

No. 12-23

IN THE
Supreme Court of the United States

SPRING TERM 2013

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 PETITIONER

Team 6P
Counsel for Petitioner

QUESTIONS PRESENTED

- I. As a matter of law, under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), may a trial court admit into evidence against a defendant in a criminal case the hearsay declaration of a murder victim, where the defendant could reasonably have foreseen that his co-conspirator would murder the declarant to silence him and to prevent him from betraying the unlawful conspiracy?
- II. As a matter of law, under Federal Rule of Evidence 501 governing rules of privilege, may a journalist assert an evidentiary privilege to obscure her source's identity where the source possesses information highly relevant to a criminal prosecution, and, if so, is the privilege qualified such that the journalist must divulge the source's identity if the Government shows a compelling interest in the source's information?
- III. As a matter of law, under Federal Rule of Evidence 701 governing lay witness opinion testimony, may a witness testify to the meaning of code words and phrases used in recorded conversations, where the witness reviewed call transcripts and records of the investigation and interviewed key witnesses in order to interpret the code words and phrases, if the witness's testimony would be helpful to a jury's understanding of the true meaning of the conversations?

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OPINION BELOW

The opinion and dissent of the Court of Appeals for the Fourteenth Circuit are reported at pages 20-35 of the record.

STANDARD OF REVIEW

Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

Statement of the Facts

In May of 2000, Respondent William Barnes inherited Big Top Circus, a small business renowned for its herd of twenty Asian elephants. (R. 1, 21.) In July of 2011, Respondent was informed that Big Top Circus would need to raise \$500,000 by December or file for bankruptcy. (R. 21.) In an effort to quickly produce a profit, Respondent invited two smaller circuses to “winter” on his sizeable grounds and to work together in hopes of staging “the greatest elephant show on earth” during the holiday season. (R. 2, 21.) Both circuses agreed, anticipating that they would each bring ten Asian elephants to Big Top Circus around December 2, 2011. (R. 2.)

In July, Respondent contacted a criminal associate, Alfred Anderson (“Anderson”),¹ and offered him the opportunity to hunt and harvest ivory from the elephants that would be housed at Big Top Circus in December. (R. 2.) Anderson agreed and suggested they find a third hunter to join them. (R. 2.) In September, Anderson informed Respondent that his acquaintance, James Reardon (“Reardon”), was interested in participating in the hunt. (R. 2.) Respondent proposed that they use a helicopter and purchase assault rifles to hunt the elephants. (R. 2.) On October 1, 2011, Anderson accepted Respondent’s proposals on behalf of himself and Reardon, contingent upon Respondent providing the necessary weapons and equipment for the hunt. (R. 2.)

¹ Respondent and Anderson met in 2008 and later created a sham charity, the donations from which they used to fund bear-hunting trips. (R. 1.) Anderson was thereafter convicted of fraud for participating in the scheme. (R. 1.)

The next day, Respondent contacted Weapons Unlimited, a firearms dealer, and arranged to purchase three unregistered, fully automatic AK-47s. (R. 2, 22.) Unbeknownst to Respondent, the “employee” he spoke with was an undercover agent from the Bureau of Alcohol, Tobacco, and Firearms, Jason Lamberti. (R. 22.) Based on this conversation, the Government obtained a warrant to tap Respondent’s telephone communications. (R. 2.) Pursuant to the warrant, the Government intercepted about twelve phone calls between October 4 and December 1, 2011. (R. 13.) During this period, the Government recorded a conversation in which Respondent contacted Alan Klestadt at Copters Corporation and arranged the one-day rental of a helicopter for December 15, 2011. (R. 3.) Respondent informed Anderson that the preparations were complete, and they agreed that the hunt would occur on December 15. (R. 3.)

The lead agent on the case, Narvel Blackstock, contemporaneously listened to and later transcribed the recorded conversations that were obtained. (R. 13.) Agent Blackstock died on December 14, 2011, and Agent Thomas Simandy took over the investigation the next day. (R. 23.) Agent Simandy later decoded Agent Blackstock’s transcriptions of Respondent’s phone calls, in which Respondent and Anderson repeatedly referred to “blood diamonds,” “Charlie tango,” and a “black cat.” (R. 13.) For example, on October 3, 2011, Respondent stated, “the black cat was arranged,” and on October 8, 2011, he stated, “Charlie tango is ready.” (R. 13.) During his investigation, Agent Simandy interviewed Agent Lamberti and Alan Klestadt, learning that Respondent had inquired into the price of three AK-47s on October 2, 2011, and had arranged the helicopter rental on October 6, 2011. (R. 13.) Based on this information, Agent Simandy concluded that the phrases “blood diamonds,” “Charlie tango,” and “black cat” referred to elephant tusks, the rented helicopter, and the purchased AK-47s. (R. 13.)

By mid-November, Anderson informed Respondent that Reardon was having “second

thoughts” about the elephant hunt. (R. 18.) Anderson suggested that they “get rid of [Reardon],” to which Respondent replied, “don’t do anything. Not yet.” (R. 18.) When pressed further, Respondent stated, “Let me think about it.” (R. 18.) By the end of the month, Anderson was firm in his plans, stating unequivocally, “We need him out of the picture . . . I’m gonna take care of him.” (R. 19.) Instead of admonishing Anderson not to act, Respondent stated, “That’s gonna make things a lot messier.” (R. 19.) At the end of the conversation, Respondent urged Anderson to “shut him up for a while,” and then stated, “I don’t want anything to do with this.” (R. 19.)

Near the same time, Reardon confided in his friend, Daniel Best (“Best”), that he was involved in a conspiracy to hunt elephants and harvest the ivory for profit. (R. 24.) Reardon revealed that he had invited Anderson to his home to speak with him the following day but that he was afraid Anderson might harm him. (R. 24.) The next day, Best drove to Reardon’s home and observed Anderson fleeing from Reardon’s front door. (R. 24.) Best entered Reardon’s home and found Reardon dead. (R. 24.) Shortly thereafter, police apprehended Anderson, who confessed to killing Reardon to prevent him from exposing the conspiracy. (R. 24.)

Meanwhile, to make “the greatest elephant show on earth” appear legitimate, Respondent invited reporter Kara Crawley (“Crawley”) from the *Boerum Times* to write an article on the circus to increase publicity for the “event.” (R. 9.) She agreed and began touring the facilities in mid-September. (R. 22.) During her visits, Crawley met an employee who revealed that he or she had overheard a conversation between Respondent and another person concerning the elephant-poaching conspiracy. (R. 10.) Although the source requested that Crawley not disclose his or her identity while he or she remained at the circus, the source agreed to be videotaped with his or her face fully visible during the entire recording. (R. 10.) Though the source requested that Crawley not identify him or her as an employee, Crawley later revealed that information

during testimony. (R. 10.) On December 1, 2011, Crawley published an exposé of Respondent's plan to poach the elephants. (R. 3.) Respondent was arrested later that day. (R. 3.)

Procedural History

On December 4, 2011, Respondent was indicted and charged with conspiracy to deal unlawfully in firearms in violation of 18 U.S.C. §§ 922(a)(1)(A) and 371 (2012), conspiracy to commit crimes of violence against an animal enterprise in violation of 18 U.S.C. §§ 43 and 371 (2012), and with one count of conspiracy to commit unlawful takings under the Endangered Species Act in violation of 16 U.S.C. § 1538 (2012) and 18 U.S.C. § 371. (R. 3-4.) Before trial, the Government moved in limine to introduce Best's conversation with Reardon under Federal Rule of Evidence 804(b)(6). (R. 6.) Additionally, Crawley moved to quash the Government's subpoena for her source's identity by asserting a journalist's privilege under Federal Rule of Evidence 501. (R. 6.) Lastly, the Government moved to admit the lay witness opinion testimony of Agent Simandy under Federal Rule of Evidence 701. (R. 6-7.)

