
**IN THE
SUPREME COURT OF THE UNITED STATES**

CASE NO. 12-23

October Term, 2012

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 THE RESPONDENT

QUESTIONS PRESENTED

- I. Whether this Court should extend the hearsay exception for forfeiture-by-wrongdoing to wrongful acts committed by a party's alleged coconspirator when there is no evidence that the party intended to procure a witness's unavailability.
- II. Whether this Court should recognize a journalist privilege protecting a confidential conversation between a journalist and her anonymous informant, and, if so, whether the privilege should be absolute so as to ensure its consistent application.
- III. Whether this Court should allow a government agent to give lay-opinion testimony interpreting plain-English words in conversations when he neither participated in nor contemporaneously observed the conversations, and simply conducted an after-the-fact review of transcripts created by another agent.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
I. Statement of the Facts.....	1
II. The Course of Proceedings and Dispositions in the Court Below.....	3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	6
I. APPLICATION OF THE FORFEITURE-BY-WRONGDOING EXCEPTION CANNOT BE BASED ON WRONGFUL ACTS COMMITTED BY A PARTY’S COCONSPIRATOR ABSENT EVIDENCE OF THE PARTY’S OWN INTENT.....	6
A. Rule 804(b)(6) Codifies the Founding-Era, Common-Law Forfeiture-by- Wrongdoing Exception, Which Includes an Intent Requirement.....	7
B. The Government’s Reliance on <i>Pinkerton v. United States</i> is Misplaced.....	9
C. The Government’s Construction of Rule 804(b)(6) Contravenes Rules of Statutory Construction and Ignores the Rule’s Underlying Rationale.....	13
II. A JOURNALIST’S TESTIMONY REGARDING HER CONFIDENTIAL CONVERSATION DURING AN INVESTIGATION WITH AN ANONYMOUS INFORMANT IS PROTECTED BY AN ABSOLUTE JOURNALIST PRIVILEGE.....	14
A. A Journalist Privilege Exists Because the Significant Private and Public Interests in Maintaining Confidentiality Substantially Outweigh the Minimal Burden on Truth-Seeking.....	15
B. The Journalist Privilege Is Absolute Because its Effectiveness Directly Depends Upon its Consistent Application.....	18
C. Even With a Qualified Journalist Privilege, Ms. Crawley’s Confidential Conversation is Still Protected Because the Anonymous Informant’s	

Interest in Confidentiality Outweighs the Government’s Interest in Disclosure.....	20
III. A GOVERNMENT AGENT MAY NOT GIVE LAY-OPINION TESTIMONY CONSTRUING ALLEGED “CODE WORDS” IN CONVERSATIONS UNLESS THE OPINION ARISES FROM THE AGENT’S FIRST-HAND KNOWLEDGE AND IT WILL BE HELPFUL TO THE JURY.....	21
A. Agent Simandy’s Testimony is Inadmissible as a Lay Opinion Because He Neither Participated in Nor Contemporaneously Observed the Conversations and Thus Lacks First-Hand Knowledge to Substantiate His Opinion.....	22
B. Agent Simandy’s Testimony Is Inadmissible As a Lay Opinion Because it Amounts to an Unhelpful, Meaningless Assertion to the Jury of the Government’s Position.....	27
CONCLUSION.....	29

TABLE OF AUTHORITIES

	<i>Page(s)</i>
United States Supreme Court Cases:	
<i>Barnhart v. Sigmon Coal Co., Inc.</i> , 534 U.S. 438 (2002).....	13
<i>Bourjaily v. United States</i> , 483 U.S. 171 (1987).....	20
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	8, 11
<i>Florida v. J.L.</i> , 529 U.S. 266 (2000).....	19, 21
<i>Giles v. California</i> , 554 U.S. 353 (2005).....	<i>passim</i>
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006).....	13
<i>Huddleston v. United States</i> , 485 U.S. 681 (1988).....	20
<i>In re Winship</i> , 397 U.S. 358 (1970).....	12
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996).....	<i>passim</i>
<i>Lovell v. City of Griffin, Ga.</i> , 303 U.S. 444 (1938).....	16
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966).....	16
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980).....	11
<i>Pers. Adm’r of Mass. v. Feeney</i> , 442 U.S. 256 (1979).....	10
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946).....	9
<i>Reynolds v. United States</i> , 98 U.S. (8 Otto) 145 (1878).....	14
<i>Tennant v. Peoria & P. U. Ry. Co.</i> , 321 U.S. 29 (1944).....	21–22
<i>Trammel v. United States</i> , 445 U.S. 40 (1980).....	15, 19
<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981).....	<i>passim</i>
United States Circuit Court Cases:	
<i>Asplundh Mfg. Div. v. Benton Harbor Eng’g</i> , 57 F.3d 1190 (3d Cir. 1995).....	22
<i>Olmsted v. Taco Bell Corp.</i> , 141 F.3d 1457 (11th Cir. 1998).....	16

<i>Peoples v. United States</i> , 250 F.3d 630 (8th Cir. 2001).....	<i>passim</i>
<i>United States v. Aguiar</i> , 975 F.2d 45 (2d Cir. 1992).....	12
<i>United States v. Alvarez</i> , 755 F.2d 830 (11th Cir. 1985).....	10
<i>United States v. Awan</i> , 966 F.2d 1415 (11th Cir. 1992).....	23
<i>United States v. Cano</i> , 289 F.3d 1354 (11th Cir. 2002).....	24, 25
<i>United States v. Cherry</i> , 217 F.3d 811 (10th Cir. 2000).....	10, 11, 12
<i>United States v. Diaz</i> , 637 F.3d 592 (5th Cir. 2011).....	23
<i>United States v. Dinkins</i> , 691 F.3d 358 (4th Cir. 2012).....	10, 11
<i>United States v. Grinage</i> , 390 F.3d 746 (2d Cir. 2004).....	23, 27, 28
<i>United States v. Hamaker</i> , 455 F.3d 1316 (11th Cir. 2006).....	25
<i>United States v. Jayyousi</i> , 657 F.3d 1085 (11th Cir. 2011).....	25
<i>United States v. Johnson</i> , 617 F.3d 286 (4th Cir. 2010).....	24
<i>United States v. Miranda</i> , 248 F.3d 434 (5th Cir. 2001).....	23
<i>United States v. Rollins</i> , 544 F.3d 820 (7th Cir. 2008).....	24
<i>United States v. Thompson</i> , 286 F.3d 950 (7th Cir. 2002).....	10, 11
<i>Wactor v. Spartan Transp. Corp.</i> , 27 F.3d 347 (8th Cir. 1994).....	23
United States District Court Cases:	
<i>Philadelphia v. Westinghouse Electric Corp.</i> , 205 F. Supp. 830 (E.D. Pa. 1962).....	17
<i>United States v. Rivera</i> , 292 F. Supp. 2d 827 (E.D. Va. 2003).....	10, 11
State Court Cases:	
<i>In re John Doe Grand Jury Investigation</i> , 574 N.E. 2d 373 (Mass. 1991).....	18
<i>Senear v. Daily Journal-Am.</i> , 641 P.2d 1180 (Wash. 1982).....	18
<i>Sinnott v. Boston Ret. Bd.</i> , 524 N.E. 2d 100 (Mass. 1988).....	18

