
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, under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), a hearsay declaration of a murder victim is admissible in a criminal trial through *Pinkerton* conspiratorial liability where the defendant did not directly participate in the murder, there is no evidence that the defendant intended to procure the unavailability of the declarant, and the government relies only on evidence that the defendant could reasonably have foreseen that his co-conspirator would murder the declarant in order to silence him.
- II. Whether an evidentiary privilege for information gathered in a journalistic investigation exists under Federal Rule of Evidence 501 and, if so, whether the privilege should be absolute or qualified.
- III. Whether, under Federal Rule of Evidence 701 governing lay witness opinion testimony, a law-enforcement agent may testify as a lay witness about alleged code words and phrases in conversations, when the agent neither participated in nor observed the conversations, but merely read transcripts of them and reviewed the investigatory work of other law-enforcement personnel.

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STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Defendant, Mr. William Barnes, inherited Big Top Circus from his father in May 2000, and ran the circus for several years before he began to have financial difficulties. (R. at 21). Mr. Barnes then invited a reporter for the *Boerum Times*, Ms. Kara Crawley, to visit the circus with unlimited access in hopes that she would write a positive article that would help his business. (R. at 22). While there, Ms. Crawley claims that she met with a Big Top Circus employee who alleged that Mr. Barnes conspired with Mr. Alfred Anderson and Mr. James Reardon to invite two smaller circuses to winter their elephants with the Big Top Circus and then hunt and kill the elephants to harvest and sell the ivory. (R. at 21-22). The employee asked to remain anonymous until he or she left the circus and that a pseudonym be used. (R. at 22). The employee agreed to be videotaped but the intended that the recording only be used for Ms. Crawley's notes. (R. at 22). Ms. Crawley published a story about Mr. Barnes using the confidential information from the anonymous employee. (R. at 22).

The government obtained a warrant to tap Mr. Barnes' phone lines and intercepted several telephone conversations between Mr. Barnes, Mr. Anderson, and Mr. Reardon between October and December 2011. (R. at 23). Agent Thomas Simandy was assigned to the case after the calls took place and Mr. Barnes had already been arrested. (R. at 23). Agent Simandy, therefore, did not hear the conversations but instead read transcripts of the calls written by a previous agent, Agent Blackstock, who listened to the calls contemporaneously. (R. at 23). The government moved pre-trial to admit Agent Simandy's testimony regarding the calls and specifically the meaning of Mr. Barnes' repeated references to "blood diamonds," allegedly referring to elephant ivory tusks; "Charlie tango," allegedly referring to a helicopter to be used to help kill the elephants; and "black cat," allegedly referring to weapons purchased to use to kill the elephants. (R. 23-24).

According to conversations the government recorded, Mr. Reardon voiced his concerns about participating in killing the elephants with Mr. Anderson. (R. at 24). Mr. Anderson relayed this to Mr. Barnes who repeatedly discouraged Mr. Anderson from doing anything about it including harming Mr. Reardon. (R. at 24). The government also recorded a conversation between Mr. Reardon and his friend, Mr. Daniel Best, in which Mr. Reardon expressed concerns about his safety around Mr. Anderson. (R. at 24). Mr. Best later found Mr. Reardon dead in his home. (R. at 25). Mr. Anderson confessed to killing Mr. Reardon to prevent Mr. Reardon from exposing the plan to kill the elephants. (R. at 24). The government wishes to introduce a transcript of the conversation between Mr. Reardon and Mr. Best because Mr. Reardon is unavailable to testify. (R. at 25).

II. PROCEDURAL HISTORY

On December 4, 2011, Mr. Barnes was indicted and charged with five counts including two counts of Conspiracy to Deal Unlawfully in Firearms in violation of 18 U.S.C. §§ 371 & 922(a)(1)(a), two counts of Conspiracy to Commit a Crime of Violence Against an Animal Enterprise in violation of 18 U.S.C. §§ 43 & 371, and one count of Conspiracy to Commit Unlawful Takings Under the Endangered Species Act in violation of 16 U.S.C. §§ 371 & 1538. Before trial, Mr. Barnes opposed the government's motion under Federal Rule of Evidence 804(b)(6) to introduce out-of-court statements made by the late Mr. James Reardon. (R. at 6). Mr. Barnes also opposed the government's motion to introduce Agent Simandy's testimony about code words and phrases under Rule 701 as a lay witness. (R. at 14). A third party, Ms. Crawley, moved to quash a government subpoena for her testimony about confidential information obtained in her journalistic investigation of Mr. Barnes' business, citing the journalist's privilege under Rule 501. (R. at 6).

On May 1, 2012, the United States District Court for the Southern District of Boerum heard oral argument and testimony on these motions and on May 2, 2012, ruled against the

government in all three. (R. at 5-17). Pursuant to 18 U.S.C. § 3731, the government filed an interlocutory appeal to the United States Court of Appeals for the Fourteenth Circuit on all three issues. (R. at 20). The Circuit Court affirmed the District Court's decisions in all three issues. (R. at 20). The government subsequently filed a petition for writ of certiorari before this Court which this Court granted on Oct. 1, 2012. (R. at 36).

SUMMARY OF THE ARGUMENT

In the present case, the lower courts correctly ruled that: (1) the Reardon hearsay evidence should be excluded and the forfeiture-by-wrongdoing doctrine is inapplicable here; (2) Ms. Crawley should not be compelled to testify about confidential information obtained in her journalistic investigation because a journalist privilege applies under Rule 501 and the privilege is absolute; and (3) Agent Simandy's lay opinion testimony about code words and phrases is inadmissible under Rule 701.

First, the conversation between Mr. Reardon and Mr. Best was properly excluded because it is improper hearsay evidence and the forfeiture-by-wrongdoing doctrine codified in Federal Rule of Evidence 804(b) does not apply here. The government alleges that *Pinkerton* conspiratorial liability links Mr. Anderson's murder of Mr. Reardon to Mr. Barnes because the murder was a reasonably foreseeable consequence of the alleged conspiracy. The government further alleges that through the forfeiture-by-wrongdoing doctrine, Mr. Barnes waived his right to confront his accuser as a result of his conspiratorial liability. The forfeiture-by-wrongdoing doctrine, however, cannot combine with the *Pinkerton* liability without an affirmative act or reasonable foreseeability coupled with affirmative intent to make the witness unavailable for testimony at trial. The nature of conspiratorial liability and the reasonably foreseeable standard makes the two doctrines inapplicable together in this case, especially where Mr. Barnes did not

directly participate in the murder, the murder was not a reasonably foreseeable consequence of the alleged conspiracy, and there is no evidence that Mr. Barnes intended to procure the unavailability of Mr. Reardon at trial.