On May 1, 2012, the United States District Court for the Southern District of Boerum heard oral arguments on the motions and, on May 2, 2012, ruled for Respondent on the Government's motions and for Crawley on the motion to quash. (R. 5, 16-17.) Pursuant to 18 U.S.C. § 3731 (2012), the Government filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 20.) On July 12, 2012, the Fourteenth Circuit affirmed the decision of the District Court. (R. 20.) The Government subsequently filed a petition for writ of certiorari, which this Court granted on October 1, 2012. (R. 36.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit erred in affirming the District Court's denial of the Government's motion to introduce Reardon's statements under Rule 804(b)(6). First, the Fourteenth Circuit

erroneously applied the forfeiture-by-wrongdoing exception to the confrontation right, analyzed by this Court in *Giles v. California*, to Reardon's nontestimonial statements. Second, even if Reardon's statements are testimonial, the Fourteenth Circuit erred in reading *Giles* broadly to preclude co-conspirator forfeiture according to *Pinkerton v. United States*. Accordingly, Respondent should not be permitted to enjoy the silence that resulted from Reardon's murder.

The Fourteenth Circuit further erred in recognizing an absolute journalist's privilege under Rule 501. First, both this Court and Congress have already weighed the competing interests at stake and have chosen not to adopt a privilege. Second, even if this Court adopts a privilege, it should be qualified, in accordance with how a majority of jurisdictions have resolved the issue. Under a qualified privilege, Crawley should not be allowed to thwart the effective administration of justice by withholding key evidence of the elephant-poaching plot.

Finally, the Fourteenth Circuit erred in refusing to admit Agent Simandy's lay opinion testimony under Rule 701. Agent Simandy's testimony interpreting code words and phrases used during recorded conversations is admissible because it is rationally based on his perception, helpful to a jury's clear understanding of the conversations, and based on no scientific, technical, or other specialized knowledge. A jury should not be deprived of key evidence simply because the lead agent on the case passed away before the investigation could be completed.

ARGUMENT

I. REARDON'S STATEMENTS ARE ADMISSIBLE AGAINST RESPONDENT UNDER RULE 804(b)(6) BECAUSE THEY ARE NOT TESTIMONIAL AND, EVEN IF THEY ARE, RESPONDENT FORFEITED HIS RIGHT TO CONFRONTATION BY ACQUIESCING TO ANDERSON'S MURDER OF REARDON.

Federal Rule of Evidence 804(b)(6) provides that a witness's out-of-court statement is admissible against a party notwithstanding the hearsay rule if that party deliberately rendered the witness unavailable through a wrongful act. In addition to establishing a hearsay exception, this

rule codifies the forfeiture-by-wrongdoing doctrine, a long-recognized exception to a criminal defendant's Sixth Amendment right to confront adverse witnesses. *Davis v. Washington*, 547 U.S. 813, 833 (2006); *see also Reynolds v. United States*, 98 U.S. 145, 158-59 (1878) (“[I]f a witness is kept away by the adverse party, his testimony . . . may be given in evidence.”). Courts developed the forfeiture-by-wrongdoing rule for two reasons: to deter criminal defendants from seeking to intimidate or eliminate witnesses through violence, *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002); *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000), and to uphold the equitable principle that “no one should be permitted to take advantage of his wrong,” *Giles v. California*, 554 U.S. 353, 382 (2008) (citing *Reynolds*, 98 U.S. at 159). The doctrine is aimed at “abhorrent behavior which strikes at the heart of the system of justice itself.” Fed. R. Evid. 804 cmt. (1997) (internal quotation omitted).

Conspiring with others to harm another person or the public has long been recognized as a wrongful act, *see, e.g., R v. Amery*, (1788) 100 Eng. Rep. 278 (K.B.) 291 (describing the substantive crime of conspiracy), and the common law has long imputed the act of one conspirator in pursuit of the conspiracy's objective to all co-conspirators, *see, e.g., United States v. Gooding*, 25 U.S. 460, 469 (1827) (reasoning that each conspirator “is deemed to consent to, or command, what is done by any other in furtherance of the common object”); Edward H. East, *A Treatise of the Pleas of the Crown* 97 (1803). At present, this principle of co-conspirator liability is expressed as the *Pinkerton* rule: a defendant is liable for acts of co-conspirators that are within the scope and in furtherance of the conspiracy and are reasonably foreseeable. *Thompson*, 286 F.3d at 964 (citing *Pinkerton v. United States*, 328 U.S. 640, 647 (1946)).

The Fourteenth Circuit erred in refusing to apply *Pinkerton* co-conspirator liability to Rule 804(b)(6). First, the Fourteenth Circuit erroneously applied the forfeiture-by-wrongdoing

exception to the confrontation right, analyzed by this Court in *Giles*, to Reardon’s nontestimonial statements. Second, even if Reardon’s statements are testimonial, the Fourteenth Circuit erred in reading *Giles* broadly to preclude imputed forfeiture. This Court should reverse the Fourteenth Circuit’s judgment, both to prevent Respondent from enjoying the silence his co-conspirator purchased with murder and to deter the future formation of violent conspiracies.

A. Reardon’s Statements to Best Are Admissible Under the *Pinkerton* Rule Because the Murder Was Within the Scope and in Furtherance of the Conspiracy and Was Reasonably Foreseeable.

In *Pinkerton*, this Court held that a conspirator may be liable for the criminal act of a co-conspirator even if that act was not the object of the conspiracy. 328 U.S. at 647. This Court stressed the importance of co-conspirator liability, to punish “deliberate plotting to subvert the laws” of the United States and to deter the concealment of crime through secret collusion. *Id.* at 644. To that end, this Court reasoned that a substantive offense committed in furtherance of a conspiracy may be imputed to all conspirators because “the partners act for each other in carrying [the conspiracy] forward.” *Id.* at 646. This Court limited the principle by noting that a conspirator is not liable for a co-conspirator’s criminal act that was not within the scope or in furtherance of the conspiracy or was not reasonably foreseeable. *Id.* at 647-48.

Rule 804(b)(6) provides that when a defendant “wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result,” he forfeits his hearsay and confrontation objections to the witness’s statements. Fed. R. Evid. 804(b)(6);² *Davis*, 547 U.S. at 833. Applying the *Pinkerton* rule, when one conspirator forfeits these objections through a reasonably foreseeable, wrongful act in furtherance of the conspiracy, all co-conspirators forfeit them as well. *Thompson*, 268 F.3d at 965; *Cherry*, 217 F.3d at 820.

² Rule 804 generally requires that the declarant be “unavailable” according to one of five listed definitions. Fed. R. Evid. 804(a), (b). This requirement does not apply to Rule 804(b)(6). Fed. R. Evid. 804(a).

Federal courts have long imputed wrongdoing from one person to another when applying the forfeiture-by-wrongdoing doctrine. *Cherry*, 217 F.3d at 818-19; *see also United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (imputing forfeiture where a defendant knew of and did not intervene in a plot to kill a witness); *Olson v. Green*, 668 F.2d 421, 429 (8th Cir. 1982) (imputing a conspirator's wrongful act on a defendant's behalf to the defendant).