Statutory Provisions:

16 U.S.C. § 371 (2006).....4
16 U.S.C. § 1538 (2006).....4
18 U.S.C. § 43 (2006).....4
18 U.S.C. § 371 (2006).....3
18 U.S.C. § 922 (a)(1)(a) (2006).....3
18 U.S.C. § 3731 (2006).....4

Federal Rules:

Fed. R. Evid. 104(a).....20
Fed. R. Evid. 407.....17
Fed. R. Evid. 411.....16
Fed. R. Evid. 501.....14
Fed. R. Evid. 701.....21, 22, 27
Fed. R. Evid 801(d)(2)(E).....13
Fed. R. Evid. 804(b)(6).....7, 8, 12, 14

Secondary Sources:

Black’s Law Dictionary (8th ed. 2004).....8
David H. Kaye et al., *New Wigmore: A Treatise on Evidence* (2013).....23
Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist’s Privilege*, 154 U. Pa. L. Rev. 201 (2005).....18

STATEMENT OF THE CASE

I. Statement of the Facts.

William Barnes, Respondent, owns Big Top Circus (“Big Top”) and co-owns a charity called “Boerum 4 Animals.” (R. 1.) Although featuring other acts, Big Top is famous for its herd of Asian elephants. (R. 1.) When not performing, the elephants graze on the circus’s expansive grasslands, which resemble their natural habitat. (R. 1.)

In July 2011, Mr. Barnes began organizing the “greatest elephant show on earth.” (R. 2.) Scheduled to begin that December, the show would feature elephants from Big Top and two other Boerum circuses. (R. 2.) Because Big Top is located on over a hundred acres of grazing land, Mr. Barnes agreed to host ten Asian elephants from each circus. (R. 2.) To publicize the event, Mr. Barnes contacted Kara Crawley, a local reporter at the Boerum Times, to write a feature article about it. (R. 9.) Mr. Barnes gave Ms. Crawley unrestricted access to the circus grounds. (R. 9.)

Also in July 2011, Mr. Barnes contacted Alfred Anderson, his long-time business associate and hunting partner, to join him on a hunting trip later in December. (R. 1, 11.) Mr. Anderson later invited James Reardon to accompany them on the trip. (R. 7.) In October 2011, Mr. Barnes began to prepare for the hunting trip. He booked a one-day helicopter rental from Copters Corporation after speaking with Alan Klestadt, its representative. (R. 13.) He also contacted Weapons Unlimited (“Unlimited”), a gun store, to purchase rifles. (R. 13.)

At Unlimited, the government secretly planted ATF Agent Lamberti to pose as a salesman and cajole customers into purchasing weapons “under the table.” (R. 2.) Agent Lamberti would entice customers by promising them cheaper prices and a shorter acquisition waiting period. (R. 2.) The ruse worked. Mr. Barnes agreed to Agent Lamberti’s proposal. (R. 2.)

After Agent Lamberti made his “sale,” the FBI began wiretapping Mr. Barnes’s telephone conversations. (R. 2.) The FBI secretly intercepted about a dozen of Mr. Barnes’s conversations between October 4 and December 1, 2011. (R. 13.) FBI Agent Blackstock contemporaneously listened to these conversations and transcribed them. (R. 13.)

Agent Simandy, who mostly had experience with drug crimes, began investigating Mr. Barnes on December 15, 2011. (R. 12, 14.) However, Agent Simandy never participated in nor observed any of the conversations intercepted by Agent Blackstock. (R. 14.) Aside from interviewing Agent Lamberti and Mr. Klestadt, his investigation was limited to reading the transcripts that Agent Blackstock created. (R. 13.) After reading these transcripts, Agent Simandy concluded that certain plain-English phrases used in the conversations, such as “blood diamonds,” “Charlie tango,” and “black cat,” had alternate meanings. (R. 13.)

In two of the government-intercepted conversations, Mr. Barnes and Mr. Anderson discussed Mr. Reardon. (R. 6, 18–19.) The first of these conversations took place on November 15, 2011. (R. 18.) Mr. Anderson called Mr. Barnes with concerns about Mr. Reardon “having second thoughts” and “asking questions . . . about permits and stuff.” (R. 6, 18.) Mr. Barnes responded, “[D]on’t do anything.” (R. 18.) The second conversation took place two weeks later and was also initiated by Mr. Anderson. (R. 6, 19.) This time, he said that Mr. Reardon needed to be “out of the picture” and that he would “take care of him.” (R. 19.) Mr. Barnes again told Mr. Anderson to “[h]old off” and said, “I don’t want anything to do with this.” (R. 19.)

Unbeknownst to Mr. Barnes, Mr. Anderson was a very mentally ill man who suffered from delusions. (R. 7.) In one of his delusions, Mr. Anderson imagined that the hunting trip was an elaborate scheme to hunt the elephants scheduled to perform in the “greatest elephant show on earth.” (R. 7.) After his conversation with Mr. Barnes, in which Mr. Barnes told him to “[h]old

off,” (R. 19), Mr. Anderson apparently still suffered from his delusion; he went to Mr. Reardon’s home and killed him. (R. 7.) Daniel Best, Mr. Reardon’s friend, later claimed to have spoken with Mr. Reardon. (R. 8.) In that conversation, Mr. Reardon allegedly described an “elephant hunt” conspiracy and expressed fear that Mr. Anderson was going to harm him. (R. 24.)

Two days after Mr. Reardon’s murder, Ms. Crawley, the journalist, published an article accusing Mr. Barnes of conspiring to kill the elephants on his circus grounds. (R. 11.) She claims that she received the information about this conspiracy from a circus employee. (R. 10–11.) The employee, aware that Ms. Crawley was a journalist, brought Ms. Crawley to the private caging area and, speaking in “hushed tones,” asked to discuss a “sensitive” and “delicate” matter. (R. 10.) The employee told Ms. Crawley that he overheard a conversation between Mr. Barnes and another unknown person about a plan to kill elephants. (R. 10.)

The employee wished to remain anonymous. (R. 10.) He requested that Ms. Crawley use a pseudonym for her source and not reveal that she obtained the information from a Big Top employee. (R. 12.) Further, concerned for his safety, the employee asked her not to publish any information until he ended his employment with Big Top. (R. 10.) Because it was a Boerum Times policy, the employee allowed Ms. Crawley to videotape their conversation—but only on the condition that the videotape would not be released and that it was “for [her] eyes only.” (R. 10.) Federal officers arrested Mr. Barnes the day Ms. Crawley’s report was published. (R. 3.)

II. The Course of Proceedings and Dispositions in the Court Below.

On December 4, 2011, the government filed an indictment charging Mr. Barnes with two counts of Conspiracy to Deal Unlawfully in Firearms under 18 U.S.C. §§ 371 and 922 (a)(1)(a) (2006), two counts of Conspiracy to Commit a Crime of Violence Against an Animal Enterprise

under 18 U.S.C. §§ 43 and 371 (2006), and one count of Conspiracy to Commit Unlawful Takings Under the Endangered Species Act, 16 U.S.C. §§ 371 and 1538 (2006). (R. 4–6.)

