy liability that his alleged co-conspirator would kill Reardon.

3. The intent requirement strikes the proper balance between protecting a defendant's constitutional rights and deterring criminals from procuring the absence of witnesses against them.

The right to confront and cross-examine witnesses has been unanimously held by the courts to be a fundamental requirement to ensure the Constitutional goal of a fair trial. Pointer v. Texas, 380 U.S. 400, 405 (1965). The primary goal of Rule 804(b)(6) is to deter criminals from subverting the justice system by procuring the absence of witnesses set to testify against them. Thompson, 286 F.3d at 962. Applying the Giles intent requirement to Rule 804(b)(6) is consistent with balancing a defendant's fundamental right to confront witnesses, with protecting the integrity of the justice system by deterring criminals from procuring the absence of witnesses. Davis v. Washington, 547 U.S. 813, 833 (2006).

In Davis, this Court held that it is the courts duty to balance constitutional rights and integrity of the judicial system, but courts cannot vitiate constitutional guarantees merely because those guarantees allow the guilty to go free. 547 U.S. at 833. This Court reasoned that although the Confrontation Clause does not allow a criminal a windfall by having hearsay evidence excluded when they procure the absence of the witness, mere criminality that does not affect the justice system is not sufficient to forfeit constitutional protections. Id.

Here, the intent requirement under Giles, strikes the proper balance between protecting constitutional guarantees with protecting the integrity of the justice system because allowing a

reasonable foreseeability standard under conspiracy liability enables the government to argue forfeiture of a fundamental right based merely on a defendant's relationship in an alleged criminal enterprise. This does not strike the proper balance between Constitutional rights and protecting the integrity of the justice system. Not only does a reasonable foreseeability standard vitiate on Constitutional guarantee based on mere criminality it insults the integrity of the justice system by not ensuring the Constitutional goal of providing fair trials.

Based on the common-law doctrine of forfeiture-by-wrongdoing and this Court's holding in *Giles*, the District Court properly excluded the hearsay evidence of Reardon by applying the intent requirement to Rule 804(b)(6), striking the proper balance between protecting Constitutional rights and protecting the integrity of the justice system.

B. Alternatively, even if participation in a conspiracy can constitute a forfeiture, there is no evidence that the murder of Reardon was in furtherance of, within the scope of, and was reasonably foreseeable as a necessary or natural consequence of the conspiracy.

If this Court chooses to follow the rule created by Tenth Circuit, and adopted by the Seventh Circuit, and hold that conspiracy liability is applicable to Rule 804(b)(6), there is no evidence that the murder of Reardon, by Anderson, was in furtherance of, within the scope of and was reasonably foreseeable as a natural consequence of the alleged conspiracy to admit the hearsay statements against Barnes. *Cherry*, 217 F.3d at 820; *Thompson*, 286 F.3d at 964.

In *Thompson*, the Seventh Circuit adopted the test for conspiracy liability applied to Rule 804(b)(6) created by the Tenth Circuit in *Cherry*, which states that a defendant waives his Confrontation rights and hearsay objections if it can be shown by a preponderance of the evidence that the wrongful procurement of the witness was in furtherance, within the scope, and reasonably foreseeable as a natural and necessary consequence of the conspiracy. *Id.* The court then applied the test to the defendants in the case and determined the defendants had not waived

their Confrontation rights or their hearsay objections because the murder of the witness was not reasonably foreseeable as a necessary and natural consequence of the conspiracy. Id. at 966.

There was no evidence to show that the defendants knew or had reason to know the witness would be murdered and no evidence that this conspiracy had previously engaged in murder or attempted murder. Id.

Similar to Thompson, where the court held the defendant did not forfeit their Confrontation rights or hearsay objections because the murder of the witness was not reasonably foreseeable, the murder of Reardon by Anderson was not foreseeable to Barnes as a necessary and natural consequence of the conspiracy. The two recorded phone calls between Barnes and Anderson discussed nothing specific about murdering or even harming Reardon. In the first phone call between Barnes and Anderson, Anderson conveys his concern to Barnes about Reardon having second thoughts and that they should not have used him. R. 18. Anderson suggests that they should “get rid of him” and Barnes later replies in the conversation, “yeah, well, don't do anything. Not yet.” R. 18. These statements between Barnes and Anderson do not suggest that Anderson was talking about killing Reardon. A more likely interpretation of the conversation is that Anderson wanted to push Reardon out of the deal the three individuals had with each other.

Furthermore, Barnes had no reason to believe that murder was within the scope of and in furtherance of the conspiracy. The alleged conspiracy was to purchase weapons for the purpose of hunting animals. Barnes' prior dealings with Anderson involved hunting animals and never was there any indication to Barnes that Anderson was capable of murdering someone or that the alleged conspiracy he was engaged in contemplated harming people. R. 1.