A co-conspirator's murder of a potential witness to prevent the witness from betraying the conspiracy satisfies the *Pinkerton* rule. *United States v. Dinkins*, 691 F.3d 358, 385-86 (4th Cir. 2012). In *Dinkins*, two conspirators murdered a co-conspirator turned government informant. *Id.* at 363, 385. Under *Pinkerton*, the Fourth Circuit upheld admission of the informant's statements against the defendant, despite a lack of evidence of the defendant's direct involvement in the informant's murder. *Id.* at 385. The court found the murder within the scope and in furtherance of the conspiracy because the informant "posed a continuing liability" to the conspiracy. *Id.* The murder was also reasonably foreseeable because the conspirators, including the defendant, had attempted to kill the informant in the past, announcing their intent to "finish the job." *Id.* at 386. Finding that the defendant's co-conspirators killed the informant to prevent him from testifying, the court upheld introduction of the informant's statements. *Id.*

Here, Reardon's statements are admissible against Respondent under the same *Pinkerton* theory of co-conspirator forfeiture. Anderson's murder of Reardon satisfies the elements of Rule 804(b)(6). Indeed, Respondent does not dispute that Anderson killed Reardon to prevent him from betraying the conspiracy. (R. 7.) The killing also satisfies the *Pinkerton* rule. As in *Dinkins*, the killing was within the scope and in furtherance of the conspiracy. Anderson feared that Reardon would betray the elephant-poaching plot, and believed that murdering Reardon was the only way to prevent him from doing so. (R. 18, 19.) The murder was also reasonably

foreseeable because in at least two phone conversations, Anderson unambiguously told Respondent that he intended to “get rid of” Reardon, to which Respondent eventually replied, “Just shut him up for a while.” (R. 18, 19.) Respondent made clear that he understood Anderson’s meaning when he said, “that’s gonna make things a lot messier.” (R. 19.) Because the murder was within the scope and in furtherance of the conspiracy and reasonably foreseeable to Respondent, Respondent’s hearsay and confrontation objections to Reardon’s statements are forfeited. Reardon’s statements are thus admissible under *Pinkerton* and Rule 804(b)(6).

B. Applying *Pinkerton* and Holding That Respondent Forfeited His Hearsay and Confrontation Objections to Reardon’s Statements Upholds the Principles Underlying Rule 804(b)(6).

Shortly after Rule 804(b)(6) was enacted, the Tenth Circuit applied *Pinkerton* to admit a witness’s out-of-court statements against a defendant based on a co-conspirator’s wrongful acts to silence the witness. *Cherry*, 217 F.3d at 820. The court reasoned that the *Pinkerton* rule strikes an appropriate balance between protecting a defendant’s confrontation right, in that participation in a conspiracy alone does not result in forfeiture, and preventing witness intimidation, in that the defendant will not enjoy a windfall when his partner foreseeably and wrongfully silences a witness. *Id.* at 816, 820. The court also observed that adopting a more stringent standard would lead to the absurd result that a defendant could be found criminally liable for a co-conspirator’s wrongful act against a witness, yet the witness’s statements could not be admitted against him. *Id.* at 818. Accordingly, the Tenth Circuit held that a defendant “acquiesces” to a co-conspirator’s wrongful intimidation or elimination of a witness that is both reasonably foreseeable and within the scope and in furtherance of the conspiracy. *Id.* at 820.

The Seventh Circuit followed suit in applying the *Pinkerton* rule to Rule 804(b)(6) in *Thompson*, 286 F.3d at 963-64. In addition to endorsing the Tenth Circuit’s reasoning in *Cherry*,

the Seventh Circuit rejected the argument that imputed forfeiture under *Pinkerton* would lead to involuntary waiver of an important trial right. *Id.* at 965. The court reasoned that acquiescence in wrongdoing according to the *Pinkerton* rule is premised on the voluntary, wrongful act of entering a conspiracy, and that imputing forfeiture on that basis is therefore constitutionally permissible. *Id.* at 965. The Fourth and D.C. Circuits later adopted the same approach in applying the *Pinkerton* rule to Rule 804(b)(6). *Dinkins*, 691 F.3d at 385; *United States v. Carson*, 455 F.3d 336, 364 n.24 (D.C. Cir. 2006).

This Court should endorse the reasoning of the majority of the circuits that have addressed the question and adopt a *Pinkerton* theory of co-conspirator forfeiture under Rule 804(b)(6). Denying conspirators the benefit of their comrades' witness-silencing efforts upholds the equitable foundation of the forfeiture-by-wrongdoing doctrine. *Thompson*, 286 F.3d at 964; *Cherry*, 217 F.3d at 820. The *Pinkerton* rule also deters the formation of violent conspiracies by placing on conspirators the risk that a co-conspirator's violence against a potential witness will be imputed to them. *Thompson*, 286 F.3d at 965. The rule prevents abuse by ensuring that witness intimidation is imputed only if it is within the scope and in furtherance of the conspiracy and reasonably foreseeable; imputation will not follow from mere participation in the conspiracy. *Cherry*, 217 F.3d at 820. Holding that Respondent "acquiesced" to Anderson's reasonably foreseeable murder of Reardon, which was designed to prevent detection of the elephant-poaching plot, upholds the rule's purposes without abridging Respondent's important trial rights.

1. Respondent's confrontation right is not implicated because his statements to Best are nontestimonial, and the Fourteenth Circuit thus erred in conflating the hearsay and confrontation exceptions in Rule 804(b)(6).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

The Confrontation Clause guarantees a defendant’s right to confront witnesses who “bear testimony” against him; in other words, it applies only to statements that are “testimonial.”³ *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *Davis*, 547 U.S. at 821; *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

An out-of-court statement is testimonial if a reasonable person would understand its primary purpose to be to preserve facts for a future prosecution. *Bryant*, 131 S. Ct. at 1156; *Davis*, 547 U.S. at 822. Accordingly, a witness’s private admission of involvement in a crime to a friend or confidant is not testimonial. *United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007). In *Jordan*, a witness to a brutal murder frantically called a friend for help, and later admitted to the friend that she had conspired with the defendant in a drug transaction that led to the killing. *Id.* at 200. The Fourth Circuit held that this statement was nontestimonial: a reasonable person in the witness’s position would have understood the statement’s purpose to be “atonement and contrition,” not preservation of facts for a future prosecution. *Id.*; *see also United States v. Lopez*, 649 F.3d 1222, 1238 (11th Cir. 2011) (finding a statement to a friend admitting involvement in a robbery nontestimonial); *United States v. Saget*, 377 F.3d 223, 225, 229 (2d Cir. 2004) (finding statements to an informant nontestimonial because the declarant thought he was speaking to a friend and confidant).

As in *Jordan*, a reasonable person would not understand the purpose of Reardon’s statements to Best to be to preserve facts for a later prosecution. Reardon revealed his involvement in the elephant-poaching scheme to Best during a private phone call. (R. 8.) He described Respondent’s plan to Best while disclosing that he feared Anderson, his eventual murderer. (R. 8.) A reasonable person would understand the purpose of the phone call to be to

³ This Court must address whether Reardon’s statements are testimonial as a threshold matter, despite the lower courts’ failure to do so. This Court cannot resolve the question on certiorari without first determining whether Reardon’s statements implicate Respondent’s confrontation right.

express Reardon's fear that he was in over his head with Respondent and Anderson, not to preserve facts for future prosecution. Reardon's statements are therefore nontestimonial.

Because Reardon's statements are nontestimonial, they implicate only the rule against hearsay, not Respondent's right to confront Reardon. The constitutional forfeiture-by-wrongdoing doctrine and the hearsay exception stated in Rule 804(b)(6) are not coextensive, and the Fourteenth Circuit erred in conflating the two under *Giles*. *See* R. 27; 554 U.S. at 376 (recognizing that courts may freely adopt a more lenient standard for hearsay exceptions than for confrontation exceptions). Where confrontation is concerned, courts must balance two competing interests: the constitutional right of a defendant and the justice system's need to prevent witness tampering. *Dinkins*, 691 F.3d at 384-85; *Thompson*, 286 F.3d at 964; *Cherry*, 217 F.3d at 820. Where hearsay alone is concerned, confrontation falls out of the equation, leaving only the traditional considerations of reliability and trustworthiness that animate the hearsay rule. McCormick on Evidence § 253 (6th ed. 2006). The forfeiture-by-wrongdoing exception, however, does not rest on the reliability of a witness's statement, *id.*⁴, but on the equitable principle that an accused shall not benefit from a wrongful act attributable to him, Fed. R. Evid. 804 cmt. (1997); *Crawford*, 541 U.S. at 62; *Reynolds*, 98 U.S. at 158-59. Applying the *Pinkerton* rule to Rule 804(b)(6) upholds this principle. Where confrontation does not apply, both the equitable interest in denying defendants the benefit of their wrongful acts and the practical need to prevent witness tampering call for imputing forfeiture where a co-conspirator acted foreseeably and within the conspiracy's scope to silence a witness. Because Reardon's

⁴ Several circuits have recognized that reliability is irrelevant to whether the exception applies. *United States v. Dhinsa*, 243 F.3d 635, 655 (2d Cir. 2001) (declining to analyze a declarant's statements for reliability under the pre-*Crawford* confrontation rubric because the defendant waived his confrontation right by killing the witness); *United States v. White*, 116 F.3d 903, 913 (D.C. Cir. 1997) (finding the reliability of a witness's statements irrelevant because the defendants forfeited any hearsay objections by murdering the witness); *United States v. Houlihan*, 92 F.3d 1271, 1282 (1st Cir. 1996) (finding reliability irrelevant because the defendants simultaneously forfeited their confrontation rights and hearsay objections by conspiring to kill a witness).

statements do not implicate confrontation, they are admissible against Respondent under *Pinkerton* and the hearsay exception stated in Rule 804(b)(6).