Before trial, the United States District Court for the Southern District of Boerum heard three motions in limine. (R. 3–4.) First, the government moved to admit hearsay statements made by Mr. Reardon through the testimony of Mr. Best. (R. 6.) Next, Ms. Crawley, a third-party witness subpoenaed by the government, moved to quash the subpoena arguing that a journalist evidentiary privilege protected the confidential conversations with her anonymous informant. (R. 6.) Finally, the government moved to admit the lay-opinion testimony of Agent Simandy under Rule 701. (R. 6.)

On May 1, 2011, the district court heard oral argument on all three motions. The next day, the court issued an oral ruling against the government on all three motions. (R. 16–17.) Pursuant to 18 U.S.C. § 3731 (2006), the government filed an interlocutory appeal of the three pretrial evidentiary motions with the United States Court of Appeals for the Fourteenth Circuit. (R. 20.) On July 12, 2010, the circuit court affirmed on all three issues, and held that: (1) the forfeiture-by-wrongdoing hearsay exception could not be applied against Mr. Barnes based on a theory of his alleged conspiratorial liability; (2) Ms. Crawley’s testimony was protected under an absolute journalist privilege; and (3) Agent Simandy’s testimony construing alleged “code words” was inadmissible under Rule 701 because he lacked first-hand knowledge to substantiate his lay opinion. (R. 25–32.) The government subsequently filed a petition for writ of certiorari, and on October 1, 2012, the United States Supreme Court granted certiorari. (R. 36.)

SUMMARY OF THE ARGUMENT

This Court should affirm all three of the circuit court’s rulings upholding the district court’s actions. First, the district court correctly concluded that the forfeiture-by-wrongdoing

exception is inapplicable without evidence of a party's intent to procure the unavailability of a witness. Applying the exception under a theory of conspiratorial liability, defined by "reasonable foreseeability" and imputed intent, does not comport with the exception's specific intent requirement. The requirement of intent reflects the exception's purpose: to serve as a deterrent to wrongful conduct that causes a witness's unavailability. A rule based on imputed intent would not further this underlying rationale. In this case, in addition to there being no evidence of such intent, Mr. Barnes affirmatively objected to his alleged coconspirator taking any action to render Mr. Reardon unavailable.

Second, the district court properly quashed the government's subpoena of Ms. Crawley because her testimony regarding her confidential conversation with an anonymous informant is protected by a journalist privilege under Rule 501. The societal interest in recognizing a journalist privilege is strong because it encourages the free flow of information to the press and, in turn, the public. Further, recognizing a journalist privilege places only a minimal burden on truth-seeking because other, non-privileged avenues for obtaining the information likely exist. Tellingly, a majority of states has already recognized a journalist privilege, indicating its wisdom.

Furthermore, the district court properly defined the journalist privilege as absolute because its effectiveness directly depends upon its consistent application. If potential sources know that a journalist's promise of confidentiality can be revoked, they will not feel the necessary degree of confidence to disclose sensitive information. Even if this Court qualifies the privilege, however, Ms. Crawley's testimony regarding her confidential conversation with an anonymous informant is still protected because the informant's strong interest in keeping the conversation confidential outweighs the government's weak interest in disclosure.

Last, the district court properly excluded Agent Simandy's lay-opinion testimony interpreting the meaning of alleged code words under Rule 701. An agent must lay a foundation for lay-opinion testimony by demonstrating that the opinion is based on the agent's first-hand knowledge of the matter. Because Agent Simandy simply read transcripts of conversations created by another agent, and neither participated in nor contemporaneously observed the conversations, he lacks the first-hand knowledge necessary to substantiate a lay opinion construing their meaning. Further, lay-opinion testimony must help the jury reach its own ultimate conclusions as to the facts. Agent Simandy's testimony amounts to an unhelpful, meaningless promotion of the government's position from the witness stand, thereby usurping the jury's fact-finding role. Accordingly, this Court should affirm on each of the questions presented.

ARGUMENT

I. APPLICATION OF THE FORFEITURE-BY-WRONGDOING EXCEPTION CANNOT BE BASED ON WRONGFUL ACTS COMMITTED BY A PARTY'S COCONSPIRATOR ABSENT EVIDENCE OF THE PARTY'S OWN INTENT.

The government concedes that Mr. Barnes neither ordered nor was present at Mr. Reardon's murder. (R. 26–27.) Indeed, it is stipulated that there is no evidence whatsoever that Mr. Barnes had any intent to procure Mr. Reardon's unavailability. (R. 36) (certifying the question of whether the forfeiture-by-wrongdoing exception applies "where there is no evidence that the defendant intended to procure the unavailability of the declarant"). Nevertheless, determined to punish Mr. Barnes for a murder committed by another, the government seeks to apply the forfeiture-by-wrongdoing exception against him to admit into evidence what it acknowledges are hearsay statements. (R. 8.) The government argues that this Court should apply the forfeiture-by-wrongdoing exception against Mr. Barnes, not for his own wrongdoing,

but for his failure to foresee the wrongdoing of an alleged coconspirator. (R. 8.) Such a theory would improperly water down the exception's intent requirement to one of mere negligence.

A. Rule 804(b)(6) Codifies the Founding-Era, Common-Law Forfeiture-by-Wrongdoing Exception, Which Includes an Intent Requirement.

The forfeiture-by-wrongdoing exception may be employed only against a party that intended to procure the declarant's unavailability. *See* Fed. R. Evid. 804(b)(6); *Giles v. California*, 554 U.S. 353, 367–68 (2005). Federal Rule of Evidence 804(b)(6) explicitly requires proof of a party's intent: “A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, *and did so intending that result.*” Fed. R. Evid. 804(b)(6) (emphasis added). It is not enough that a party engaged in an unlawful act; the act must have been performed with the intent to procure unavailability. *Giles*, 554 U.S. at 359, 367–68.

If, as in this case, there is an absence of any evidence of intent to procure unavailability, the exception is inapplicable. *Id.* Recently, this Court reaffirmed the significance of the intent requirement. *Id.* In *Giles*, the State of California accused the defendant of murdering his wife and sought to admit statements that the wife made to a police officer in which she described instances of domestic violence. *Id.* at 356–57. The lower court admitted the hearsay statements under California's forfeiture-by-wrongdoing exception because the defendant's wrongful act of murdering his wife caused her unavailability. *Id.* at 357. This Court reversed because the lower court failed to consider whether the defendant committed the murder with the specific intent to procure his wife's unavailability as a witness against him. *Id.* at 367, 377. It explained that the Confrontation Clause only allowed for the founding-era exception to the common-law right of confrontation and that this ““exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.”” *Id.* at 358–59, 367 (citations omitted). In other

words, the wrongful conduct must have been “designed to prevent a witness’s testimony.” *Id.* at 366.