The recorded phone conversations between Barnes and Anderson and the scope of conspiracy being limited to purchasing weapons and hunting animals made the murder of Reardon by Anderson an unforeseeable consequence of the alleged conspiracy. Reardon's hearsay statements must be excluded because Barnes has not forfeited his Confrontation rights or his hearsay objections.

II. THE JOURNALIST'S PRIVILEGE IS A RECOGNIZED EVIDENTIARY PRIVILEGE THAT PROTECTS INFORMATION GATHERED IN THE COURSE OF A JOURNALISTIC INVESTIGATION AND SHOULD BE ABSOLUTE TO PRESERVE COUNTERVAILING PUBLIC INTEREST IN RELIABLE INFORMATION

The journalist's privilege is a developing and recognized evidentiary privilege and should be absolute to protect the public interest in the free flow of information. Rule 501 provides, "[t]he 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." FED. R. EVID. 501. In jurisdictions where the journalist's privilege is recognized but not absolute, courts generally apply a balancing test considering three factors under Jaffee v. Redmond, 518 U.S. 1, 11-14 (1996). Thus, if this Court should rule the privilege is qualified and not absolute, the circuit court properly applied this Court's Jaffee balancing test to conclude the district court's grant of Crawley's motion to quash was proper. Therefore, its ruling should be affirmed.

A. Rule 501 preserves the right of courts to recognize a journalist's privilege.

Congress reserved the power to recognize a journalist's privilege to the courts. The Committee, "through a single rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases." FED. R. EVID. 501 advisory

committee's notes. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. Branzburg v. Hayes, 408 U.S. 665, 685 (1972). However, the broad language in Rule 501 enacted in 1974, just two years after the Branzburg decision suggests Congress granted courts with the authority to decide the circumstances where a privilege was appropriate and was a response to this Court's decision in Branzburg that held that no constitutional, testimonial privilege existed to protect the confidentiality of newsmen sources. FED. R. EVID. 501; Branzburg, 408 U.S. at 697.

B. This Court's Jaffee considerations support a journalist's privilege.

In Jaffee, this Court was guided by three inquiries whether to recognize the psychotherapist-patient privilege. 518 U.S. at 11-14. First, the significant public and private interests supporting recognition of the privilege; second, the balancing of the public and private interests against the burden on truth-seeking, and third, the "reason and experience" supporting the recognition of the privilege. Id.

Here, under the first consideration the significant public and private interests supporting the recognition of a journalist's privilege is vast. The public is entitled to uncensored information. The First Amendment freedom of press is moot absent protection of news sources. Regarding the private interests, relationships of trust and confidentiality between a journalist and a source secures the reliability of that information. This consideration is met.

Second, balancing the public and private interests here against the burden on truth-seeking. The employee spoke to Crawley with the assurance that he or she remain anonymous. The employee did not commit any crimes but overheard a conversation with Barnes and another person purporting to describe a crime. If Crawley is compelled to disclose the identity of her

source, disclosure of information especially crimes will be diminished. If the identity of the employee is revealed, this does not support the truth-seeking function but only serves to confirm the information disclosed. The employee would only repeat what was already published in Crawley's article. Non-disclosure of the employee's identity does not burden truth-seeking.

Third, "reason and experience" supporting the recognition of a journalist's privilege is strong. As the Third Circuit stated, "The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring." Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979). If the journalist's privilege is recognized in some jurisdictions but not others, this would lead to forum shopping. Furthermore, a source would be reluctant to disclose information to any journalists knowing that depending on the jurisdiction in which the journalist publishes, the journalist could potentially be compelled to reveal the source's identity. Thus, reason and experience would support a recognition of a journalist's privilege.

C. **This court's considerations under *Branzburg* do not support disclosure of the employee's identity.**

This court's balancing test in Branzburg does not warrant disclosure of the employee's identity. Some courts have considered the factors outlined in Branzburg to determine whether disclosure is appropriate. Branzburg, 408 U.S. at 710. The first consideration is the need of the party seeking disclosure and the interests of justice. Id. Second, is the relevance and importance or centrality of the information in question. Id. Third, whether the material is available from alternate sources. Id. The issue for the court is whether there is a compelling need for production that should override the privilege. Id. In Branzburg, this Court review four cases where journalists asserted a reporter's privilege. Events covered by the journalists involved drugs or social upheaval and civil unrest. Id. at 672-678.