2. Even if Respondent's statements to Best are testimonial, the Fourteenth Circuit erred in excluding them because *Giles* does not preclude forfeiture of a defendant's confrontation right based upon a co-conspirator's wrongful conduct.

Under the Confrontation Clause, a testimonial, out-of-court statement is inadmissible against a defendant unless the declarant is unavailable to testify and was previously subject to cross-examination. *Crawford*, 541 U.S. at 68. Forfeiture by wrongdoing stands as an exception to this rule, *id.* at 62, codified in its modern form as Rule 804(b)(6), *Davis*, 547 U.S. at 833.

This Court's decision in *Giles* established only that a defendant does not forfeit his confrontation right solely by causing a witness's absence. *See* 554 U.S. at 357, 377. The California forfeiture statute at issue in *Giles* provided for forfeiture whenever a defendant's wrongful act rendered a witness unavailable, whether or not the defendant or anyone else intended that result. *Id.* This Court determined that the common law existing at the time of the Sixth Amendment's ratification⁵ provided for forfeiture only where a defendant "engaged in conduct designed to prevent the witness from testifying."⁶ *Id.* at 359 (emphasis omitted). Importantly, it observed that the California statute provided for forfeiture based merely on a pretrial determination that the defendant is guilty of silencing the witness. *Id.* at 365. Such a result is "akin to . . . 'dispensing with [a] jury trial because a defendant is obviously guilty.'" *Id.*

⁵ The Sixth Amendment, along with the rest of the Bill of Rights, was ratified in 1791. Bernard Schwartz, *The Bill of Rights: A Documentary History* 1172 (1971).

⁶ This Court recognizes only those exceptions to the confrontation right that were "established at the time of the founding." *Giles*, 554 U.S. at 358 (quoting *Crawford*, 541 U.S. at 54) (finding that forfeiture by wrongdoing was recognized as an exception in 1791). Like forfeiture by wrongdoing, co-conspirator liability was well established by the end of the eighteenth century. *E.g.*, East, *supra*, at 97; *see also Gardner v. Preston*, 2 Day 205, 210 (Conn. 1805) (noting that one conspirator's act in furtherance of the conspiracy is imputed to all). Combining forfeiture by wrongdoing and co-conspirator liability is therefore consistent with the common law as it existed at the time the Sixth Amendment was ratified.

(quoting *Crawford*, 541 U.S. at 62); *see also id.* at 379 (Souter, J., concurring in part) (describing the “near circularity” of forfeiture based on a pretrial determination of guilt).

The Fourteenth Circuit erroneously read *Giles* too broadly in determining that forfeiture of confrontation results only if a defendant himself intended the specific wrongful act in question to cause a witness’s unavailability. (R. 27.) Rather, the full extent of the holding in *Giles* was simply to reject California’s statute because it allowed for forfeiture based on *any* wrongful conduct that happened to prevent a witness from testifying, without regard for the conduct’s purpose. 554 U.S. at 377. The decision established that, contrary to the California statute, “something more” than a defendant’s wrongful conduct is required in order to justify forfeiture. *Id.* at 365, 379 (Souter, J., concurring in part). In cases of domestic abuse, for example, evidence that a defendant’s violent acts were intended at least in part to dissuade the victim from contacting authorities could supply that “something more.” *Id.* at 376. Whether one defendant’s intentional silencing of a witness may be imputed to a co-conspirator was not at issue in *Giles*. *See id.* at 356 (*Giles* involved a single defendant charged with murdering his ex-girlfriend.). At least one circuit has since held that *Pinkerton* co-conspirator forfeiture is consistent with *Giles*. *See Dinkins*, 691 F.3d at 385.⁷

Contrary to the Fourteenth Circuit’s decision, imputing forfeiture by wrongdoing amongst co-conspirators according to *Pinkerton* is consistent with this Court’s interpretation of the confrontation right. Unlike the statute rejected in *Giles*, the *Pinkerton* rule premises forfeiture not on mere participation in an illegal conspiracy, but on wrongful acts by co-conspirators that are reasonably foreseeable and within the scope and in furtherance of the

⁷ The Fourth Circuit read *Giles* to require evidence of a “design” to prevent a witness from testifying, but implied that such a design may be imputed amongst co-conspirators according to *Pinkerton*. *See Dinkins*, 691 F.3d at 385-86. The court held that a defendant forfeited his confrontation right, despite his incarceration at the time of the witness’s murder and a lack of evidence connecting him to the killing, because a previous attempt to kill the witness made the murder foreseeable. *Id.*

conspiracy. This “something more” suffices to prevent defendants from suffering forfeiture of their confrontation right based only on a pretrial determination of guilt. *Giles*, 554 U.S. at 365, 379 (Souter, J., concurring in part). The *Pinkerton* rule also upholds the equitable and deterrent principles underlying the forfeiture-by-wrongdoing doctrine. *Thompson*, 286 F.3d at 964-65; *Cherry*, 217 F.3d at 820; *see also Giles*, 554 U.S. at 356. In short, the *Pinkerton* rule lacks the shortcomings that led this Court to reject the California statute. Therefore, even if Reardon’s statements are testimonial, this Court should hold them admissible against Respondent under Rule 804(b)(6) and *Pinkerton*.

II. NO JOURNALIST’S PRIVILEGE SHOULD BE RECOGNIZED UNDER RULE 501 BUT, EVEN UNDER A QUALIFIED PRIVILEGE, CRAWLEY MUST DISCLOSE HER SOURCE BECAUSE THERE IS A COMPELLING INTEREST IN OBTAINING THE SOURCE’S IDENTITY AND INFORMATION, AND BECAUSE THE INFORMATION IS RELEVANT AND OTHERWISE UNOBTAINABLE.

Federal Rule of Evidence 501 provides that claims of privilege are governed by the common law as interpreted by courts “in light of reason and experience.” It has long been “recognized as a fundamental maxim that the public . . . has a right to every man’s evidence,” *United States v. Bryan*, 339 U.S. 323, 331 (1950) (internal citations omitted), and that any exemptions place “a heavy burden . . . on the search for truth,” *Swidler & Berlin v. United States*, 524 U.S. 399, 411-12 (1998) (O’Connor, J., dissenting). Therefore, when examining claims of exemption, courts “start with the primary assumption that there is a general duty to give what testimony one is capable of giving.” *Id.* at 412.

Although Rule 501 provides courts with the “flexibility to develop rules of privilege on a case-by-case basis,” this Court has consistently and unambiguously declined to exercise that authority expansively. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (internal quotation omitted); *see also United States v. Nixon*, 418 U.S. 683, 710 (1974) (recognizing that new

privileges should not be “lightly created nor expansively construed”). Ultimately, courts will recognize a new privilege only when doing so will serve “a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation omitted).

