No. 11-647

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2011

UNITED STATES OF AMERICA,

Petitioner,

-- against --

DONALD POWERS,

Respondent.

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Does Federal Rule of Evidence 106 allow admission of otherwise inadmissible hearsay evidence where exclusion of the offered evidence would allow the jury to form a distorted impression of the portions taken out of context by the Government?

II. Does a writing satisfy the requirements of Federal Rule of Evidence 803(5) where the writing was not made by the declarant but was transcribed by a third party who did not read the information back to the declarant and where the declarant did not convey the information until more than twenty hours had elapsed since he briefly viewed the information?

III. Do statements made by a subsequently deceased witness exculpating Powers qualify as an exception to the rule of attorney-client privilege, or, alternatively, does Powers' Due Process right to introduce material exculpatory evidence mandate admission of the evidence?

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STATEMENT OF THE CASE

Statement of Facts

Donald Powers ("Powers") was employed as a full-time programmer for United States Cyber Command ("USCYBERCOM") from the organization's inception in January 2009. (R. 1.) USCYBERCOM, which is supervised by the National Security Agency/Central Security Service ("NSA/CSS"), protects and manages computer networks for the United States Department of Defense and the military, and conducts military cyberspace operations (R. 44.) In March 2009, Powers was assigned to lead Team Brushfire, a task force assembled to develop the "Brushfire Worm," a computer worm "specifically designed to perform controlled attacks on encrypted computer systems." (R. 44.) Among Team Brushfire's members was the now-deceased Elizabeth "Bitty" Jones ("Jones"). (R. 16, 44.) After Powers, Jones, and the rest of Team Brushfire presented the completed Brushfire Worm to NSA/CSS, NSA/CSS found the worm to be "too uncontrollable and too imprecise to implement for National Security initiatives." (R. 44.) Consequently, USCYBERCOM allegedly destroyed it, along with its coding and encryption. (R. 44.) In August, 2010, Powers was promoted to Chief of Operations for USCYBERCOM's Boerum office and obtained Sensitive Compartmentalized Information security clearance ("SCI"), the highest security clearance level. (R. 44.)

Several months later, in early October 2010, multiple news outlets reported the sudden shutdown of the nation of Natoristan's primary nuclear reactors. (R. 45.) It was later determined that the shutdown in Natoristan, one of the United States' Middle Eastern trade partners, was caused by "a massive failure in the reactor's computerized control systems brought on by a computer worm." (R. 45.)

The IT Security subdivision of the United States Office of Personnel Management, *inter*

alia, supervises the accessing of classified and confidential information to ensure that only individuals with the appropriate security clearance are accessing such information. (R. 45.) On November 16, 2010, employee Dylan Bosley ("Bosley") was on duty, monitoring access by USCYBERCOM employees, when he was notified at approximately 3:30 p.m. that information from the Office of the President requiring SCI clearance had been opened. (R. 44, 45.) Despite learning that the accessing individual had the requisite SCI clearance level to view the information, Bosley still felt compelled to contact the FBI to inform them of the incident. (R. 45.) However, because his computer crashed, Bosley forgot to do so and did not convey the information until the next day. (R. 45-46.)

At approximately 11:00 a.m. the following day, Bosley called Agent Madison Hunt ("Agent Hunt") and conveyed to her the memorandum number and workstation number of the accessing individual, as he remembered it. (R. 46.) Agent Hunt transcribed this information but never read her writing back to Bosley, nor did Bosley ever see what Agent Hunt had written. (R. 14.) Agent Hunt's writing contains the workstation number CC 36912, and the memorandum number USCC 185. (R. 35.) It was later determined that workstation number CC 36912 was assigned to Powers. (R. 47.)