The first consideration is the need of the party seeking disclosure and the interests of justice. "In light of strong public policy supporting unfettered communication to public of information, comment and opinion, and constitutional dimension of that policy, journalist has federal common law privilege, albeit qualified, to refuse to divulge his or her sources." Riley, 612 F.2d at 708. The strong public policy supporting the free flow and reliability of information would be diminished if a reporter is required to disclose sources as sources would be reluctant to provide information if they could be potentially revealed. The interests of justice here do not require disclosure as the prosecution could prove their case-in-chief without the employee's identity. The prosecution's case does not rest on the employee's identity.

Second, is the relevance and importance or centrality of the information in question. "Information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources." U.S. v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986). As discussed above, the government has failed to established the relevance of the employee's identity in its prosecution of Barnes. Unlike the cases in Branzburg which discussed rampant drug use and civil unrest during the journalists' coverage events, here, there is no such threat or ill targeted at society at large. This case involves animals at a circus and the information sought by the government is tangential to its case-in-chief.

Third, whether the material is available from alternate sources. "The requisite balance cannot be made without showing that only practical access to crucial information necessary for development of case is through reporter's sources, that other means of obtaining information have been exhausted, and that material sought provides source of crucial information going to heart of claim." Riley, 612 F.2d at 708. The government has not exhausted its efforts to obtain

the information sought. Other Big Top employees could testify to their knowledge of Barnes's alleged involvement or plan to poach. The government is infringing on Crawley's resources if this Court's compels disclosure.

III. THE CIRCUIT COURT CORRECTLY RULED THAT THE DISTRICT COURT PROPERLY EXCLUDED AGENT SIMANDY'S TESTIMONY AS LAY WITNESS TESTIMONY WHERE AGENT SIMANDY LACKED FIRST-HAND KNOWLEDGE OF THE CONVERSATIONS TRANSCRIBED BY ANOTHER AGENT AND THAT REQUIRED SPECIAL KNOWLEDGE TO INTERPRET

The circuit court correctly affirmed the district court's ruling to exclude Simandy's testimony as lay witness opinion under Rule 701. The 2000 amendments to Rule 701 seeks to prevent parties from evading expert disclosure requirements by presenting expert testimony as lay opinion. FED. R. EVID. 701 advisory committee's notes. Rule 701 provides that lay testimony in the form of an opinion is limited to the personal perception of the witness; should be helpful to the jury in understanding the witness's testimony or to determine a fact in issue; and cannot be based on scientific, technical, or other specialized knowledge within the scope of expert testimony under Rule 702. FED. R. EVID. 701. The applicable standard of review for a district court's evidentiary rulings should be upheld unless the opponent can show an abuse of discretion. Old Chief v. U.S., 519 U.S. 172, 174 (1997). Thus, the circuit court ruling should be affirmed as it properly excludes Simandy's testimony regarding conversations in which he did not participate under Rule 701(a).

A. The legislative intent underlying the 2000 amendments to Rule 701 is to prevent parties who do not comply with disclosure requirements from introducing expert testimony in the guise of lay opinion.

Before the 2000 amendments, Rule 701 required lay opinion testimony to be "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." FED. EVID. R. 701; U.S. v. Ayala-Pizarro, 407

F.3d 25, 28 (2005). With the 2000 amendments, the final limitation of Rule provides that lay testimony in the form of an opinion "not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Indeed, the advisory committee notes expressly states, "[b]y channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson." FED. R. EVID. 701 advisory committee's notes. Thus, the 2000 amendments seeks to prevent expert testimony masquerading as lay opinion from circumventing criminal and civil procedure disclosure requirements and introduce otherwise impermissible evidence to the jury.

B. Simandy's testimony was based on transcripts of conversations in which he was not a participant contrary to the personal knowledge requirement of Rule 701(a).

The first requirement under Rule 701(a) is not met here. Rule 701(a) requires lay witness opinion testimony be limited that which is "rationally based on the perception of the witness" FED. EVID. R. 701. A rational perception is one involving first-hand knowledge or observation. U.S. v. Rea, 958 F.2d 1206, 1215 (2d Cir. 1992). The rule seeks to provide the trier of fact "an accurate reproduction of the event." FED. R. EVID. 701 advisory committee's notes.

The First Circuit has held that an undercover agent's testimony to interpret code words used by defendants was admissible because the agent was actively involved in the investigation, learned voices and patterns, and heard and used the coded language in his undercover buys relating to the investigation. U.S. v. Santiago, 560 F.3d 62, 66 (1st Cir. 2009).