This Court has already declined to adopt a journalist’s privilege in the context of a First Amendment claim. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972). In *Branzburg*, this Court considered the same policy question presented here: whether the burden on news gathering that would allegedly result from compelling journalists to disclose their sources outweighed the public’s interest in that information. *Id.* at 681. This Court found that policy arguments in favor of adopting a privilege were inadequate to justify impeding the effective administration of justice. *Id.* at 695. In rejecting a privilege, this Court announced, “we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source . . . on the theory that it is better to write about crime than to do something about it.” *Id.* at 692. Ultimately, this Court affirmed that the duty to determine whether a privilege is necessary or desirable belongs to Congress. *Id.* at 706. Three years later, Congress approved the Federal Rules of Evidence, but explicitly declined to enact any specific privileges, including a journalist’s privilege. An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. 93-595, 88 Stat. 1926, 1933-34 (1975); *Trammel*, 445 U.S. at 47.

This Court should decline to recognize a journalist’s privilege under Rule 501 because both this Court and Congress have already weighed the competing interests at stake and have chosen not to adopt the privilege. Additionally, there is no evidence that sources would be deterred from coming forth without the privilege. Therefore, Crawley must disclose her source. Even if this Court adopts the privilege, it should be qualified, in accordance with how a majority

of jurisdictions have resolved the issue. Under a qualified standard, Crawley must disclose her source because there is a compelling interest in obtaining the source's information, and because the information is relevant and otherwise unobtainable.

A. No Journalist's Privilege Should Be Recognized Under Rule 501 Because, As This Court and Congress Have Both Recognized, the Likely Evidentiary Benefit Resulting from the Denial of a Privilege Overcomes Any Competing Interest.

"[E]videntiary privileges in litigation are not favored." *Herbert v. Lando*, 441 U.S. 153, 175 (1979). Accordingly, this Court imposes stringent requirements for adopting an evidentiary privilege under Rule 501. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). In *Jaffee*, this Court adopted a psychotherapist-patient privilege because it "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 9-10. In so finding, this Court relied on three considerations: the private and public interests served by recognizing the privilege, the likely evidentiary benefit resulting from denial of the privilege, and the number of states that have already adopted the privilege. *Id.* at 11-13. Under these three factors, the interests in favor of a journalist's privilege—the same interests dismissed by this Court in *Branzburg*—are not sufficient to merit adoption of the privilege.

1. The interest in the effective administration of justice eclipses the interest in obtaining future possible news from undisclosed and unverified sources.

This Court has already considered the significant interests at stake and has expressly declined to adopt a journalist's privilege, rejecting "the theory that it is better to write about crime than to do something about it." *Branzburg*, 408 U.S. at 692. Here, both the Fourteenth Circuit and the District Court failed to heed this Court's admonition that "we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest" in prosecuting crime. *Id.* at 695. Despite the Fourteenth Circuit's reasoning that the public interest would be served by

recognition of a journalist's privilege, R. 30, "it is evident from the result in [*Branzburg*] that the interest of the press in maintaining confidentiality . . . is not absolute," *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003). This Court should reaffirm that holding.

This Court should not accept the argument, erroneously relied on by various courts, that news sources will be deterred from coming forth in the absence of a privilege. The press was not afforded such a privilege for over one hundred and fifty years, yet still flourished. *Branzburg*, 408 U.S. at 698-99. Therefore, the absence of a privilege has "not been a serious obstacle to either the development or retention of confidential news sources by the press." *Id.* at 699. Furthermore, no empirical research supports the claim that sources will be deterred, or the free flow of information impaired. *See, e.g.*, John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 59 n.11 (1985) (noting that one study found only seventeen reported cases of deterrence from 1911 to 1968); *see also Shoen v. Shoen*, 5 F.3d 1289, 1294 (9th Cir. 1993) (asserting the theory that sources would be deterred without citing corroborating research); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 142-43 (2d Cir. 1987) (same); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (same). Indeed, Judge Posner has noted that, under *Branzburg*, "these courts may be skating on thin ice." *McKevitt*, 339 F.3d at 533.

Furthermore, journalists should not be given parity with doctors, lawyers, and priests—groups that enjoy an evidentiary privilege. *Trammel*, 445 U.S. at 51. These privileges are premised on service relationships with individual clients, rather than on a self-serving relationship with the news-consuming public. For instance, this Court recognized a psychotherapist-patient privilege because the ability to help a patient depends upon the patient's willingness and ability to talk freely. *Jaffee*, 518 U.S. at 10. This Court recognized the lawyer-

client privilege based on a similar concern for the lawyer's ability to help her client. *Trammel*, 445 U.S. at 51. In contrast, journalists are in the business of selling newspapers to the public, not of serving the needs of individuals. The interest in disseminating information for profit should not overcome the interest in protecting the public through seeking out and prosecuting crime. This Court has wholeheartedly embraced this maxim and should continue to do so now.

2. The likely evidentiary benefit of declining to adopt a journalist's privilege outweighs all competing interests.

The likely evidentiary benefit derived from denying a journalist's privilege is "far from modest." *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 45 (D.D.C. 2007). The "fundamental function of government" of protecting the public through effective law enforcement, *Branzburg*, 408 U.S. at 690, would be frustrated unless journalists may be compelled to disclose sources that possess critical evidence. "A journalist's privilege subordinates law enforcement to newsgathering." David Abramowicz, *Calculating the Public Interest in Protecting Journalists' Confidential Sources*, 108 Colum. L. Rev. 1949, 1952 (2008). This Court recognized this principle in *Branzburg*, 408 U.S. at 690-91, and forty years later, nothing has changed. Thus, a journalist's privilege "to refuse to aid the administration of justice by telling any relevant facts within his personal knowledge should not be allowed under the law." Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 Am. Crim. L. Rev. 1441, 1460 (2002) (internal quotation omitted).

3. The choice by this Court and Congress not to adopt a journalist's privilege is determinative, notwithstanding acceptance of the privilege by the states.

Both this Court and Congress have declined to adopt a journalist's privilege despite numerous opportunities to do so. Thus, although state recognition of a privilege is an important factor in considering whether this Court should adopt a privilege, *Jaffee*, 518 U.S. at 2, it is not

dispositive. The Advisory Committee, the Judicial Conference, and this Court did not see fit to provide a journalist's privilege when the Federal Rules were promulgated. This suggests "that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *United States v. Gillock*, 445 U.S. 360, 367-68 (1980). Moreover, Congress enacted the Rules without recognizing a journalist's privilege, only three years after *Branzburg* explicitly deferred to it the question whether to do so. 408 U.S. at 705-06.

Further demonstrating reluctance to adopt the privilege is Congress's reaction to the Free Flow of Information Act, a bill first introduced in 2005 and intended to codify the privilege. *See, e.g.*, H.R. 2932, 112th Cong. (2011); H.R. 985, 111th Cong. (2009); H.R. 2102, 110th Cong. (2007); S. 1267, 110th Cong. (2007); H.R. 3323, 109th Cong. (2005). Despite numerous introductions over the last eight years, the bill has never garnered enough votes to pass through Congress. Therefore, regardless of the number of jurisdictions that have adopted the privilege in the past, the fact that Congress has not should be determinative. This Court is "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege" because the weighing of these types of interests is "particularly a legislative function." *Univ. of Pa.*, 493 U.S. at 189. Here, Congress's failure to enact a privilege after four decades of opportunities to do so demonstrates that the Fourteenth Circuit's concerns do not merit the adoption of a journalist's privilege.