While *Giles* decided a Confrontation Clause issue, its analysis of the forfeiture-by-wrongdoing exception is applicable to all Rule 804(b)(6) analyses, even if the Confrontation Clause is not implicated. *See id.* at 367. The *Giles* court discussed Rule 804(b)(6) and noted that the Rule merely codified the common-law forfeiture doctrine that it was analyzing. *Id.* *Giles* required California’s forfeiture-by-wrongdoing exception to conform to the founding-era, common-law rule because the Confrontation Clause, which permits only exceptions to the right of confrontation “‘established at the time of the founding,’” was implicated. *Id.* at 358–59 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). Because the decision in *Giles* analyzed the founding-era understanding of the common-law forfeiture exception that Rule 804(b)(b)(6) codifies, *Giles* controls in all Rule 804(b)(6) issues.

The forfeiture-by-wrongdoing exception can be applied when an alleged coconspirator acquiesces in wrongdoing that directly causes the unavailability of a witness. *See Fed. R. Evid.* 804(b)(6). Here, however, Mr. Barnes did not acquiesce in Mr. Reardon’s wrongdoing because acquiescence requires more than a mere failure to act. Acquiescence is a “tacit or passive acceptance” of an act. *See Black’s Law Dictionary* 25 (8th ed. 2004). One cannot accept something without both knowing about and agreeing to it. The acquiescence itself must be coupled with specific intent to procure unavailability. *See Giles*, 554 U.S. at 367–68. This intent requirement is more protective than a mere “reasonable foreseeability” requirement and better serves the deterrent function of the exception. *See id.* at 367–68, 374. The rule is not meant to make parties accused of conspiracy contemplate all the possible actions their alleged coconspirators may take. It only encompasses the actions that they have actual knowledge of and

intentionally acquiesce to for the purpose of obtaining a specific result—witness unavailability. *Id.* The necessity of an intent requirement is even stronger in cases like Mr. Barnes’s, where not only did he not acquiesce, but he explicitly objected to the wrongful conduct that the government seeks to impute to him. (R. 18–19, 27–28.)

B. The Government’s Reliance on *Pinkerton v. United States* Is Misplaced.

Paradoxically, the government argues that Mr. Barnes caused or acquiesced in the murder of Mr. Reardon while conceding that Mr. Barnes objected to any such action. (R. 27–28.) The government would have this Court hold that otherwise inadmissible hearsay statements can be admitted against an accused even when the accused committed no wrongful conduct intended to procure witness unavailability. The government’s basis for admitting such statements is by vicariously attributing the conduct of an alleged coconspirator to the accused himself. (R. 8.) Relying on *Pinkerton v. United States*, 328 U.S. 640 (1946), the government proposes that in the conspiracy context, the forfeiture-by-wrongdoing’s intent requirement can be relaxed to one of mere “reasonable foreseeability.” (R. 8.)

The government’s attempt to intertwine *Pinkerton* with a hearsay exception is misplaced. The *Pinkerton* court’s conception of “conspiratorial liability” arose in the context of substantive criminal liability—a context much different from the analysis of a hearsay exception. *See id.* at 647. *Pinkerton* held that one member of a conspiracy could be criminally liable for the substantive crime of another coconspirator if the offense was in furtherance of the conspiracy and was a reasonably foreseeable consequence of it. *Id.* at 647–48. While it is true that the *Pinkerton* court stated that “the overt act of one partner in crime is attributable to all,” *id.* at 647, this statement was not meant to be blindly applied in every legal analysis without regard to context. The *Pinkerton* court did not discuss hearsay or any other admissibility issues. Indeed,

Pinkerton was decided 155 years after the ratification of the Sixth Amendment and therefore its concept of “conspiratorial liability” would have been alien to a founding-era understanding of the forfeiture-by-wrongdoing exception. *See Giles*, 554 U.S. at 367 (noting that Rule 804(b)(6) is limited to the founding-era understanding of the exception). *Pinkerton* itself, decided in 1946, was not applied to a hearsay analysis until over fifty years later. *See United States v. Cherry*, 217 F.3d 811, 820–21 (10th Cir. 2000). Additionally, the Rule 804(b)(6) requirement that a party *intend* the result of its wrongdoing is squarely inconsistent with *Pinkerton* liability, which imposes liability for “reasonably foreseeable but originally *unintended* substantive crime[s].” *United States v. Alvarez*, 755 F.2d 830, 851 n.27 (11th Cir. 1985) (emphasis added).

In other contexts, this Court has noted that intent and foreseeability are not coterminous. For example, in the equal protection context, this Court held that the fact that a legislature could reasonably foresee that a law would have a disparate impact on a particular group is insufficient to show that the legislature necessarily had a discriminatory intent. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278–80 (1979) (upholding a law mandating a preference for hiring veterans even though it had “foreseeable” and “inevitable” adverse consequences to women and explaining that discriminatory intent requires more than mere “awareness of consequences”). In fact, this Court rejected the use of foreseeability as a lodestar for the forfeiture-by-wrongdoing exception itself when it stated that the “claim that knowledge is sufficient to show intent is emphatically *not* the modern view.” *Giles*, 554 U.S. at 368.

It is true that some courts have applied *Pinkerton* conspiratorial liability to the forfeiture-by-wrongdoing exception. *See United States v. Dinkins*, 691 F.3d 358, 384–85 (4th Cir. 2012); *United States v. Thompson*, 286 F.3d 950, 963–65 (7th Cir. 2002); *United States v. Rivera*, 292 F. Supp. 2d 827, 830–33 (E.D. Va. 2003). In doing so, however, all these courts relied on the

Tenth Circuit’s pre-*Crawford* (and thus pre-*Giles*) decision in *United States v. Cherry. Dinkins*, 691 F.3d at 384–85 (relying on *Cherry*); *Thompson*, 286 F.3d 963–65 (same); *Rivera*, 292 F. Supp. 2d at 830–33 (same). Such a pre-*Crawford* case is based on a now-rejected understanding of the Confrontation Clause. See *Crawford* 541 U.S. at 53–54, 67–68 (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)). As these courts relied on a case decided under a since-overruled legal framework to apply *Pinkerton* to Rule 804(b)(6), their holdings regarding *Pinkerton*’s applicability to the forfeiture-by-wrongdoing exception should be rejected.

The fundamental rationale underlying *Crawford* and *Giles* is that new, non-founding-era exceptions may not be applied to the constitutional right of confrontation. See *id.* at 375–76 (citing *Crawford*, 541 U.S. at 54). The *Cherry* court, operating under this background of overruled law, based its decision to apply *Pinkerton* to the forfeiture-by-wrongdoing exception out of a concern that a failure to do so would afford “*too much weight to Confrontation Clause values* in balancing those values against the importance of preventing witness tampering.” *Cherry*, 217 F.3d at 820 (emphasis added). The *Cherry* court made this statement without the benefit of this Court’s own statement that “[t]he asymmetrical nature of the Constitution’s criminal trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent.” *Giles*, 554 U.S. at 376 n.7.