Second, Ms. Crawley's motion to quash the government's subpoena for her testimony was properly granted based on a journalistic privilege under Federal Rule of Evidence 501. This Court should recognize a privilege for journalistic sources and information under Federal Rule of Evidence 501 because the legislative history shows that the Rule was intended to be flexible and extend a journalistic privilege and the privilege passes the *Jaffee* test for recognizing new privileges. Furthermore, the privilege was properly recognized as an absolute privilege. Qualifying the privilege would undermine the purpose of the privilege, which is to protect the freedom of the press and encourage the truth-seeking activities by protecting source confidentiality. The press plays an important investigative role in society and if the privilege were qualified, the sources would likely be less willing to provide information and this role would be hampered.

Third, Agent Simandy's lay opinion testimony regarding alleged code words and phrases in conversations was properly excluded under Federal Rule of Evidence 701 because (a) it is not based on his first-hand perception and (b) it is not helpful to clearly understanding the witness's testimony or determining a fact in issue. Reading the transcripts of an event after-the-fact is not first-hand perception of the event, which is required by Rule 701. This requirement is designed to keep lay witnesses from simply telling the jury what to infer from evidence and impinging on the jury's providence. Also, Agent Simandy's testimony would not be helpful to the jury in understanding the Agent's first-hand perception through an explanation of his sensory experience of the event. Furthermore, Agent Simandy's interpretation of the transcript based on his work experience is outside the role of a lay opinion witness.

ARGUMENT

I. HEARSAY DECLARATIONS ARE INADMISSIBLE UNDER THE DOCTRINE OF FORFEITURE-BY-WRONGDOING UNDER THE *PINKERTON* DOCTRINE OF CONSPIRATORIAL LIABILITY ABSENT DIRECT PARTICIPATION OR REASONABLE FORESEEABILITY COUPLED WITH INTENT.

The admission of the Reardon hearsay evidence would violate both the Confrontation Clause of the United States Constitution and Federal Rule of Evidence 804(b)(6) because (1) Mr. Barnes did not participate directly in planning or procuring the declarant's unavailability through wrongdoing; (2) Mr. Reardon's murder was not in furtherance, within the scope, or reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy; and (3) Mr. Barnes did not have the requisite intent to prevent Reardon from testifying required by this Court. This Court should, therefore, affirm the lower court's decision to exclude such evidence.

A. Background

The Confrontation Clause of 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 requires that a criminal defendant be given the opportunity to confront and cross-examine any witness against him, unless a common law exception in force at the time the amendment was drafted would permit the admission of the evidence. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

The common law doctrine of forfeiture-by-wrongdoing was recognized at the time the Sixth Amendment was drafted. *See Davis v. Washington*, 547 U.S. 813, 833 (2006). This exception allows testimonial statements that would otherwise be considered hearsay to be admitted in cases where the defendant's misconduct caused the declarant's unavailability at trial. *Id.*

Federal Rule of Evidence 804(b)(6) represents the codification of the doctrine of forfeiture-by-wrongdoing as applied to federal hearsay rules. Rule 804(b)(6) provides an

exception to the hearsay exclusion rule for “statement[s] 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).

B. Traditional Forfeiture-By-Wrongdoing

In order to apply the forfeiture-by-wrongdoing exception in the traditional sense, the trial court must find, by a preponderance of the evidence, that “(1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness.” *United States v. Gray*, 405 F.3d 227 (4th Cir. 2005) (citing *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002)). In *Giles*, the Supreme Court clarified that the forfeiture-by-wrongdoing exception applies “only when the defendant engaged in conduct *designed* to prevent the witness from testifying.” *Giles v. California*, 554 U.S. 353, 359 (2008). After the *Giles* decision, courts have held that, even where a defendant clearly caused the unavailability of a witness through homicide, there must be additional proof that the express intended purpose of the killing was to prevent the witness from testifying. *See e.g., United States v. Taylor*, 622 F. Supp. 2d 693 (E.D. Tenn. 2008) (trial court, applying *Giles*, barred testimonial statements of a victim wherein evidence established that the person was kidnapped and shot to death by the defendant after he suspected the person to be a witness in a criminal case against him, even when the killing occurred when the victim was trying to escape from the kidnappers); *Hunt v. State*, 218 P.3d 516 (Okla. Crim. App. 2009) (citing *Giles* to reverse, under the forfeiture-by-wrongdoing principle, the erroneous admission of the decedent's previous testimonial description to a 911 operator of acts of domestic violence committed by the defendant who later killed her, absent any evidence that her death was to prevent her future testimony).

Here, the government seeks to submit certain hearsay declarations into evidence under Rule 804(b)(6). Although the appellee, Mr. Barnes, did not wrongfully cause or acquiesce in wrongfully causing Mr. Reardon's unavailability as a witness, the government claims that Mr. Barnes is liable under the doctrine of conspiratorial liability as outlined in *Pinkerton v. United States*, 328 U.S. 640 (1946).

C. Conspiratorial Liability

Pinkerton v. United States established conspiratorial liability in the United States. 328 U.S. at 647. In *Pinkerton*, two brothers, Daniel and Walter Pinkerton, were tried and convicted on several bootlegging charges and one conspiracy charge of Internal Revenue Code violations. *See id.* at 641, 648. Although there was “no evidence to show that Daniel participated directly in the commission of the substantive offenses[,] . . . there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement or conspiracy existing between the brothers.” *Id.* at 645 (footnote omitted).

The Court held that, because “(a)n overt act is an essential ingredient to the crime of conspiracy” and “can be supplied by the act of one conspirator . . . the same or other acts in furtherance of the conspiracy are likewise . . . attributable to the others for the purpose of holding them responsible for the substantive offense.” *Id.* at 647. Thus, under *Pinkerton*, direct participation in a substantive offense is not required for criminal liability. *Id.* Instead, each participant in a conspiracy is liable for the acts of his co-conspirators in furtherance of the conspiracy. *Id.*

In *United States v. Cherry*, the Tenth Circuit established a two-prong test to determine whether a defendant may be deemed to have committed forfeiture-by-wrongdoing under the *Pinkerton* theory of conspiratorial liability. *See* 217 F.3d 811, 820 (10th Cir. 2000). Under the test,

a defendant may be deemed to have waived his or her *Confrontation Clause* rights (and, a fortiori, hearsay objections) if a preponderance of the evidence establishes one of the following circumstances: (1) he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing, or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.