Additionally, in the past decade, judicial support for a journalist's privilege has diminished. Lucy A. Dalglish & Casey Murray, *Déjà Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. Ark. Little Rock L. Rev. 13, 39 (2006).⁸ In 2003, for instance, the Seventh Circuit became the first circuit to refuse to

⁸ This diminished support is due in part to concern over leaks to the media of sensitive counterterrorism information. *See In re Miller*, 438 F.3d 1141, 1142-43 (D.C. Cir. 2006) (affirming the District Court's denial of a

recognize a journalist's privilege under Rule 501. *McKevitt*, 339 F.3d at 530. Writing for the court, Judge Posner questioned the reasoning of his sister circuits: some "essentially ignore *Branzburg*, . . . some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion . . . [and] some audaciously declare that *Branzburg* actually created a reporter's privilege" *Id.* at 532. Three years later, the D.C. Circuit questioned the continued validity of the privilege, which it had adopted years earlier in *Zerill v. Smith*, 656 F.2d 705 (D.C. Cir. 1981). *Miller*, 438 F.3d at 1148. While the court did not explicitly overrule *Zerill*, no judge recognized the privilege outright and one refused to recognize it at all.⁹ *Id.* at 1150, 1153, 1159. Changing judicial attitudes toward the privilege and Congress's continued reluctance to adopt it indicate a change in public sentiment that calls upon this Court to reject the privilege once again.

B. Even If This Court Recognizes a Journalist's Privilege Under Rule 501, Such a Privilege Should Be Qualified, in Accordance with a Majority of Jurisdictions' Resolution of the Issue.

The Government has an undeniable interest in investigating and prosecuting crimes "reported to the press by informants and in thus deterring the commission of such crimes in the future." *Branzburg*, 408 U.S. at 695. Where a journalist's privilege is recognized, the Government still retains that "highly compelling and legitimate interest," which would be "seriously compromised" if the press enjoyed an absolute privilege. *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006). Recognizing these interests, both the concurrence and dissent in *Branzburg* agreed that any journalist's privilege would necessarily be qualified, not absolute. *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring), 739-40 (Stewart, J., dissenting). Justice

privilege to reporters who were subpoenaed to reveal the identities of sources that had leaked the confidential identities of CIA agents). This concern over combating terrorism is closely analogous to the general need for effective law enforcement.

⁹ In his concurrence, Judge Sentelle explained that he thought "it indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment." *Miller*, 438 F.3d at 1154 (Sentelle, J., concurring). He pointed out that it would not make sense for this Court to "reach[] out to take a constitutional question" that would not need answering if a common law privilege existed. *Id.*

Powell emphasized that an asserted claim of privilege “should be judged on its facts” by striking a “balance between the freedom of press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* at 710. Accordingly, each circuit that has adopted the privilege has refused to recognize it as absolute. *See, e.g., Shoen*, 5 F.3d at 1292; *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980); *Cuthbertson*, 630 F.2d at 146. Furthermore, the Free Flow of Information Act, a bill repeatedly rejected since 2005, would also provide a qualified privilege. H.R. 2932, 112th Cong. (2011).

Where a journalist’s privilege applies, courts have employed a relatively uniform standard in considering whether the party seeking the information has made a sufficient demonstration of need to overcome the privilege, consistent with the reasoning of the dissent in *Branzburg*. 408 U.S. at 739-40 (Stewart, J., dissenting). This three-part test considers: “(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.” *LaRouche v. Nat’l Broad. Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986). Here, a weighing of the interests under this test requires Crawley to disclose her source.

1. Crawley’s source’s information is relevant because it tends to prove the existence of and Respondent’s participation in the elephant-poaching conspiracy.

“[T]here is no absolute right for a newsman to refuse to answer relevant and material questions asked during a criminal proceeding.” *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980). Federal Rule of Evidence 401 defines relevant evidence as having “any tendency to make a fact more or less probable than it would be without the evidence” if the fact is “of consequence in determining the action.” Here, Respondent faces several counts of conspiring with others to slaughter dozens of circus elephants. (R. 3, 4.) The information that Crawley’s

source possesses is relevant precisely because the source observed Respondent conspiring with others and overheard portions of their preparations to poach the elephants. (R. 10.) Therefore, the source's information tends to prove that the elephant-poaching conspiracy existed and that Respondent advanced and participated in this conspiracy. The information is critical to the Government's case because it will contextualize the statements made by Respondent in furtherance of the conspiracy, thus lending credence to those statements.

2. The source's identity and information cannot be obtained by alternative means because not only is Crawley's article likely inadmissible, but it is also inadequate to establish the full extent of what the source overheard, the meaning and context of the statements, or the credibility of the source.

The Government must next "demonstrate that the information sought cannot be obtained by alternative means." *State v. Rinaldo*, 689 P.2d 392, 396 (Wash. 1984). Crawley's published article is not an adequate alternative source. "Simply put, there is a world of difference between cold and lifeless written words on paper" and live testimony. *In re Star-Ledger Subpoena*, 99 F. Supp. 2d 496, 500 (D.N.J. 2000). Crawley's article represents only snippets of what was said. Without the actual source's testimony or the video recording of Crawley's interview, a jury will be unable to place the statements that the source overheard in proper context. From the article alone, a jury cannot know how, when, or where the statements were made. Moreover, observing live testimony or the video recording will enable a jury to evaluate the source's credibility in a way that introducing only the article would not. Most importantly, it is unlikely that the article will be admissible at trial,¹⁰ making the source's identity and information all the more critical. The article is not an adequate substitute for the source's direct evidence of Respondent's

¹⁰ "Ordinarily, when offered to prove the truth of the matters stated therein, newspaper articles are held inadmissible as hearsay." *May v. Cooperman*, 780 F.2d 240, 262 n.10 (3d Cir. 1985) (Becker, J., dissenting) (citing *Pallotta v. United States*, 404 F.2d 1035, 1036 (1st Cir. 1968); *Poretto v. United States*, 196 F.2d 392, 395 (5th Cir. 1952)).

involvement in the elephant-poaching conspiracy.¹¹

3. The Government's compelling interest in obtaining the source's identity and information overrides any interest in maintaining confidentiality.

The Government has a compelling interest in evidence relevant to proving specific crimes that cannot otherwise be obtained. *Storer Commc'ns, Inc. v. Giovan*, 810 F.2d 580, 586 (6th Cir. 1987); *see also United States v. King*, 194 F.R.D. 569, 585 (E.D. Va. 2000) (noting a compelling interest in "every man's evidence at a criminal trial"). The source's otherwise unobtainable information is directly relevant to the charges against Respondent. Failing to require disclosure would frustrate the Government's interest in prosecuting the heinous crimes charged here.

Further, the compelling interest in effective law enforcement overrides the interest of the press, especially where no confidentiality in a source's identity remains. *King*, 194 F.R.D. at 585. Crawley's actions here vitiate the effect of any promise to her source of confidentiality. *See Miller*, 438 F.3d at 1147 (finding that the interests at stake weighed against a privilege "regardless of any confidence promised by the reporter"). First, Crawley allowed the source to appear on videotape with the source's face fully visible. (R. 10.) If Crawley were truly concerned with the source's confidentiality, she could have obscured the source's face and voice or taken handwritten notes. She did none of those things. Moreover, Crawley revealed during testimony that her source was a circus employee, contrary to her source's wishes. (R. 10.) Finally, there was no expectation or promise that any confidentiality granted would last beyond the source's employment with the circus. (R. 10.) Crawley's demonstrated lack of concern for her source's confidentiality negates any effect that a promise of confidentiality may have in

¹¹ While the Government has evidence in the form of recorded phone conversations implicating Respondent in the conspiracy, R. 13, the source's direct testimony would provide a clearer, more comprehensive picture of Respondent's involvement. The recorded phone conversations were conducted largely in code, R. 13, while the source was apparently able to understand the import of the conversations he or she overheard, R. 10. Though the coded conversations may ultimately be difficult for a jury to comprehend, the source can testify directly to the existence of the elephant-poaching plot, making the source's information crucial to the Government's case.

overcoming the Government's compelling interest in obtaining the source's information.

III. RULE 701 PERMITS LAY WITNESS OPINION TESTIMONY INTERPRETING CODE WORDS IN RECORDED CONVERSATIONS WHERE THE WITNESS REVIEWED TRANSCRIPTS OF THE RECORDINGS AND INVESTIGATION RECORDS, AND INTERVIEWED KEY WITNESSES.