No court, including the Tenth Circuit, may expand common-law hearsay exceptions to recalibrate the “balance” between Confrontation Clause values and other competing interests. See *id.* The founders’ forfeiture-by-wrongdoing doctrine could not have included the concept of *Pinkerton* liability—a concept recognized over 150 years after the ratification of the Sixth Amendment. *Pinkerton* itself did not purport to be a case regarding hearsay or confrontation issues. The forfeiture-by-wrongdoing exception of the founding era, codified in Rule 804(b)(6),

required a showing of intent. *Id.* at 367–68. Based on its belief that “a *Pinkerton* theory strikes a better balance,” the *Cherry* court held that, under its version of the forfeiture-by-wrongdoing exception (as opposed to the founders’ version codified by the drafters of Rule 804(b)(6)), “actual knowledge is not required.” *Cherry*, 217 F.3d at 821. In doing so, it did what *Crawford* and *Giles* forbid: it substituted its own values for those of the framers. In this case, the lower court correctly resisted the government’s invitation to follow in the *Cherry* court’s folly.

Though the dissent in the court below characterized not applying *Pinkerton* to a hearsay exception as creating an “incongruous” result where one may be held criminally liable for a coconspirator’s actions, but not held responsible for the purpose of a hearsay exception, the distinction is actually well founded. (R. 33.) In a forfeiture-by-wrongdoing analysis, a judge makes a “preponderance of the evidence” determination of whether the exception applies. *See, e.g., United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *see also* Fed. R. Evid. 804(b)(6) advisory committee’s note. Contrarily, when the government sets out to prove conspiratorial liability, a criminal defendant is afforded the protections of a jury trial and a “beyond a reasonable doubt” evidentiary standard. *See In re Winship*, 397 U.S. 358, 364 (1970) (holding that the “beyond a reasonable doubt” standard is constitutionally required in criminal matters). In identifying an incongruity, the dissent failed to consider that when the government actually charges a defendant for wrongdoing it must have enough evidence to prove the wrongdoing within the framework of these bedrock procedural protections. The government has the option to charge Mr. Barnes with the murder of Mr. Reardon, but such a choice would encompass submitting to a higher evidentiary standard. *See id.* Its failure to exercise this option is telling. The government should not be allowed to circumvent procedural protections and effectively,

though indirectly, hold Mr. Barnes responsible for Mr. Anderson's actions under a lower evidentiary standard without a jury trial. That would be a true incongruity.

C. The Government's Construction of Rule 804(b)(6) Contravenes Rules of Statutory Construction and Ignores The Rule's Underlying Rationale.

Basic rules of statutory interpretation also counsel against the government's construction of Rule 804(b)(6). Other parts of the Federal Rules of Evidence—indeed other parts of the section on hearsay—explicitly discuss the implications of taking part in a conspiracy. *See, e.g.*, Fed. R. Evid. 804(d)(2)(E) (providing that a statement “made by the party's coconspirator during and in furtherance of the conspiracy” is not hearsay). On the other hand, Rule 804(b)(6) makes no mention of conspiracies. Similarly, the advisory committee's notes do not make any connection between conspiratorial liability cases such as *Pinkerton* and any of the Rule 804 exceptions. The reference to coconspirators in Rule 801(d)(2)(E), and the absence of any such reference elsewhere, suggests that the drafters of the Rules of Evidence considered the effect of a party engaged in a conspiracy and deliberately chose to make participation in a conspiracy consequential in some rules and inconsequential in others. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 577–80 (2006) (“A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (“[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (citation and internal quotation marks omitted)).

Additionally, the government's proposed rule does nothing to further the stated purpose of the forfeiture-by-wrongdoing exception. The purpose of the exception is to deter parties from

trying to prevent a witness from testifying by removing the incentive to procure a witness's unavailability. *See* Rule 804(b)(6) advisory committee's note (noting that the exception was added to "recognize[] the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself'" (citation omitted)); *Giles*, 554 U.S. at 374 ("The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them"). Extending the exception to the conduct of a third-party through imputed intent would leave the doctrine without any logical underpinning. *See Reynolds v. United States*, 98 U.S. (8 Otto) 145, 159 (1878) ("The rule has its foundation in the maxim that no one shall be permitted to take advantage of *his own* wrong" (emphasis added)). A rule based on reasonable foreseeability that ignores the actual intent of the party does nothing to alter the framework of incentives and deterrents to prevent a witness from testifying. Instead, it effectively transforms a "purpose-based" rule, *Giles*, 554 U.S. at 360, into one of ordinary negligence.

II. A JOURNALIST'S TESTIMONY REGARDING HER CONFIDENTIAL CONVERSATION DURING AN INVESTIGATION WITH AN ANONYMOUS INFORMANT IS PROTECTED BY AN ABSOLUTE JOURNALIST PRIVILEGE.

The Federal Rules of Evidence explicitly authorize courts to create and develop evidentiary privileges. *See* Fed. R. Evid. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege"); *see also Jaffee v. Redmond*, 518 U.S. 1, 8–9 (1996) ("The Rule . . . directed courts to continue the evolutionary development of testimonial privileges." (citation and internal quotation marks omitted)). Since the passage of Rule 501, this Court has exercised its discretion granted by the Rules to create and define various evidentiary privileges. *See, e.g., Jaffee*, 518 U.S. 1, 6–18 (1996) (recognizing a psychotherapist-patient privilege); *Upjohn Co. v. United States*, 449 U.S.

383, 393–404 (1981) (defining the attorney-client privilege); *Trammel v. United States*, 445 U.S. 40, 44–53 (1980) (defining the spousal testimony privilege). This Court should again exercise its discretion in the instant case to recognize a journalist privilege that protects confidential conversations between a journalist and her anonymous informant during an investigation, and that privilege should be absolute so as to ensure its consistent application.

A. A Journalist Privilege Exists Because the Significant Private and Public Interests in Maintaining Confidentiality Substantially Outweigh the Minimal Burden on Truth-Seeking.

It is appropriate for a court to recognize an evidentiary privilege when private and public interests “transcend the normally predominant principle of utilizing all rational means for ascertaining truth.” *Trammel*, 445 U.S. at 50. In determining whether such is the case, the Court looks to three main considerations: (1) the significant public and private interests that would be served by the privilege; (2) the relative weights of the interests to be served by the privilege and the burden on truth-seeking that might be imposed by it; and (3) the extent to which the privilege has been recognized by the states. *See Jaffee*, 518 U.S. at 9–14.

For example, in *Jaffee*, this Court recognized a psychotherapist-patient privilege because effective psychotherapy depends on the ability of the patient to speak openly and freely. *Id.* at 10. Due to the “sensitive nature” of the issues discussed between a psychotherapist and a patient, disclosure of information received through such discussions could cause “embarrassment or disgrace” to the patient. *Id.* Therefore, in order for psychotherapy to be effective, the patient must trust that her conversation with the therapist will remain confidential. *Id.*

Like a psychotherapist-patient relationship, the relationship between a journalist and an informant is based on trust. Also, similar to discussions held during psychotherapy, conversations between a journalist and an informant are of a “sensitive nature.” (R. 10.) Such

conversations may consist of scandalous or offensive details that, if revealed, would cause shame or embarrassment to the informant, or put the informant in danger of being the subject of retaliation. *See, e.g., Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460–61 (11th Cir. 1998) (finding a causal relationship between an employee’s reporting of illegal activities and subsequent termination). Indeed, the informant in the instant case expressed fear for his safety should the information he provided be traced back to him. (R. 10.) Without confidence that their identities will remain secret, informants will not feel comfortable divulging sensitive information to journalists due to the risk of adverse consequences.