Id. (internal citations omitted). Several Circuits have adopted the two-prong test established in *Cherry*. See e.g., *United States v. Dinkins*, 691 F.3d 358, 385 (4th Cir. 2012); *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004). In *Dinkins*, the Fourth Circuit modified the *Cherry* test to take into account this Court's decision in *Giles*. See *Dinkins*, 691 F.3d at 385. According to the *Dinkins* court, "a court's decision under the second prong in *Cherry* must be supported by evidence that the defendant 'engaged in conduct *designed* to prevent the witness from testifying.'" *Id.* (quoting *Giles*, 554 U.S. at 359). Thus, a court may admit hearsay evidence under Rule 804(b)(6) where the defendant (1) participated directly in planning or procuring the declarant's unavailability through wrongdoing, or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy *and* designed or intended to prevent the witness from testifying. See *id.*

In *Cherry*, five defendant co-conspirators were indicted on drug charges. *Cherry*, 217 F.3d at 813. Much of the evidence was provided by a cooperating witness who was murdered before trial by one of the co-conspirators. *Id.* The murderer was severed from the case, and the court was left to determine whether hearsay statements by the murdered witness were admissible against the remaining co-conspirators. *Id.* at 814. The court refused to extend Pinkerton liability to all co-conspirators. *Id.* at 817. In justifying its decision, the court noted that "[t]o extend substantive Pinkerton liability in the manner urged by the government would apparently render every minor drug distribution co-conspirator, regardless of knowledge, the extent of the conspiracy, its history of violence, and like factors, liable for first-degree murder." *Id.* Rejecting

this conclusion, the court noted that “[s]uch a result appears incompatible with the due process limitations inherent in Pinkerton.” *See id.*

D. Argument

Under the *Cherry* test, as modified by *Giles* and *Dinkins*, Mr. Barnes did not commit forfeiture-by-wrongdoing on a theory of conspiratorial liability because (1) Mr. Barnes did not participate directly in planning or procuring the declarant’s unavailability through wrongdoing, (2) Mr. Reardon’s Murder was not in furtherance, within the scope, or reasonably foreseeable as a necessary or natural consequence of the alleged conspiracy and (3) Mr. Barnes did not have the requisite intent to prevent Reardon from testifying required under *Giles*.

1. Mr. Barnes Did Not Participate Directly in Planning or Procuring the Declarant’s Unavailability Through Wrongdoing.

The first prong of the *Cherry* test waives a defendant’s constitutional and hearsay objections under the doctrine of forfeiture-by-wrongdoing where a co-conspirator “participated directly in planning or procuring the declarant’s unavailability through wrongdoing.” *See Cherry*, 217 F.3d at 820.¹ The *Dinkins* court noted that “[m]ere participation in a conspiracy will not trigger the admission of testimonial statements under a forfeiture-by-wrongdoing theory.” 691 F.3d at 385. In *United States v. Houlihan*, the First Circuit required an affirmative act by the particular defendant in order to trigger waiver-by-wrongdoing. 92 F.3d 1271, 1280 (1st Cir. 1996). *But see United States v. Mastrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982) (“Bare knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.”) The Eighth Circuit, in *Olson v. Green*, also requires either an

¹ This prong is similar to the traditional requirements to prove forfeiture-by-wrongdoing discussed in *Gray*. *See Gray*, 405 F.3d at 241. In *Gray*, the court determined that in order to apply the forfeiture-by-wrongdoing exception, the defendant must have (1) engaged in or acquiesced in wrongdoing, (2) the wrongdoing must have been intended to render the declarant unavailable as a witness, and (3) the wrongdoing must actually render the declarant unavailable. *Id.* Thus, the first *Cherry* prong covers the traditional theory of forfeiture-by-wrongdoing where an individual is directly involved in rendering the declarant unavailable.

affirmative act or a showing that the co-conspirator “acted on [the defendant’s] behalf.” 668 F.2d 421, 449 (8th Cir. 1982). In *Cherry*, the court agreed with a lower court holding that “mere failure to prevent [a] murder, or mere participation in [an] alleged . . . conspiracy . . . , must surely be insufficient to constitute a waiver of a defendant’s constitutional confrontation rights.” 217 F.3d at 820. Absent a showing that a murder was “in furtherance and within the scope of an ongoing conspiracy and reasonably foreseeable as a natural or necessary consequence thereof,” to trigger forfeiture-by-wrongdoing, “the government [must] show that the particular defendant participated in some manner in the planning or execution of the murder.” *Id.* Thus forfeiture-by-wrongdoing requires some affirmative act to procure the unavailability of the witness, beyond mere participation in a conspiracy.

Here, Mr. Barnes did not murder Mr. Reardon and did not participate directly in planning Mr. Reardon’s murder. Indeed, when Mr. Anderson suggested to Mr. Barnes that they “get rid of” Mr. Reardon, Mr. Barnes told him to not do anything. (R. at 18). Later, when Mr. Anderson again suggested that Mr. Reardon had to die, Mr. Barnes unequivocally stated that he didn’t want anything to do with it. (R. at 19). Because he refused to participate in the planning or the execution of the murder, and explicitly stated that he wanted nothing to do with it, Mr. Barnes did not participate directly in planning or procuring the declarant’s unavailability. Therefore, the first prong of *Cherry* fails and the forfeiture-by-wrongdoing exception does not attach.

2. Reardon’s Murder Was Not in Furtherance, Within the Scope, or Reasonably Foreseeable as a Necessary or Natural Consequence of the Alleged Conspiracy.

Mr. Barnes cannot be held to have waived his confrontation clause rights because Mr. Reardon’s murder was not in furtherance, within the scope, or reasonably foreseeable as a necessary or natural consequence of the alleged conspiracy.

In *Cherry*, the court noted that, “mere participation in a conspiracy does not suffice” to waive confrontation rights, “yet participation may suffice when combined with findings that the wrongful act at issue was in furtherance and within the scope of an ongoing conspiracy and reasonably foreseeable as a natural or necessary consequence thereof.” 217 F.3d at 820. The court noted that although “intimidation and violence may or may not be foreseeable results of a particular drug conspiracy, first degree murder liability incorporates a specific intent requirement far more stringent than mere foreseeability.” *Id.* at 818. The court further declined to extend the *Pinkerton* conspiratorial liability doctrine “to hold co-conspirators liable for first-degree murder that was not the original object of the conspiracy.” *Id.* Applying the general *Pinkerton* principles outlined above to the forfeiture-by-wrongdoing framework, the *Cherry* court noted that “[i]t would make little sense to limit forfeiture of a defendant’s trial rights to a narrower set of facts than would be sufficient to sustain a conviction and corresponding loss of liberty.” *Id.* Thus, under the analysis in *Cherry*, the application of forfeiture-by-wrongdoing under the *Pinkerton* theory of conspiratorial liability should be limited to those situations where the murder of a potential witness was “the original object of the conspiracy.” *See id.*

Here, the original object of the alleged conspiracy was to hunt elephants. In furtherance of this alleged conspiracy, Mr. Barnes allegedly purchased guns and rented a helicopter. Both of these alleged actions would be considered in furtherance, within the scope, or reasonably foreseeable as a necessary or natural consequence of the alleged conspiracy. Murdering a human being was not in furtherance, within the scope, or reasonably foreseeable as a necessary or natural consequence of a conspiracy to hunt elephants. It was not until the plans for the alleged conspiracy began to break down that Mr. Anderson unilaterally determined that he needed to kill Mr. Reardon. This action was not in furtherance of any conspiracy; instead, it was an

independent act by Mr. Anderson. Therefore, because Mr. Reardon's murder was not reasonably foreseeable, the second *Cherry* prong fails and, as a result, Mr. Barnes can not be held to have forfeited his rights under the confrontation clause. Accordingly, this court should uphold the lower court's decision to deny the government's attempt to use the Reardon hearsay evidence against Mr. Barnes.