Federal Rule of Evidence 701 governs opinion testimony by a lay witness, providing:

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

This Court endorses a "broad approach to admissibility . . . consistent with the Federal Rules' general approach of relaxing the traditional barriers to opinion testimony" under Rule 701.

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988) (internal quotation omitted).

Accordingly, the Federal Rules favor the admissibility of opinion evidence where the witness is subject to cross-examination. *Id.* at 169 n.12; *see also Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403 (3d Cir. 1980) (noting that the modern trend favors opinion testimony that is "well founded on personal knowledge and susceptible to specific cross-examination").

Agent Simandy's testimony interpreting code words and phrases that Respondent used during the course of the elephant-poaching conspiracy is admissible, because it satisfies each of Rule 701's three requirements under a plain reading of the rule. His interpretations are rationally based on his perception through review of the call transcripts and his interviews of witnesses, helpful to a jury's clear understanding of the conversations, and based only on his investigation into the conspiracy, not on any scientific, technical, or other specialized knowledge.

A. Agent Simandy's Testimony Was Rationally Based on His Perception Because He Has Firsthand Knowledge of the Investigation Through His Extensive Review of the Records and His Interviews of Key Witnesses.

Rule 701 first requires that lay opinion testimony be "rationally based on the witness's

perception.” Fed. R. Evid. 701(a). This element is “the familiar requirement of firsthand knowledge or observation.” Fed. R. Evid. 701 cmt. (1975).

1. Agent Simandy’s testimony is consistent with the First, Seventh, Ninth, Eleventh, and D.C. Circuits’ reasoning that “firsthand knowledge” may result from review of records coupled with actual investigatory efforts.

A lay witness with personal knowledge may give opinions as to the meaning of code words used in recorded conversations. *United States v. Freeman*, 498 F.3d 893, 904-05 (9th Cir. 2007) (admitting a detective’s lay testimony interpreting ambiguous conversations because it was based on review of intercepted conversations and other facts learned during the investigation); *United States v. Lizardo*, 445 F.3d 73, 83 (1st Cir. 2006) (admitting a drug dealer’s lay witness testimony to the meanings of code words used in intercepted conversations). “Personal knowledge upon which a lay witness’s testimony rests may be gained during the course of the witness’s investigation.” *United States v. Weaver*, 281 F.3d 228, 231 (D.C. Cir. 2002) (internal quotation omitted). A witness need not have knowledge of every fact surrounding the act or transaction at issue; failure to observe some surrounding condition goes to the weight of his testimony, and not its admissibility. *Altvater v. Battocletti*, 300 F.2d 156, 160 (4th Cir. 1962). Moreover, the extent of a witness’s opportunity to observe a defendant also goes only to the weight of his testimony. *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005) (following *United States v. Allen*, 787 F.2d 933, 936 (4th Cir. 1986); *United States v. Jackson*, 688 F.2d 1121, 1125 (7th Cir. 1982)). In accordance with these accepted principles, several circuits recognize that a lay witness need not have participated in the conversations in question to satisfy Rule 701(a). *See, e.g., United States v. Jayyousi*, 657 F.3d 1085, 1095 (11th Cir. 2011); *Freeman*, 498 F.3d at 904-05; *Lizardo*, 445 F.3d at 83; *United States v. Saulter*, 60 F.3d 270, 276

(7th Cir. 1995). Rather, it is sufficient that the witness have “personal knowledge of the subject discussed and the persons involved” in the conversations. *Saulter*, 60 F.3d at 276.

A law enforcement agent may testify as a lay witness about the meaning of code words where the agent reviewed transcripts of conversations in which the words were used, regardless of whether the agent participated in the conversations or observed them contemporaneously. *Jayyousi*, 657 F.3d at 1095. The agent in *Jayyousi* was allowed to testify to multiple defendants’ use of code words—such as “football” and “soccer” for “jihad,” and “dogs” for the “U.S. government”—based on his review of recorded phone calls after they occurred. *Id.* The Eleventh Circuit held that the agent’s examination of documents and investigatory records satisfied Rule 701’s perception requirement. *Id.* at 1102 (citing *United States v. Hamaker*, 455 F.3d 1316, 1331-32 (11th Cir. 2006) (allowing an FBI financial analyst to testify as a lay witness because his review and summary of financial documents satisfied Rule 701(a)); *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984) (allowing lay witness testimony in a Medicare fraud prosecution because the witness’s examination of store records satisfied Rule 701(a))).

Like the agent in *Jayyousi*, Agent Simandy based his testimony on review of call transcripts after the fact, review of investigation records, and interviews of key witnesses. (R. 13.) In the recorded phone calls, Respondent made repeated references to “blood diamonds,” a “black cat,” and “Charlie tango,” specifically stating on October 3, 2011, that the “black cat was arranged,” and on October 8, 2011, that “Charlie tango is ready.” (R. 13.) Through interviews, Agent Simandy learned from Agent Lamberti that Respondent had arranged the purchase of three AK-47s on October 2, 2011, and from Alan Klestadt at Copters Corporation that Respondent had arranged the one-day rental of a helicopter on October 6, 2011. (R. 13.) Based on the dates of these transactions, Agent Simandy was able to determine that the cryptic phrase

“Charlie tango” referred to the helicopter, and that “black cat” referred to the assault rifles.

(R. 13.) Similarly, Agent Simandy determined based on his investigation that “blood diamonds” referred to elephant tusks. (R. 13.) As in *Jayyousi*, Agent Simandy’s review of the records and his investigatory work allowed him to attribute meaning to terms that are not otherwise clear. His opinions are based on firsthand review and investigation, and therefore firsthand knowledge, as the term is understood by the First, Seventh, Ninth, Eleventh, and D.C. Circuits.

2. The Fourteenth Circuit misinterpreted case law from the Eighth Circuit in refusing to allow Agent Simandy to offer his opinion regarding the code words in place of the late Agent Blackstock.

The Fourteenth Circuit erroneously relied on *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001), in holding that a court may not admit lay opinion testimony unless the witness has firsthand knowledge “either as (1) a participant in a conversation, or (2) as a listener to a conversation who contemporaneously observes the speakers.” (R. 30.) This entirely omits an additional basis recognized in *Peoples* for admitting lay witness testimony. *Peoples* held that a lay opinion is admissible “when the law enforcement officer is a participant in the conversation, *has personal knowledge of the facts being related in the conversation*, or observed the conversations as they occurred.” *Peoples*, 250 F.3d at 641 (emphasis added). The Fourteenth Circuit omitted the “personal knowledge of the facts” basis for admitting lay opinion testimony, thus mischaracterizing the case law.

Furthermore, *Peoples* is factually inapposite. The Eighth Circuit in *Peoples* held that admission of an agent’s testimony regarding code words and phrases was in error not because the agent had failed to participate in or observe the conversations contemporaneously, but because her testimony consisted of unsupported opinions regarding supposed alternative meanings of “plain English words and phrases.” *Id.* at 640, 641. By relying only on the unambiguous

transcripts and not on any additional investigation, the agent failed to establish even the existence of a code, much less what any code words might mean. *Id.* The court implied, however, that if the agent had personal knowledge from outside the transcripts on which to base her opinion, her testimony might have been admissible. *See id.*

Under the “personal knowledge of the facts” basis for admitting lay opinion testimony that the Fourteenth Circuit edited out of *Peoples*, Agent Simandy’s testimony is admissible. Agent Simandy had personal knowledge of the facts in the call transcripts through his examination of records of the investigation and his interviews of witnesses. (R. 13.) He testified that his interviews of Agent Lamberti and Klestadt allowed him to contextualize and interpret the words used by Respondent in the call transcripts. (R. 13.) Unlike the agent’s testimony in *Peoples*, Agent Simandy’s opinions are more than mere reinterpretations of unambiguous terms based on no more than a transcript. (*See* R. 13-14.) In holding otherwise, the Fourteenth Circuit fundamentally misinterpreted the Eighth Circuit’s requirements for admission of lay testimony.