Journalists play a vital role in disseminating information to the public, an important reality that has long been recognized by this Court. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.”); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938). The failure to recognize a journalist privilege would have a chilling effect on the free flow of information to the media, and, in turn, to the public. *Cf. Jaffee*, 518 U.S. at 11–12 (“If the [psychotherapist-patient] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled . . .”).

The Rules often exclude probative evidence for policy reasons, and maintaining the free flow of information to the public is a social policy that the judicial system should embrace. For example, Rule 411 excludes evidence of insurance to prevent discouraging people from purchasing it. *See* Fed. R. Evid. 411 advisory committee’s note. Rule 407 excludes evidence of subsequent remedial measures to prevent discouraging parties from taking steps in furtherance of

added safety. *See* Fed. R. Evid. 407 advisory committee’s note. Similarly, here, this Court should protect a journalist’s confidential conversations with an informant to prevent discouraging people from providing information to the media.

While the private and public interests in maintaining the confidentiality of conversations during a journalistic investigation are high, recognizing a journalist privilege would only place a minimal burden on truth-seeking. Without such a privilege, many of the conversations giving rise to the sought-after evidence would not occur. *Cf. Jaffee*, 518 U.S. at 12. Without the assurance of confidentiality, individuals with knowledge of delicate information will not feel comfortable volunteering it to the press in the first place. Therefore, *failing* to recognize a privilege would stifle the production of evidence because the relevant information would never come to light at all.

Moreover, the scope of the privilege is very narrow. It does not broadly shield all information obtained by a journalist. It only protects private communications with a confidential source during an investigation. Therefore, the privilege does not apply to public communications made in front of third parties. Nor does it apply to a journalist’s video footage or photograph of a public event. Similarly, it does not apply to a journalist’s personal, eyewitness observations of a public event. The narrow scope of the privilege causes any burden on fact-finding to be very modest.

Further, the privilege does not bar admission of the information itself; only the manner of discovering the information through the journalist. *See Upjohn*, 449 U.S. at 395 (“[T]he protection of the privilege extends only to *communications* and not to facts.” (quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962))). As here, there will often be non-privileged avenues for obtaining the desired information. The extent of

the government's resources is demonstrated by its telephone-tapping and its placement of an undercover ATF Agent. (R. 2, 13.) Clearly, the government does not need to rely on one anonymous tip. Therefore, recognizing a journalist privilege simply compels the government to thoroughly carry out its investigation. Surely the importance of protecting the free flow of information to the press and public far outweighs this mere inconvenience to the government.

The third consideration in deciding whether to recognize a privilege—the extent to which the privilege has been recognized by the states—also weighs heavily in favor of recognizing a journalist privilege. *See Jaffee*, 518 U.S. at 12–13. Notably, a majority of states has recognized one. Thirty-two states have enacted statutes creating “shield laws” for journalists. *See* Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. Pa. L. Rev. 201, 225 n.120 (2005). In addition to legislatures, state supreme courts have also recognized a journalist privilege. *See, e.g., In re John Doe Grand Jury Investigation*, 574 N.E. 2d 373, 375–77 (Mass. 1991) (recognizing a common-law journalist privilege for criminal grand juries); *Sinnott v. Boston Ret. Bd.*, 524 N.E. 2d 100, 103–04 (Mass. 1988) (recognizing a common-law journalist privilege for civil actions); *Senear v. Daily Journal-Am.*, 641 P.2d 1180, 1183 (Wash. 1982) (recognizing a common-law journalist privilege). In every state except Wyoming (because it has never been presented with the issue), courts have recognized a journalist privilege in some form. *See* Nestler, *supra*, at 226.

B. The Journalist Privilege Is Absolute Because its Effectiveness Directly Depends Upon its Consistent Application.

The government argues that where a court determines that the interests furthered by disclosure outweigh the interests furthered by the journalist privilege, the privilege should yield. (R. 11.) In order for the privilege to work as intended, however, it must be consistently and reliably applied. *See Upjohn*, 449 U.S. at 393 (“An uncertain privilege . . . is little better than no

privilege at all.”). Qualifying the privilege would substantially compromise the journalist’s ability to receive sensitive information. If a potential source knows that a journalist’s promise of confidentiality can be revoked, she will not feel the necessary degree of confidence to disclose sensitive information. Thus, qualifying the privilege flouts the purpose of recognizing it at all. *See Jaffee*, 518 U.S. at 17 (“Making the promise of confidentiality contingent upon a trial judge’s later evaluation . . . would eviscerate the effectiveness of the privilege.”).

Despite this chilling effect on the press, the balancing test proposed by the government has no countervailing benefit. The private and public interests furthered by protecting a journalist’s confidential conversations will *always* outweigh the interests furthered by disclosure. Because the privilege is so narrow, private conversations with only those sources who desire to remain anonymous will be at issue. Information from such anonymous sources is never highly valued. *Cf. Florida v. J.L.*, 529 U.S. 266, 272–74 (2000) (holding that information from an anonymous source, without more, does not even amount to reasonable suspicion). Therefore, the interests furthered by disclosing information from an anonymous source will always be low, and substantially outweighed by the interests furthered by protecting it.

Even though non-privileged evidence of the sought-after information will usually exist, the journalist privilege should remain an absolute shield from discovery even when such evidence is unattainable. Although this will potentially exclude probative information from trial, the importance of the rationale behind the journalist privilege—ensuring the flow of information to the press—warrants such a sacrifice. Courts have recognized this concept in shielding doctors from disclosing private discussions with their patients, attorneys with their clients, and husbands with their wives. *See, e.g., Jaffee*, 518 U.S. at 6–18; *Upjohn*, 449 U.S. at 393–404; *Trammel*, 445 U.S. at 44–53. Although these well settled privileges may also cause probative evidence to be

excluded, the judicial system has acknowledged that significant societal interests justify this result.

Recognizing an absolute privilege will not cause protection to journalists to become overbroad or sweeping. Of course, a threshold analysis to determine whether a witness qualifies as a “journalist” who is eligible for protection may be necessary. Courts routinely conduct such factual inquiries to determine whether an evidentiary rule applies. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 686 (1988) (holding that courts should conduct a “threshold” inquiry to determine whether Rule 404(b) applies); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (holding that courts should conduct a “preliminary” factual inquiry to determine whether Rule 801(d)(2)(E), the hearsay exception for statements of a coconspirator, applies); *see also* Fed. R. Evid. 104(a) (“Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court.”). An analysis of whether a witness qualifies as a “journalist” would be no more burdensome than a court’s determination of whether an attorney-client relationship existed before applying the attorney-client privilege. Mr. Barnes merely argues that, once a court has determined that a journalist privilege does in fact apply to the facts at hand, it must be an absolute privilege that is not overcome by opposing counsel’s showing of need.

C. Even With a Qualified Journalist Privilege, Ms. Crawley’s Confidential Conversation is Still Protected Because the Anonymous Informant’s Interest in Confidentiality Outweighs the Government’s Interest in Disclosure.