3. Mr. Barnes Did Not Have the Requisite Intent under *Giles* to Prevent Reardon from Testifying.

Finally, Mr. Barnes did not have the requisite intent under *Giles* to prevent Reardon from testifying. In *Giles*, this Court determined that, in order to forfeit his Confrontation Clause right to confront a witness against him, the defendant must not only procure the witness's unavailability, but must "engage[] in conduct *designed* to prevent the witness from testifying." *Giles*, 554 U.S. at 359. Thus, the act of procuring a witness's unavailability is insufficient without the requisite intent to procure such witness's unavailability. *See id.*

Here, Mr. Barnes did not have the requisite intent to prevent Mr. Reardon from testifying. Mr. Anderson twice discussed his desire with Mr. Barnes to murder Mr. Reardon. In both instances, Mr. Barnes attempted to discourage Mr. Anderson from committing the murder. In their final conversation before Mr. Reardon was murdered, Mr. Barnes stated unequivocally "I don't want anything to do with this," referring to the murder, and terminated the call. By consistently voicing his opposition to Mr. Anderson's desired course of action, Mr. Barnes made it clear that he did not intend to harm Mr. Reardon. Mr. Reardon's subsequent murder did render Mr. Reardon unavailable as a witness, but because Mr. Barnes did not intend to participate in Mr. Anderson's unilateral plan to harm Mr. Reardon, Mr. Barnes did not have the requisite intent to prevent Mr. Reardon from testifying, and therefore cannot be held to have forfeited his Confrontation Clause right. Therefore, because Mr. Barnes did not have the requisite intent, this

Court should uphold the lower court's decision to deny the government's attempt to introduce the Reardon hearsay evidence against Mr. Barnes.

II. MS. CRAWLEY SHOULD NOT BE COMPELLED TO REVEAL CONFIDENTIAL INFORMATION BECAUSE FEDERAL RULE OF EVIDENCE 501 PROVIDES FOR AN EVIDENTIARY PRIVILEGE FOR INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION AND THE PRIVILEGE IS ABSOLUTE.

A. Rule 501 Provides For an Evidentiary Privilege for Information Gathered in a Journalistic Investigation Based on the Rule's Legislative History and Because the Privilege Satisfies the *Jaffee* Test.

This Court should recognize a privilege for journalistic sources and information under Federal Rule of Evidence 501 because (1) the legislative history shows that the Rule was intended to be flexible and extend a journalistic privilege and (2) the privilege passes the *Jaffee* test for recognizing new privileges.

Rule 501 establishes the rule for claims of privilege in federal courts. The Rule states:²

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.

Fed. R. Evid. 501 (emphasis added).

² Congress has only amended the Rule once since the original enactment in 1975. This amendment took place in 2011 as part of an overall restyling of the Federal Rules of Evidence to make them easier to understand and to standardize terminology throughout. The amendment did not and was not intended to change the meaning or effect of the Rule in any way.

1. The Legislative History of Rule 501 and Resulting Case Law Supports Congress’s Intent to Have a Flexible and Evolving Privilege Standard and To Include a Reporter Privilege.

When Congress adopted the Federal Rules of Evidence in 1975, it declined to enumerate permitted privileges³ in Rule 501, but instead opted to have the courts apply a more flexible standard: “in the light of reason and experience.” *Id.* This approach “directed federal courts to ‘continue the evolutionary development of testimonial privileges.’” *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). Although the journalistic privilege was not included on the list of nine enumerated privileges originally proposed by the Advisory Committee, the authors of one of the seminal treatises on the Federal Rules of Evidence still conclude that “[t]he legislative history suggests that Congress expected that Rule 501 would be used to create a privilege for newsmen.” 23 Charles Alan Wright & Kenneth A. Graham Jr., *Federal Practice and Procedure: Federal Rules of Evidence* § 5426 (1980 & Supp. 2012); *see also Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (discussing congressional review focusing on the absence of the “newspaperman’s privilege”). The Advisory Committee’s initial rejection of the journalistic privilege was, in fact, thought to be one of the reasons that Congress got involved in the rulemaking process to begin with. *See Wright & Graham, supra*, § 5426 (citing 119 Cong. Rec. 7643 (1973) (statement of Mr. Rodino), 7647 (statement of Mr. Wydler and Mr. Hungate), 7648 (statement of Ms. Holtzman). By instituting the flexible standard, Congress affirmatively demonstrated its intention to not freeze the law of privilege, but to require the courts to develop privilege rules on a case-by-case basis.⁴

³ The original proposal for the rule laid out nine enumerated privileges: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer. Fed. R. Evid. 501 advisory committee’s note.

⁴ In applying the flexible “reason and experience” standard stated in Rule 501, courts have recognized many privileges including the psychotherapist privilege, the spousal privilege, the cleric-communicant privilege, the

Trammel, 445 U.S. at 47 (citing 120 Cong. Rec. 40,891 (1974) (statement of Rep. Hungate); S. Rep. No. 93-1277, at 11 (1974); H.R. Rep. No. 93-650, at 8 (1973)).

The resulting case law supports the recognition of a common law journalistic privilege. Under the Rule 501 “reason and experience” standard, several appellate courts, including the Second, Third, and Fourth Circuits, have recognized a common law journalistic privilege in some form. *See, e.g., Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29, 32, 35 & n.6 (2d Cir. 1998) (holding that the privilege exists in a civil case); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) (holding the privilege exists in a criminal case); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (holding that there is a federal common law journalist privilege in a civil case); *United States v. Steelhammer*, 539 F.2d 373, 376-77(4th Cir. 1976) (Winter, J., dissenting), *rev’d*, 561 F.2d 539 (4th Cir. 1977) (en banc order adopting Judge Winter’s position that a common law reporter privilege exists in a civil case).