The Fourteenth Circuit’s flawed reasoning leads to the absurd result that law enforcement agencies will lose the fruits of their agents’ labor if it becomes necessary to replace them in a particular case with new agents. In a complex, lengthy investigation like this one, the primary agent may spend months or even years listening to, transcribing, and interpreting conversations. If that agent dies, as Agent Blackstock did, R. 12, all that the agent learned about the meaning of the conversations would follow him to the grave under the Fourteenth Circuit’s rule. Requiring contemporaneous observation or participation would make it impossible for any agent to testify about the meaning of code words used in recorded conversations merely because the conversations happened to occur before the lead agent’s death. Contrary to the Fourteenth Circuit’s opinion, Agent Simandy’s review of investigation records and call transcripts coupled

with his interviews of key witnesses satisfies the personal knowledge requirement. This Court should decline to read restrictions into Rule 701(a) that do not exist.

B. Agent Simandy’s Testimony Would Be Helpful to a Jury Because the Code Words Used by Respondent Do Not Have Immediately Discernible Meanings.

Rule 701 next requires that lay witness testimony be “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701(b). Testimony that clarifies ambiguous statements or otherwise unintelligible conversations is helpful to the finder of fact. *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir. 1994). Such testimony is helpful insofar as it is based on independent investigation. *Jayyousi*, 657 F.3d at 1095. However, testimony that is mere speculation unsupported by independent investigation is not helpful and is thus inadmissible under Rule 701(b). *See Freeman*, 498 F.3d at 905 (citing *United States v. Dicker*, 853 F.2d 1103, 1109 (3d Cir. 1988)); *Peoples*, 250 F.3d at 640.

In *United States v. De Peri*, 778 F.2d 963, 977 (3d Cir. 1985), the Third Circuit upheld the admission of lay witness testimony interpreting unintelligible language from recorded phone calls. The court reasoned that the testimony was helpful to the jury because the defendant’s language was “sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references” that would be clear only to the defendant and the other party to the conversation, and noted that the trial court “vigorously policed” the examination of the witness to ensure that he was not asked to interpret relatively clear statements. *Id.* at 977-78.

Similarly here, the terms “blood diamonds,” “black cat,” and “Charlie tango” are unintelligible references that would not be immediately clear to a jury in the context of Respondent’s conversations. In particular, Respondent’s phrase “the black cat is arranged” is nonsensical unless the reference to a black cat is not actually to a cat, which cannot be “arranged.” In addition, the words “Charlie” and “tango,” which are well-known government

agency code words for the letters “C” and “T,” are empty references on their own. *E.g.*, Nat'l Imagery and Mapping Agency, International Code of Signals for Visual, Sound, and Radio Communications 18 (U.S. ed. rev. 2003). Finally, “blood diamonds” literally refers to diamonds mined in a war zone; here, however, that meaning does not make sense in the context of the conversations, especially in conjunction with the other code words used. Agent Simandy’s testimony based on his extensive review and investigation would thus help a jury ascertain the true meaning of Respondent’s otherwise unintelligible coded references.

The Fourteenth Circuit erred in analogizing Agent Simandy’s opinions to those of the agent in *Peoples*, rather than to those of the agent in *Jayyousi*. In *Peoples*, the court found an agent’s testimony inadmissible because it was speculation based on nothing more than her review of transcripts. 250 F.3d at 640-41. Conversely, the Eleventh Circuit in *Jayyousi* found an agent’s statements helpful to the jury where the agent was able to gain firsthand knowledge through not only a review of transcripts but also of “thousands of wiretap summaries . . . as well as faxes, publications, and speeches.” 657 F.3d at 1102. Only after this investigation was the agent able to accurately interpret vague and ambiguous conversations and place them into proper context. *Id.* at 1102-03. Moreover, the court noted that the agent “had examined thousands of documents, many of which were not admitted into evidence.” *Id.* at 1103.

Here, Agent Simandy’s firsthand conversations with Agent Lamberti and Klestadt helped him link specific words in Respondent’s phone calls to activities that occurred on particular dates. (R. 13.) His familiarity with the investigation therefore allowed him to perceive coded meanings that would not be easily discernible to a jury. Even if a jury hears independent testimony about Respondent’s activities, the jurors will not have access to every document and record that Agent Simandy relied on in forming his opinions, and will not have the opportunity

to perform the same type of extensive review and investigation. Agent Simandy's opinions will help a jury piece together the true meaning of Respondent's conversations, and are thus admissible under the reasoning of *Jayyousi*.

C. Agent Simandy's Testimony Was Based Solely on Facts Learned During His Investigation, Not on Scientific, Technical, or Other Specialized Knowledge.

Congress amended Rule 701(c) in 2000 to clarify that opinion testimony admitted under the rule should not simply seek to circumvent the stricter requirements for admission of expert testimony under Federal Rule of Evidence 702. Fed. R. Evid. 701 cmt. (2000). Lay opinions are admissible only to help a jury understand a witness's testimony, not to provide "specialized explanations or interpretations that an untrained layman could not make." *Peoples*, 250 F.3d at 641 (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244-45 (9th Cir. 1997); *United States v. Cortez*, 935 F.2d 135, 139-40 (8th Cir. 1991)). Testimony interpreting code words based only on what an agent learned during a single investigation is admissible as a lay witness opinion under Rule 701. *Jayyousi*, 657 F.3d at 1104. The *Jayyousi* court held that the agent there could properly testify as a lay witness to the meaning of code words because the basis of his opinion was limited to facts he learned during that particular investigation; his review of records and call transcripts alone allowed him to place the code words into context. *Id.*

The Fourteenth Circuit erroneously held that permitting Agent Simandy's lay opinion testimony would allow the Government to circumvent the stringent requirements governing expert testimony. (R. 32.) Where a law-enforcement agent testifies to the meaning of code words and phrases, a Rule 702 analysis is only appropriate where the opinion testimony stems from extensive experience with a particular type of case or criminal. For example, in drug-related cases, a witness's knowledge about code words often comes from familiarity and experience with the types of code words generally used by drug offenders, not necessarily from

facts learned during a particular investigation. *See Figueroa-Lopez*, 125 F.3d at 1246 (holding inadmissible an agent's lay opinion testimony interpreting coded references to drug sales because it was based only on his extensive experience with drug investigations). Here, however, Agent Simandy testified that he had not worked on a poaching case before. (R. 14.) His opinions as to the meaning of the code words used by Respondent came exclusively from his review of the records and his interviews of witnesses, and were not based on any prior knowledge about the type of code that defendants might typically use in a poaching case. (R. 13.) Accordingly, in assuming without explaining that Agent Simandy's testimony should have been analyzed under Rule 702, the Fourteenth Circuit mischaracterized the content of and bases for his testimony. The testimony here is not based on scientific, technical, or other specialized knowledge, but instead only on what Agent Simandy learned during his investigation of this case.

CONCLUSION

The Fourteenth Circuit Court of Appeals erred in affirming the District Court's denial of the Government's motions in limine and in affirming the District Court's grant of Crawley's motion to quash. A jury is entitled to hear Reardon's statements under Rule 804(b)(6), the full extent of Crawley's source's information under Rule 501, and Agent Simandy's lay witness opinion testimony under Rule 701. This Court should therefore REVERSE the decision of the Fourteenth Circuit, and allow a jury to hear critical evidence of Respondent's involvement in the elephant-poaching conspiracy.

Dated: February 20, 2013

Respectfully Submitted,

Team 6P
Counsel for Petitioner

APPENDIX I

Relevant Provisions of the Constitution of the United States

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX II

Relevant Provisions of the Federal Rules of Evidence

Federal Rule of Evidence 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.

Federal Rule of Evidence 701: Opinion Testimony by Lay 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.

Federal Rule of Evidence 804: Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

...

(b) *The Exceptions.* The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

...

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant’s Unavailability.*

A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result.