Ms. Crawley’s informant has a strong interest in keeping his conversation with Ms. Crawley secret. The conversation was of such a delicate nature that he feared for his safety if it were discovered. (R. 10.) The employee took many steps to ensure the confidentiality of his conversation. He brought Ms. Crawley to a private area, spoke in hushed tones, and asked that his identity remain secret by using a pseudonym in place of his real name. (R. 10.) He also asked

that he not even be identified as an employee at Big Top, and that Ms. Crawley not publish the story until after he terminated his employment there. (R. 10.) Because it is a Boerum Times policy to record conversations, (R. 9), the employee allowed Ms. Crawley to videotape him, but only on the condition that the tape be viewed by no one but Ms. Crawley. (R. 10). The great care taken by the employee to ensure the confidentiality of his conversation illustrates his strong interest in protecting it.

By contrast, the government's interest in the conversation's disclosure is very low. The government does not need Ms. Crawley's testimony to build its case. Of course the government was able to gather more evidence than a mere anonymous tip. Such additional evidence would be necessary for it to have probable cause to indict Mr. Barnes in the first place. *See J.L.*, 529 U.S. at 272–74 (holding that a tip from an anonymous source, without more, does not even rise to reasonable suspicion). So, the government must possess other, non-privileged evidence implicating Mr. Barnes. It cannot seriously claim that it has a substantial interest in one anonymous tip.

Accordingly, this Court should recognize an absolute journalist privilege and protect the confidentiality of Ms. Crawley's conversation with her anonymous informant.

III. A GOVERNMENT AGENT MAY NOT GIVE LAY-OPINION TESTIMONY CONSTRUING ALLEGED “CODE WORDS” IN CONVERSATIONS UNLESS THE OPINION ARISES FROM THE AGENT’S FIRST-HAND KNOWLEDGE AND IT WILL BE HELPFUL TO THE JURY.

Federal Rule of Evidence 701 provides that lay-opinion testimony must be “(a) rationally based on the witness's perception; [and] (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.” Fed. R. Evid. 701. By restricting the admissibility of lay-opinion testimony, Rule 701 reflects a foundational principal of American jurisprudence—the jury alone must “draw[] the ultimate conclusion as to the facts.” *Tennant v. Peoria & P. U.*

Ry. Co., 321 U.S. 29, 35 (1944). In this case, the government endeavors to supplant the jury by injecting its own ultimate conclusions as to the meaning of alleged ‘code words’ used in certain intercepted conversations under the guise of lay-witness testimony. This, Rule 701 will not permit.

This Court should hold that the district court properly excluded Agent Simandy’s testimony for two reasons. First, Agent Simandy neither participated in nor contemporaneously observed the intercepted conversations, and consequently lacks the first-hand knowledge necessary to lay a foundation for his opinion. Second, Agent Simandy’s testimony amounts to little more than an endorsement of the government’s interpretation of the conversations, and should be excluded for its lack of helpfulness to the jury.

A. Agent Simandy’s Testimony is Inadmissible as a Lay Opinion Because He Neither Participated in Nor Contemporaneously Observed the Conversations and Thus Lacks First-Hand Knowledge to Substantiate His Opinion.

Lay-opinion testimony must be based on the witness’s “first-hand knowledge or observation.” Fed. R. Evid. 701 advisory committee’s note. Applying this first-hand-knowledge requirement to testimony offered under Rule 701 abates “the risk that the reliability requirements [for expert testimony] set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Fed. R. Evid. 701 advisory committee’s note. Permissible subjects of Rule 701 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, [and] distance.” Fed. R. Evid. 701 advisory committee’s note (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3d Cir. 1995)).

To offer an agent’s lay testimony construing the meaning of alleged code words in an intercepted conversation, the offering party must first lay a foundation for the opinion by

showing that it “is based upon [the agent’s] personal observation and recollection of concrete facts.” *Peoples v. United States*, 250 F.3d 630, 639 (8th Cir. 2001) (quoting *Wactor v. Spartan Tramps. Corp.*, 27 F.3d 347, 350 (8th Cir. 1994)). Here, as the party seeking to admit an agent’s lay-opinion, the government bears the burden of establishing a foundation for the testimony. *United States v. Grinage*, 390 F.3d 746, 749 (2d Cir. 2004).

Lay-opinion testimony interpreting alleged code words for the jury is admissible when the testifying agent either (1) participated in the conversation; or (2) observed it contemporaneously. *See, e.g., United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001) (allowing an agent to give lay-opinion testimony because his “undercover purchases of drugs . . . allowed him to form opinions concerning the meaning of certain code words . . . based on his personal perceptions”). Such testimony satisfies the Rule 701(a) first-hand-knowledge requirement because the opinions offered necessarily relate to the agent’s personal “observations about events such as a person’s presence or behavior.” David H. Kaye et al., *New Wigmore: A Treatise on Evidence* § 2.7.6 (2013).

An agent’s simultaneous perception of intercepted conversations ensures that his opinion stems from his personal observation of the relevant events. For example, in *United States v. Awan*, the Eleventh Circuit affirmed the admission of an undercover agent’s lay-opinion testimony as to the meaning of conversations the agent personally observed because the agent “was *actually present and participating* in the conversation and observing what was happening at the time in terms of gestures and the like of those who [were] speaking.” 966 F.2d 1415, 1430–31 (11th Cir. 1992) (emphasis added); *see also United States v. Diaz*, 637 F.3d 592, 600 (2011) (admitting an undercover agent’s testimony that the defendant served as a lookout because the agent personally perceived suspicious behavior). In another case, the Seventh Circuit

similarly affirmed the admission of an agent's lay opinion interpretation of intercepted conversations because the agent "listened to the intercepted calls every day for the duration of the wiretaps." *United States v. Rollins*, 544 F.3d 820, 827, 833 (7th Cir. 2008).

On the other hand, lay-opinion testimony as to the meaning of alleged code words is inadmissible when an agent entirely bases his opinion on an after-the-fact investigation. *See, e.g., Peoples*, 250 F.3d at 641. For example, in *United States v. Johnson*, the Fourth Circuit determined that the district court abused its discretion by admitting an agent's lay-opinion testimony. 617 F.3d 286, 293 (4th Cir. 2010). The court noted that the agent "did not participate in the surveillance during the investigation" because he did not listen to the conversations contemporaneously. *Id.* Reasoning that "[n]one of this second-hand information qualifies as the foundational personal perception needed under Rule 701," the court held that an agent's "post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701." *Id.*

When an agent's lay opinion derives from a second-hand review of information collected by other investigators, the testimony amounts to an impermissible "deliver[y] [of] a jury argument from the witness stand," and, under Rule 701, must be excluded. *United States v. Cano*, 289 F.3d 1354, 1363 (11th Cir. 2002). For example, the *Peoples* court excluded an agent's lay-opinion testimony because the agent "did not personally observe the events . . . nor did she hear or observe the conversations as they occurred." *Peoples*, 250 F.3d at 640–41. The agent's lay-opinion "testimony was not limited to coded, oblique language, but included plain English words and phrases" from which the jury itself could draw inferences. *Id.* Holding that the agent's "opinions were based on her investigation after the fact, not on her perception of the facts" the Eighth Circuit reversed the lower court. *Id.* at 641; *see also Cano*, 289 F.3d at 1360–63 (holding

that lay-opinion testimony must be based on first-hand knowledge and determining that the testifying agent's opinions amounted to a jury argument from the witness stand because his lay opinion was entirely based on facts already in evidence).