Only the Ninth Circuit has rejected a reporter’s privilege under the common law outright, but even that rejection was limited to the grand jury context, *see, e.g., In re Grand Jury Subpoena, Joshua Wolf*, 201 F. App’x 430, 433 (9th Cir. 2006); *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993). The Seventh Circuit considered, but did not explicitly reject, a common law privilege, *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003), and the D.C. Circuit split three ways resulting in no precedential decision on the issue, *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d 964, 973 (D.C. Cir. 2006). The First Circuit has conflicting decisions on the matter. *Compare Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (agreeing with the Third Circuit in *Riley* that “journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources”) *with United States v.*

military secrets privilege, *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d 964, 989 (2005) (Tatel, J., concurring), and, as argued here, the journalist’s privilege.

LaRouche Campaign, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988) (rejecting, in a footnote and without discussion, a federal common law journalistic privilege).

Although the Supreme Court denied a constitutional journalistic privilege in *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972), this limitation is not applicable to the facts in this case and does not limit the recognition of a common law privilege. The *Branzburg* Court merely held that there is no absolute constitutional privilege under the First Amendment for journalists to withhold sources and information from the grand jury, particularly in light of the secrecy inherent in the grand jury's proceedings.⁵ *Branzburg*, 408 U.S. at 692. The Court even left the door open for the development of a common law reporter's privilege, stating that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable." *Id.* at 706. Furthermore, the Court confirmed that Congress can "fashion [these] standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* Three years later, Congress did just that by adopting Rule 501 and the "reason and experience" standard.

2. A Journalistic Privilege Satisfies All Three Factors of the *Jaffee* Standard.

To determine which privileges to recognize under the reason and experience standard, lower courts apply the three-factor test promulgated by this Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), where it was used to recognize a psychotherapist privilege under federal common law. *See, e.g., In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 991-1001 (Tatel, J., concurring) (applying *Jaffee* analysis to journalist's privilege). The three factors to weigh are: (1) the significant public and private interests served by the proposed privilege; (2) whether those

⁵ The resulting line of cases denying a journalistic privilege under *Branzburg* are likewise inapplicable and unpersuasive in this case because they address a constitutional privilege, not a common law privilege as claimed here.

interests outweigh the burden on truth-seeking that the privilege might impose; and (3) how widely the States recognize the proposed privilege. *See Jaffee*, 518 U.S. at 10-13. Each factor in the *Jaffee* test supports the recognition of a federal common law reporter’s privilege both generally and specifically in this case.

a. Significant Public and Private Interests Are Served.

First, the journalistic privilege strongly serves private and public interests. This Court in *Jaffee* emphasized that the psychotherapist-patient relationship is “a public good of transcendent importance” and that, like the spousal and attorney-client relationships, it is grounded on the need for trust and confidentiality. *Id.* at 10-11. Similarly, a free and unfettered press is “a public good of transcendent importance.” This Court has recognized that “[t]he free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences.” *Estes v. Texas*, 381 U.S. 532, 539 (1965); *see also Mills v. Alabama*, 384 U.S. 214, 219 (1966). Without a free press, the public “would be far less able to make informed political, social, and economic choices.” *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). The press’ role as a source of information for citizens is diminished if its ability to gather and report the news is impaired in any way. *Id.* The press’s ability to gather and report news would be substantially impaired if journalists were required by law to disclose the sources of facts or the identities of sources, particularly where a journalist has promised confidentiality. *Id.* Rejecting a legal privilege here would destroy a journalist’s ability to pledge confidentiality, thereby compromising the press’ role—especially in highly sensitive stories where confidentiality of sources is a prerequisite for informant cooperation.

Without journalistic confidentiality, the public likely would have missed out on stories such as Watergate and others involving national security or public governmental corruption. *See* Brief for ABC, Inc. et al. as Amici Curiae Supporting Respondents at 23 n.10, *United States v. Sterling*, (4th Cir. 2012) (No. 11-5028) 2012 WL 554007 (citing declarations from journalists stating that many stories were only possible because of the assurance of complete confidentiality and that confidentiality often results in more accurate information). As such, almost every federal Circuit has recognized the important public interest in preserving the ability of journalists to keep investigative information confidential. *See e.g.*, *Bruno & Stillman, Inc.*, 633 F.2d at 595 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986, 990 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

This important public interest is evident in the case at hand. Ms. Crawley's article in the *Boreum Times* broke the story of the elephant hunt scheme to the public. As was suggested in *Estes*, the press here was a catalyst in exposing this corruption and awakening the public to an evil within the community. The article allowed the community to make better-informed economic decisions as to whether to support the Big Top Circus through patronage and also provided the government with important information that spurred a prosecutorial investigation. These beneficial effects likely would not have happened if the Big Top employee had not felt secure in Ms. Crawley's guarantee of confidentiality. This case demonstrates the vital importance of journalistic privilege in fulfilling the significant public interest in a free press.

b. There is Limited Evidentiary Benefit.

Second, any evidentiary benefit resulting from a rejection of the journalistic privilege would not outweigh the important public interests that the privilege is designed to protect. Indeed, in the absence of the privilege, it is likely that the information that led to these charges would have never been revealed in the first place—resulting in a diminution in evidence. As this Court explained in *Jaffee*, speaking about the psychotherapist’s privilege:

If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

518 U.S. at 11-12; *see also Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998)

(“[T]he loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.”) The same is true for the journalist’s privilege. If a source knows that journalists can be compelled to disclose information obtained in confidence, the source may not agree to provide the information in the first place. Therefore there is very little truth-seeking benefit to be gained by rejecting the journalist privilege.

In the case at hand, the employee at Big Top only approached Ms. Crawley with the information in hushed tones and specifically asked that a pseudonym be used in place of his or her real name. The employee was concerned for his or her personal safety if his or her identity as the source became known to the employer. Although the employee agreed to be videotaped, the recording was only made for the purpose of Ms. Crawley’s notes and was not to be viewed by anyone else. Ms. Crawley’s pledge of confidentiality was necessary for this employee to feel personally safe and secure enough to expose the elephant hunt plan. Without the promise of

confidentiality, this case would likely have never been filed because the underlying information would have likely never been disclosed in the first place. The benefits of rejecting the privilege are modest as most of the information obtained through assuring confidentiality would not have been disclosed otherwise. Furthermore, the public interest in a free press clearly outweighs any minute benefits.

c. The States Widely Recognize the Journalist’s Privilege.

Third, the reporter’s privilege is widely recognized by the states. Currently forty-nine states, as well as the District of Columbia, recognize a reporter's privilege.⁶ *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 993-94 (Tatel, J., concurring). “[T]he existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.” *Jaffee*, 518 U.S. at 9. In *Jaffee*, dealing with the psychotherapist-patient relationship, this Court found that “any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court,” the “[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.” *Id.* at 13 (footnote omitted). The same rationale applies to the journalist privilege—any state law shielding a journalist from being compelled to reveal confidential facts and identity of sources will have little effect in preserving the confidential relationship required for newsgathering if the informant is aware that the same privilege may not be honored in federal court. This effectively nullifies the result the states intended.