In Ayala-Pizarro, the Ninth Circuit affirmed the trial court's ruling that an officer's testimony that defendant was arrested at a known drug point was permissible as lay testimony because it satisfied the "requisite personal knowledge requirements of Rule 602 and also met the

requirements of Fed. R. Evid. 701 because it was based on 'particularized knowledge that the witness [had] by virtue of his position' as a police officer assigned to patrol the neighborhood." 407 F.3d at 28.

Similarly, the Second Circuit has upheld a lower court's ruling where although the witness did not participate in phone conversations intercepted by the government, the witness's interpretation of certain terms was admissible as lay opinion testimony because the witness acquired particular knowledge about loansharking from participating in the conspiracy and not through specialized training or study. U.S. v. Yannotti, 541 F.3d 112, 118 (2d Cir. 2008).

In the instant case, like the witnesses in Ayala-Pizarro and Yannotti, Simandy was not a participant of the conversations to which he testified. However, unlike witnesses in Ayala-Pizarro, Yannotti, and Santiago where the circuit courts held that testimony by those witnesses was admissible as lay opinion because the testimony was based on the witnesses' personal involvement and experience of the illicit activity, here, Simandy was never involved as an undercover agent during the investigation. Furthermore, Simandy has never conducted investigations on animal poaching or crimes against animals prior to this investigation. Finally, Simandy was interpreting obscure terms such as "Charlie tango," "black cat" and "blood diamonds" which can be taken out of context. Thus, Simandy's participation or perception is paramount to his testimony as a lay witness. Therefore, the circuit court properly excluded Simandy's testimony.

C. **Simandy's conclusion of obscure terms not in everyday usage from the phone conversations would not help the jury in understanding the fact in issue because it usurps the jury's role.**

Rule 701(b) requires that lay opinion be "helpful to understanding the witness's testimony or to determining a fact in issue" FED. R. EVID. 701.

In U.S. v. Jayyousi, a case agent with over five years experience investigating the case testified that based on his involvement in over 20 terrorist-related cases, people involved in terrorism used code words. U.S. v. Jayyousi, 657 F.3d 1085, 1095 (11th Cir. 2011). The Eleventh Circuit explained that the agent's explanation of code words helped the jury understand the defendants' conversations that related to their support of international terrorism because they "would like be unfamiliar with the complexities" of terrorist activities. Id. at 1103. The agent testified he knew the defendants used code words because the speakers indicated they were using code words, or in other contexts the agent could detect the speakers spoke in code. Id. The court held the district court did not abuse its discretion to allow the agent to give lay opinion testimony regarding his interpretation of code words in intercepted calls in which he did not participate. Id. at 1102-04.

The Seventh Circuit held in U.S. v. Estrada that an informant's testimony as to his understanding of meaning of recorded conversations between himself and defendant was admissible as opinion testimony of lay witnesses. U.S. v. Estrada, 39 F.3d 772, 773 (7th Cir. 1994). In that case, the words "contracts" and "letter" referred to cocaine and reasoned that the code words for negotiations for cocaine was helpful to the jury's understanding of issues at trial. Id.

In U.S. v. Grinage, a case agent gave testimony regarding 13 of the 2000 calls the government intercepted, but only three of the 13 calls were made by the defendant-appellant and of which only two calls contained substantive dialogue.⁵ U.S. v. Grinage, 390 F. 3d 746, 751 (2d Cir. 2004). Yet, the case agent made sweeping conclusions regarding the defendant-appellant's involvement in illegal drug activity. Id. The Second Circuit held the agent's testimony on

⁵ "The third call occurred about 12 minutes later, in it, Osman [defendant-appellant] indicates he dialed the wrong number and did not mean to call Grinage [co-defendant]." Id.

interpretations of the phone calls he reviewed went beyond permissible lay opinion testimony.

Id.

Here, Simandy listened to approximately twelve intercepted phone calls between Barnes, Reardon, and Anderson. Like the case agents' testimony regarding drug jargon in Estrada and Grinage, and terrorism code words in Jayyousi, Simandy concluded the terms "blood diamonds" referred to elephant ivory tusks, "black cat" referred to the three AK-47s from Weapons Unlimited and "Charlie tango" referred to the helicopter arranged with Copters Corporation to be used in the plan to poach elephants. Moreover, unlike the speakers in Jayyousi who explicitly expressed their code word usage, no speakers in the conversations made such a declaration. Similar to the case agent in Grinage who concluded the defendants were involved in illicit drug activity, Simandy concluded the terms in this case related to poaching when "black cat" and "blood diamonds" are common and a lay person could infer meaning to in the context of the conversation. Furthermore, Simandy lacked the extensive experience as the agent in Jayyousi who not only had terrorism case experience but also spent five years investigating the case. Simandy was assigned to the case on December 15, 2011 and had no prior experience with animal poaching cases, thus Simandy's testimony is not helpful to the jury.⁶

D. Simandy's explanation or interpretation of certain terms in the conversation though helpful to the jury exceeded the scope of lay testimony.