Courts that have permitted agents to give lay opinions as to the meaning of alleged code words without participating in or contemporaneously observing the subject conversations relied heavily on the voluminous nature of the documents. *See, e.g., United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011); *see also United States v. Hamaker*, 455 F.3d 1316, 1331–32 (11th Cir. 2006) (allowing an agent's lay opinion interpreting over seven thousand financial documents). In *Jayyousi*, the Eleventh Circuit reasoned that the testifying agent satisfied the Rule 701(a) personal-knowledge requirement because he “read thousands of wiretap summaries plus hundreds of verbatim transcripts . . . he listened to the intercepted calls in English and Arabic.” *Jayyousi*, 455 F.3d at 1102. The *Jayyousi* court distinguished *Cano*, its binding precedent, by noting that the testifying agent “examined thousands of documents . . . [while the testifying agent in *Cano*] deciphered only a simple code.” *Id.* at 1103.

The record before this Court categorically establishes that Agent Simandy's testimony as to the meaning of alleged code words in conversations transcribed by Agent Blackstock (R. 13) fails to satisfy the first-hand-knowledge requirement. Because Agent Simandy did not and cannot demonstrate first-hand knowledge of the conversations at issue, his testimony amounts to argument from the witness stand, and is inadmissible as a lay opinion under. The facts of this case are analogous to the factual scenarios confronted by the Fourth, Eighth, and Eleventh circuits in *Johnson*, *Peoples*, and *Cano*, respectively, and this Court should therefore find that Agent Simandy's lay opinion is inadmissible.

Importantly, Agent Simandy's investigation was limited to a review of second-hand information and an assessment of facts already in evidence. (R. 13–14.) By the time he was assigned to the case, Agent Blackstone had already observed and transcribed all the relevant conversations. (R. 13.) Agent Simandy admitted that he did not participate in any of the intercepted conversations. (R. 14.) Moreover, Agent Simandy did not listen to the intercepted conversations contemporaneously, but simply read the transcripts created by Agent Blackstone. (R. 14.)

Because Agent Simandy conducted an entirely post-hoc investigation, his opinions regarding the meaning of alleged code words are inadmissible as lay testimony under Rule 701. Like the testifying agents in *Johnson*, *Peoples*, and *Cano*, who failed to demonstrate first-hand knowledge because they neither participated in nor observed contemporaneously any of the subject conversations, Agent Simandy also fails to show that his opinions as to the meaning of the plain-English words “Charlie tango,” “black cat” and “blood diamonds” derive from his personal perceptions and observations. Permitting Agent Simandy to offer such testimony would enable the government to evade the more rigorous requirements of expert testimony, thus eviscerating the distinction between lay and expert opinions.

Unlike the testifying agent in *Awan*, who participated in the investigation from the beginning as an undercover agent, Agent Simandy played no role in collecting the relevant facts because his investigation began after all pertinent conversations already occurred. (R. 12–13.) Unlike the testifying agent in *Rollins*, who served throughout as a surveillance operator, Agent Simandy's understanding of the transcripts created by Agent Blackwell did not derive from particular things he perceived during simultaneous observation of the intercepted conversations;

he did not perceive the tones of voice, he did not hear pauses, and so he did not and cannot place the transcripts of the conversations in an informed context.

Moreover, the facts of this case can be easily distinguished from the facts in *Jayyousi*, where the testifying agent *listened* to “thousands” of conversations. Here, Agent Simandy read transcripts of only “a dozen conversations” that were made by another agent. (R. 13.) The small number of transcripts examined by Agent Simandy is more closely analogous to the “simple code” interpreted by the agent in *Cano*, where the Eleventh Circuit excluded the agent’s lay opinion. Moreover, unlike the agent in *Jayyousi*, who actually listened to the conversations, Agent Simandy never averred to listening to any conversations. (R. 13–14.).

B. Agent Simandy’s Testimony is Inadmissible as a Lay Opinion Because it Amounts to an Unhelpful, Meaningless Assertion to the Jury of the Government’s Position.

Lay-opinion testimony must help the jury perform its dual functions of evaluating evidence and reaching ultimate conclusions. *See* Fed. R. Evid. 701(b). In the context of Rule 701, “helpful” means “putting the trier of fact in possession of an accurate reproduction of the event.” Fed. R. Evid. 701 advisory committee’s note. Where “attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for.” *Id.* This limitation ensures that the jury retains its ability to draw its own inferences and conclusions from the facts presented, and guards against “the risk that [an agent’s testimony] is based upon information not before the jury.” *Grinage*, 390 F.3d at 750.

In *United States v. Grinage*, the Second Circuit found that, under Rule 701(b), the district court erroneously admitted an agent’s lay opinion. 390 F.3d at 751. In that case, law-enforcement collected over two thousand phone calls and the testifying agent gave opinions as to the meaning of alleged codes in thirteen conversations. *Id.* at 748. The Second Circuit rejected the

government's argument that "it was helpful for the jury to have the benefit of the testimony of an individual who reviewed every call." *Id.* at 750. The court emphasized:

This argument fundamentally misunderstands Rule 701(b). Were it to be accepted, 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 the evidence, but what inferences to draw. That is not the point of lay-opinion testimony. *Id.*

The lower court correctly excluded the agent's opinion because it "usurped the function of the jury to decide what to infer from the content of the calls." *Id.*; *see also Peoples*, 250 F.3d at 640 (excluding an agent's lay-opinion as to the meaning of plain-English phrases because the testimony amounted to a meaningless "narrative gloss").

The record in the present case establishes that Agent Simandy's interpretation of plain-English phrases fails to pass muster under Rule 701(b) because his opinion usurps the jury's function of drawing its own inferences and conclusions from facts admitted into evidence. It is categorically the jury's province to examine the available evidence and draw its own ultimate conclusions as to its true meaning. While the government may argue that Agent Simandy's interviews of Agent Lamberti and Mr. Klestadt informed his understanding of the conversations, the Rule 701(b) limitation ensures that the jury does not make determinations based on facts not in evidence. The jury is capable of drawing its own inferences as to the correlation, if any, between the dates of Mr. Barnes's contact with Unlimited and the intercepted conversations. Like in *Grinage*, allowing Agent Simandy to testify as a lay witness, and tell the jury his opinion as to the meaning of plain-English phrases, will similarly hijack the jury's function.

In order to comply with the letter and spirit of Rule 701, this Court should find that Agent Simandy's lay-opinion testimony as to the meaning of certain plain-English phrases in the conversations transcribed by Agent Blackstone is inadmissible.

CONCLUSION

For the foregoing reasons, Respondent William Barnes respectfully requests that this Court AFFIRM the circuit court's decision and hold: (1) Mr. Reardon's hearsay statements are not admissible through the forfeiture-by-wrongdoing exception; (2) Ms. Crawley's testimony is protected by an absolute journalist privilege; and (3) Agent Simandy's testimony is inadmissible as a lay opinion.

Respectfully Submitted,

3R
Counsel for Respondent

Date: February 20, 2013