The journalistic privilege clearly meets all three prongs of the *Jaffee* standard: the protection of a free and unfettered press is a recognized vital public interest, the rejection of a

⁶ Although thirty-one states have laws instituting the privilege as opposed to judicial privilege development, *In re Grand Jury Subpoena to Judith Miller*, 397 F.3d at 994 (Tatel, J., concurring), “[i]t is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision” because “it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both ‘reason’ and ‘experience,’” *Jaffee*, 518 U.S. at 13.

journalistic privilege will result in very few evidentiary gains, and forty-nine states recognize and support such a privilege. These considerations, along with Congress’s intention that the law of privilege be evolutionary and expand to cover new privileges over time, compel this Court to acknowledge what reason and experience dictates—that a federal common law journalistic privilege exists under Rule 501.

B. The Journalistic Privilege Under Rule 501 is Absolute Because a Qualified Privilege Would Undermine the Purposes of the Privilege.

The only privilege worth having is one that will actually incentivize the desired behavior. The journalist privilege must be absolute in order to uphold the purpose of the privilege. As discussed above, the rationale behind recognizing a journalistic privilege is to protect the freedom of the press by encouraging confidential disclosure to journalists when the information might otherwise remain undiscovered. As this Court stated in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the [participants] in the privilege “must be able to predict with some degree of certainty whether particular discussions will be protected” for the purpose of the privilege to be served. *Id.* at 393. “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Id.* (quoted in *Jaffee*, 518 U.S. at 17-18).

A qualified privilege is, by nature, an uncertain privilege and therefore does not serve the purposes of the privilege. The existence of a qualified privilege does not provide much security to a potential source if a judge can simply decide to take away the protection. Recognizing this, courts have found several other privileges to be absolute, including the attorney-client privilege and the psychotherapist-patient privilege, in order to fulfill the purposes of the privilege. *See Upjohn*, 449 U.S. at 393 (holding that the attorney-client privilege is absolute); *Jaffee*, 518 U.S. at 18 (holding that the psychotherapist privilege is absolute). Likewise, the majority of the states

acknowledge the need for such security in the press and recognize an absolute journalistic privilege to not disclose confidential sources or information. *See* Comm. on Comm'cns & Media Law, Ass'n of the Bar of the City of New York, *The Federal Common Law of Journalists' Privilege: A Position Paper*, at 19 (2004), available at <http://www.nycbar.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf> (last visited Feb. 20, 2013).

Additionally, the privilege should be absolute so that it will apply equally in all types of court proceedings—whether a criminal trial, civil trial, or grand jury proceeding. Absent this protection, neither the source nor the journalist would be able to predict in what context the information might be subpoenaed in the future. Limiting the privilege in different types of proceedings qualifies the privilege and undermines the faith the journalist and the informant can place in the confidentiality of the information. Although some courts currently apply the journalistic privilege only to one type of proceeding, *Jaffee*, in applying the psychotherapist privilege, did not distinguish between the various types of proceedings. The laws in most states and the Department of Justice policy guidelines do not make these distinctions either. *See* Comm. on Comm'cns & Media Law, *supra*, at 25. The underlying interests at stake do not change just because the proceeding happens to be criminal rather than civil or vice versa.

Although this Court in *Branzburg* rejects an absolute privilege for reporters under the First Amendment, it also rejects a qualified privilege, recognizing that a qualified privilege would be insufficient to protect the confidential information meant to be protected. 408 U.S. at 702. Even though *Branzburg* is not controlling,⁷ *Branzburg*'s rationale for the need for an absolute privilege is applicable here. In *Branzburg*, this Court recognized that although an absolute privilege was not asserted in that case, “[i]f newsmen's confidential sources are as

⁷ Again, for precedential value, *Branzburg* is inapplicable to the case at hand because this case deals with a federal common law privilege while *Branzburg* only dealt with a constitutional privilege and left the door open for the possibility of the creation of a common law privilege.

sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.” *Id.* (footnote omitted). Even in rejecting the journalistic privilege, this Court recognized that for the privilege to be effective in fulfilling its justifications, it would need to be absolute.

In the case at hand, the employee clearly felt that his or her physical safety might be in jeopardy if his or her identity were disclosed. If the employee understood that the confidentiality Ms. Crawley promised the employee could be overturned by a judge’s discretionary decision, the employee would likely be less willing to come forward, provide information, and stake his or her safety against the uncertainty of a judge’s whim.

This qualified treatment of the privilege would undermine the entire purpose of the privilege in the first place, which is to protect the press’ freedom and truth-seeking role by encouraging confidential sources to divulge accurate and secret information. Therefore, this Court should recognize the privilege as absolute to fulfill the purposes of the privilege.

C. Even if the Journalist Privilege is Qualified, the Lower Court Did Not Abuse Its Discretion in Upholding the Privilege Because the Evidence Was Available Elsewhere.

Even if the privilege were qualified, Ms. Crawley should still not be compelled to testify. In order to overcome the privilege, the government would have to show that the information is relevant, not available elsewhere, and that there is a compelling interest in the information. *See LaRouche*, 780 F.2d at 1139. Here, the identity of the source and details of Ms. Crawley’s journalistic investigation are cumulative evidence. Thus, they are available elsewhere, and not necessary for the government’s case. The employee’s stated fear of reprisal and safety concerns clearly overcomes any minimal benefit the government may derive from disclosure of the

confidential source. Therefore, the lower court's decision to not force Ms. Crawley to testify was not an abuse of discretion.

III. AGENT SIMANDY'S TESTIMONY IS INADMISSIBLE UNDER RULE 701 BECAUSE IT IS NOT BASED ON HIS FIRST-HAND PERCEPTION AND IS NOT HELPFUL TO THE JURY.

Agent Simandy's testimony regarding alleged code words and phrases in conversations is not admissible under Federal Rule of Evidence 701 because (a) it is not based on his first-hand perception and (b) it is not helpful to clearly understanding the witness's testimony or determining a fact in issue.

In the American judicial system, the function of the jury is to "weigh the credibility of witnesses, to draw inferences from contradictory evidence, and to reach conclusions about the evidence." *United States v. Jayyousi*, 657 F.3d 1085, 1119 (11th Cir. 2011) (Barkett, J., dissenting). Unless a witness is testifying as an expert, witness testimony is confined to facts about which the witness has first-hand knowledge. *See* Fed. R. Evid. 602. Federal Rule of Evidence 602 mandates that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *Id.* The Advisory Committee explains that "the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence upon the most reliable sources of information." Fed. R. Evid. 602 advisory committee note (1972 Proposed Rules) (internal quotations omitted). In order to testify as a fact witness, you have to have actually been there to observe the facts about which you are testifying. *See United States v. Garcia*, 413 F.3d 201, 211-12 (2d Cir. 2005) (internal quotations omitted).