Simandy's interpretation of obscure terms exceeded the scope of lay opinion under Rule 701(c). The advisory committee notes to the 2000 Amendments provides that lay witness testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." FED. R. EVID. 701 advisory committee's notes. Thus, a lay person could for example, testify that

⁶ At the pretrial hearing on May 2, 2012, Simandy would have investigated the case for approximately five months.

a substance appeared to be blood whereas an individual must first be qualified as an expert to testify that bruising around the eyes is indicative of skull trauma. Id. Indeed, circuit courts are concerned the jury would give undue weight to expert testimony. U.S. v. Freeman, 498 F.3d 893, 903 (9th Cir. 2007) (citing U.S. v. Dukagjini, 326 F.3d 45, 53 (2d Cir. 2003); U.S. v. Foster, 939 F.2d 445, 452 (7th Cir. 1991); U.S. v. Alvarez, 837 F.2d 1024, 1030 (11th Cir. 1988)).

In Dukagjini, although the issue presented to the court concerned expert testimony, the Second Circuit explained the issues that arise when a case agent testifies beyond interpreting code words as an expert and testifies to the defendant's conduct in a case. 326 F.3d at 53. The first concern is once a witness is qualified as an expert, "the witness attains unmerited credibility when testifying about factual matters from first-hand knowledge." Id. Second, the expert testimony by a case agent could impair the truth-seeking function because "impeach[ing] an expert is difficult and could result in the expert having more credibility. Third, when the case agent testifies as an expert witness, "there is an increased danger that the expert testimony will stray from applying reliable methodology and convey the witnesses "sweeping conclusions" about appellant's conduct.

Under the first inquiry, the witness attains unmerited credibility when testifying about factual matters from first-hand knowledge. This is complementary to the personal perception requirement under Rule 701(a). Simandy did not personally participate in the conversations and thus this would not give his testimony unmerited credibility. However as Simandy is giving lay witness opinion and would discuss his investigation which includes review of the transcripts and interviews with Kledstat and Lamberti, these aspects of his testimony would bolster his credibility as an expert even if he has not been qualified.

Regarding the second concern in Dukagjini, as the case agent now assigned to the

investigation, Simandy would certainly impair a trial's truth seeking function should his testimony be admitted. Where a jury may not necessarily infer veiled references to elephant ivory tusks, helicopters and guns, Simandy's testimony undoubtedly changes the dynamics of the jury's thought process.

Finally, where the government uses a case agent as an expert, there is an increased risk that the expert would stray from applying strict methodology and make sweeping conclusions regarding the defendant's conduct. Although Simandy is not testifying as an expert, that he is providing lay witness opinion would provide him with even less limitation to follow a strict methodology that experts apply when testifying. Simandy concluded that certain terms used by the speakers relate to the very crimes the government is attempting to prove. Thus, the risk of Simandy's testimony as a lay witness could introduce the jury to sweeping conclusions unsupported by a strict methodology.

In U.S. v. Peoples, an agent who did not personally observe the events and activities discussed in the recordings, nor hear the conversations as they occurred testified that "buying a plane ticket" meant killing the victim, "lost and found situations" meant no body has been found yet, and "I done already gave my loot" meant he has paid the killers to do the killing. U.S. v. Peoples, 250 F.3d 630, 640 (8th Cir. 2001). The Eighth Circuit held that the agent's opinions were based on her investigation after the fact, not on her personal perception of the facts and thus the district court erred to admit the agent's opinions about the recorded conversations. Id. at 641.

Similar to Peoples in the instant case, Simandy's lay opinion was based on his investigation after the fact and not on his perception of the fact. Simandy's conclusive interpretation of "Charlie tango" as a helicopter, "blood diamonds" as elephant ivory tusks, and "black cat" as guns was derived from his investigation of this case and not from his perception of

the recordings in real-time. Simandy's opinion was formed under his specialized knowledge acquired from investigating the case is more appropriately expert knowledge and not lay opinion. Thus, the district court properly excluded Simandy's testimony as lay opinion.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court uphold the circuit court's ruling that Pinkerton liability cannot be extended to forfeiture-by-wrongdoing; journalists have an absolute privilege; or in the alternative, a qualified privilege; and the testimony of Agent Simandy is not lay witness testimony admissible under Rule 701. Respondent respectfully requests this Court affirm the circuit court's ruling and affirm the district court's judgment.

Dated: February 20, 2012

Respectfully submitted,

/s/ Team 5

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