Witnesses are only allowed to offer opinion testimony under two circumstances: “either when they have expert knowledge and are qualified under Federal Rule of Evidence 702 to render such an opinion; or when they have personally experienced an event and therefore have the ability to describe their layperson’s perception of the event that the jury cannot otherwise experience for itself” under Rule 701. *Jayyousi*, 657 F.3d at 1119-20. Such lay opinion testimony is permitted under Rule 701 “because it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness’s sensory and experiential observations that were made as a first-hand witness to a particular event.” *Id.* at 1120. Examples of permissible lay opinion testimony include “the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *See* Fed. R. Evid. 701 advisory committee note (2000 Amendments) (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3d Cir. 1995)).

Rule 701 only permits lay opinion testimony under limited circumstances in order to ensure that, where permitted, a witness’s lay opinion serves to put “the trier of fact in possession of an accurate reproduction of [an] event” and does not “amount to little more than [the witness] choosing [a] side[.]” *See* Fed. R. Evid. 701 advisory committee note (1972 Proposed Rules). Specifically, Rule 701 provides that:

If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (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 702.⁸

⁸ Agent Simandy was not qualified as an expert. According to his testimony, his opinions were based on his review of the records in this investigation only, and not on his years as an investigator. Because Agent Simandy

Fed. R. Evid. 701. Agent Simandy’s lay opinion testimony is inadmissible because (a) it is not based on first-hand perception and (b) it is not helpful as contemplated under the Rule.

A. Agent Simandy’s Opinion Testimony is Not Admissible Because it is Not Based on First-Hand Perception.

Agent Simandy’s opinion testimony is not admissible under Rule 701 because it is not based on first-hand perception, but instead is based on an after-the-fact review of transcripts. Rule 701(a) requires lay opinion testimony to be “rationally based on the witness’s perception.” Fed. R. Evid. 701(a). The advisory committee notes explain that this limitation “is the familiar requirement of first-hand knowledge or observation.” Fed. R. Evid. 701 advisory committee note (1972 Proposed Rules); *see also United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999) (under Rule 701, “the opinion of a lay witness on a matter is admissible only if it is based on first-hand knowledge or observation”).

The circuits below are divided on the issue of whether a lay witness may offer opinion testimony based on an after-the-fact review of second-hand information. Five Circuits—the First, Second, Third, Fourth, and Eighth—interpret Rule 701 to only allow lay witness opinion testimony that is based on first-hand observation. *See United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (rejecting an agent’s interpretations of intercepted phone calls as “post-hoc assessments [that could not] be credited as a substitute for the personal knowledge and perception required under Rule 701”); *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 224-28 (3d Cir. 2008) (excluding opinion testimony of whether incident could have been prevented where witness’s knowledge was second-hand); *Garcia*, 413 F.3d at 212-13 (case agent testimony inadmissible because it does not offer “an insight into an event that was uniquely available to the

did not claim that his opinions were based on experience as an investigator, and because the issue of Agent Simandy’s testimony under Rule 702 is not before this Court, subpart (c) does not apply to this analysis.

eyewitness”); *United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001) (refusing to admit narrative testimony by an investigating agent “that consisted almost entirely of her personal opinions” about the meaning of recorded conversations that were being played for the jury); *Swajian v. Gen. Motors Corp.*, 916 F.2d 31, 36 (1st Cir. 1990) (excluding testimony where witness did not see key event).

In *Peoples*, the 8th Circuit interpreted Rule 701 to allow lay opinion testimony “only to help the jury or court to understand the facts about which the witness is testifying.” 250 F.3d at 641. The facts in *Peoples* are similar to the facts in this case. In *Peoples*, an FBI agent reviewed “recorded telephone and visitation conversations” between the defendant and an alleged co-conspirator. *Id.* at 639. The investigator “did not personally observe the events and activities discussed in the recordings, nor did she hear or observe the conversations as they occurred.” *Id.* at 640. Based on her review of the recorded conversations, the agent developed opinions about alleged hidden meaning of words and phrases used by the defendants in the recorded conversations. *Id.* During the trial, the agent offered testimony as a lay witness. *Id.* at 641. Specifically, “as the recordings of the [defendants’] conversations were played for the jury, [the agent] was allowed to offer a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant.” *Id.* at 640.

The court noted that the agent “lacked first hand knowledge of the matters about which she testified” and that “[h]er opinions were based on her investigation after the fact, not on her perception of the facts.” *Id.* at 641. Accordingly, the court held that the district court erred in admitting the agent’s lay opinion testimony about the recorded conversations. *Id.* Explaining its decision, the court cautioned that, although law enforcement officers “are often qualified as experts to interpret intercepted conversations using slang, street language and [] jargon . . .,”

testimony that is “essentially expert testimony . . . may not be admitted under the guise of lay opinions.” *Id.*

Under this standard, admissible lay opinion testimony is limited to testimony “based on [the witness’s] personal observation and recollection of concrete facts.” *Id.* at 639. The *Peoples* court held that “[w]hen a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only 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.” *Id.* at 641; *see also Garcia*, 413 F.3d at 212 (recognizing that an agent who relies on all of the information gathered in an investigation to offer an opinion as to a person’s culpable role in a charged crime “is not presenting the jury with the unique insights of an eyewitness’s personal perceptions,” and therefore, “the investigatory results reviewed by the agent—if admissible—can only be presented to the jury for it to reach its own conclusion”). This standard meets the first-hand knowledge requirements of both Rule 602 and Rule 701 as discussed above. Under this standard, anything less than first-hand knowledge provides an insufficient basis for lay opinion testimony.

Agent Simandy’s testimony is clearly inadmissible under this standard. Agent Simandy’s testimony was not based on first-hand perception—he was not a participant in any of the conversations at issue, he did not have personal knowledge of the facts being related in the conversation, and he did not listen to the conversations as they occurred. Indeed, Agent Simandy did not even listen to the actual recordings. Instead, he reviewed transcripts of the telephone conversations as transcribed by another agent, Agent Blackstock, after Agent Blackstock listened to the conversations contemporaneously. Agent Simandy did not come in contact with the transcripts until after the Petitioner had already been arrested. Because Agent Simandy’s

testimony was not based on first-hand knowledge, his opinions are inadmissible under Rule 701. Therefore, this Court should uphold the decision below to exclude Agent Simandy's testimony.

Despite Rule 701's perception requirement, the Fifth, Tenth, and Eleventh Circuits have permitted lay opinion testimony where the witness had no first-hand perception of the relevant events. *See United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011) (approving admission of testimony about meaning of wiretapped conversations and recorded videos based on after-the-fact participation in an investigation); *Jayyousi*, 657 F.3d at 1103 (upholding the admission of testimony about meaning of alleged code-words by agent who reviewed translated transcripts several years after they were recorded); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1217-22 (10th Cir. 2007) (upholding admission of investigating agent's voice and visual identification of defendant, as well as interpretation of translated transcripts, based on agent's having played recordings multiple times). The Seventh and Ninth Circuits endorse a hybrid approach, allowing lay opinion testimony in certain cases where the witness has a mixture of first- and second-hand knowledge. *See United States v. Rollins*, 544 F.3d 820, 831-32 (7th Cir. 2008) (reluctantly allowing testimony where the witness's opinions were based on the combination of contemporaneous surveillance along with after-the-fact investigation); *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007) (allowing testimony where the witness's understanding "was based on his direct perception of several hours of intercepted conversations—in some instances coupled with direct observation of [the speakers]—and other facts he learned during the investigation"). *But see United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993) (rejecting lay opinion identification based on surveillance photos, reasoning that because the jury "was able to view the surveillance photos" and "make an independent determination," the witness's testimony "ran the risk of invading the province of the jury").

The overly broad interpretation of Rule 701 endorsed by these circuits would lead to abuse and a broad circumvention of the purpose of Rule 701 outlined by the advisory committee in its notes on the 2000 amendment. *See e.g., United States v. Miessers*, 645 F.3d 5, 21-26 (1st Cir. 2011); *Garcia*, 413 F.3d at 212; *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004). In *Grinage*, the court explained the danger of allowing the kind of lay opinion testimony endorsed by the Eleventh Circuit: “there would be no need for the trial jury to review personally any evidence at all. The jurors could be ‘helped’ by a summary witness for the Government, who could not only tell them what was in evidence but tell them what inferences to draw from it.” *See* 390 F.3d at 750.

This approach to lay opinion testimony has a particularly destructive effect on the relationship between lay and expert testimony. The role of an expert in our legal system is to opine on matters about which they have no first-hand knowledge. Experts review materials after-the-fact and develop opinions based on specialized knowledge after applying that knowledge to principles and methods that have proven to be reliable in the expert’s field. *See* Fed. R. Evid. 702. Experts are even allowed to base their opinions on inadmissible evidence as long as such reliance is standard in their field. However, experts are only allowed this degree of leeway because their testimony is subject to rigorous safeguards. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

On the other hand, lay opinion testimony is subject to no such safeguards. The only check on this kind of evidence is that it must be based on first-hand perception. If witnesses were allowed to give opinions based only on a review of documents, parties would have almost no incentive to offer expert testimony. By avoiding the presentation of expert testimony, parties would be able to evade the types of challenges that are typically lodged against experts, and

thereby circumvent the systemic safeguards put in place to limit a party's ability to paint mere opinion with the sheen of reliability.

Here, the government is attempting to “proffer[] an expert in lay witness clothing.” *See* Fed. R. Evid. 701 advisory committee notes (2000 Amendment). Agent Simandy is not the kind of fact witness permitted to testify under Rule 602 and Rule 701. He did not have any first-hand knowledge of the events in question, but instead he based his conclusory opinions on an after-the-fact review of second-hand information. He reviewed the information after Mr. Barnes was arrested, and, like an expert, formed opinions based on this review. This Court must not allow the government to circumvent the safeguards imposed on expert testimony under Rule 702 by allowing Agent Simandy to offer thinly veiled expert testimony under the guise of lay opinion testimony. This Court should uphold the decision below in ruling that Agent Simandy's testimony is inadmissible under Rule 701.

B. Testimony That Merely Tells the Jury What Inferences to Draw From Evidence is Not “Helpful” Under Rule 701(b).

Testimony that merely tells the jury what inferences to draw from evidence is not “helpful” under Rule 701(b). The second requirement under Rule 701 is that lay opinion testimony must be “helpful to clearly understanding the witness's testimony or to determining a fact in issue.” Fed. R. Evid. 701. The purpose of lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make but rather is to “describe[e] something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event.” *Jayyousi*, 657 F.3d at 1120.

It is the jury's “singular responsibility to decide [the matters before them] from the evidence admitted at trial.” *Garcia*, 413 F.3d at 215. Although testimony is “certainly ‘helpful’

when a witness simply agrees with the contentions of one side, that is not the meaning of ‘helpful’ under Rule 701.” *Jayyousi*, 657 F.3d at 1125 (Barkett, J. dissenting). Lay opinion testimony “is not ‘helpful’ for purposes of admissibility under Rule 701 when it does nothing more than give one side’s understanding of the evidence.” *Id.* citing Fed. R. Evid. 701 advisory committee’s note (1972 Proposed Rules) (explaining that “meaningless assertions which amount to little more than choosing up sides” are excludable under Rule 701 for lack of helpfulness).

To be helpful under Rule 701(b), lay opinion testimony must “be helpful in resolving issues” related to witness testimony. *See* Fed. R. Evid. 701 advisory committee note (1972 Proposed Rules). Helpful testimony might include opinions about “the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *See* Fed. R. Evid. 701 advisory committee note (2000 Amendments) (quoting *Asplundh Mfg. Div.*, 57 F.3d at 1196. This kind of testimony helps the jury to gain a better understanding of the facts, but does not draw conclusions based on the facts.

Here, Agent Simandy’s lay opinions were nothing more than the government’s closing argument in disguise. Jurors were able to review the same transcripts of the pre-recorded telephone conversations and could draw their own conclusions about the evidence. *See also* *United States v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004) (en banc) (explaining that, for purposes of admissibility under Rule 702, expert testimony “generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments”); *United States v. Garcia-Ortiz*, 528 F.3d 74, 80 (1st Cir. 2008) (concluding that a witness’s opinion testimony “about non-technical subject which was not beyond the purview of the jury” was inadmissible under Rule 701 because the “jury was perfectly capable of drawing its

own independent conclusion based on the evidence presented”). Because Agent Simandy’s testimony is not “helpful” under Rule 701(b), it fails the second prong of Rule 701 and is therefore inadmissible as lay opinion testimony. This Court should uphold the decision below in holding Agent Simandy’s testimony inadmissible under Rule 701.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold that: (1) the Reardon hearsay evidence should be excluded and the forfeiture-by-wrongdoing doctrine should not apply because Mr. Barnes did not directly participate in Mr. Reardon’s murder, the murder was not a reasonably foreseeable consequence of the alleged conspiracy, and did not have the requisite intent to procure Mr. Reardon’s unavailability as a witness; (2) Ms. Crawley should not be compelled to testify because an evidentiary privilege for information gathered in a journalistic investigation exists under Rule 501 and the privilege is absolute; and (3) Agent Simandy’s testimony is inadmissible under Rule 701 because it is not based on his first-hand perception and is not helpful to the jury.

Respectfully Submitted,

/s/

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Counsel for Respondent

Date: February 20, 2013