On January 5, 2011, the front page of the *National Times Post* featured an article written by Natalie Cook ("Cook") entitled, "Feds Get Spectreia to Do Their Dirty Work" ("January 5 article"). (R. 46.) In the article, Cook revealed that a "high level informant at NSA/CSS disclosed information regarding a confidential memo that allegedly proved that the U.S. gave the Brushfire Worm to the Middle Eastern nation of Spectreia, for the purpose of performing high-powered cyber attacks on the neighboring state of Natoristan." (R. 46.) A subsequent investigation later revealed that the leaked information was memorandum number USCC 185.

(R. 48.) The following day, the *National Times Post* featured another front-page article authored by Cook entitled, "Frayed USCYBERCOM Continues to Unravel: Source Reveals Culture of Waste and Corruption" ("January 6 article"). (R. 48.) The January 6 article "discussed corruption within the main branch of USCYBERCOM in Fort Meade, Maryland" and referenced no classified or confidential information. (R. 10, 48.) At the present time, Cook's whereabouts are unknown. (R. 48.)

The investigation of the leak also revealed that on January 4, 2011, just before the two articles were published, Powers and Cook exchanged a series of three emails. (R. 47.) In the first email, Powers stated to Cook, "I can't wait to see what you make of the information that I gave you. The Beltway is going to blow a fuse once we show the truth the light of day." (R. 23.) Cook responded in the second email, "I'm so excited that we're going to drop the bomb on this one. . . . I'm working on a couple of other things, but it should be on the front page in the next couple of days. You're a real patriot." (R. 23, 24.) In the third email, Powers then informed Cook, "I'm just doing my civic duty, but I don't want to get accused of doing anything that would cause me to go to prison." (R. 25.) Powers subsequently stated that he had just had dinner with Jones and "overheard her talking on the phone about how she fed someone at the National Times Post some information on the Natoristan worm situation. When she noticed me, she quickly stopped talking. Looking forward to reading about that one too." (R. 25.)

On January 7, 2011, Jones met with attorney Martin Mallow of Steiner, Mallow, & Shaw, LLP, at his office because "she was concerned about a possible prosecution for leaking confidential government information." (R. 39.) During the meeting, Jones appeared "highly agitated and seemed upset and confused." (R. 39.) Jones told Mallow "she was 'really scared' and said that a leak had originated from her office and was 'in the papers' and 'we're going to be

in big trouble.'" (R. 40.) Jones then revealed, "I'm so afraid for my friend Don [Powers]. I think they're going to arrest him for something that I did. They should be coming after me, instead. I'm going to tell the U.S Attorney everything right now. There's just no other way." (R. 40.) Mallow then informed Jones that she should refrain from doing so until she speaks "in more detail with an attorney . . . with more expertise in the area," but Jones "insisted that she 'had to do it right now.'" (R. 40.) Immediately upon leaving the office, Jones was struck by a car while crossing the street. (R. 40.) Jones lapsed into a coma and passed away the following day, January 8, 2011. (R. 40.)

Procedural History

On January 26, 2011, Powers was indicted and charged with disclosure of information relating to the national defense under 18 U.S.C. § 793(d) and disclosure of classified intelligence information under to 18 U.S.C. § 798(a)(3). (R. 49.) Before trial, Powers moved in limine to introduce the third email from his conversation with Cook pursuant to Federal Rule of Evidence 106, in response to the Government's motion to introduce the first and second emails from the conversation. (R. 49.) Powers also moved to introduce the statements made by Jones to Mallow as an exception to the rule of attorney-client privilege and under the Due Process Clause, while the Government also moved to admit the writing made by Agent Hunt as a past recorded recollection under Rule 803(5). (R. 49-50.)

On March 2, 2011, the United States District Court for the Southern District of Boerum heard oral arguments on the motions, and on March 3, the District Court ruled in favor of Powers on all three motions. (R. 50.) Pursuant to 18 U.S.C. §§ 3731 and 3731-A, the United States filed an interlocutory appeal with the United States Court of Appeals for the Fourteenth Circuit. (R. 43.) On July 1, 2011, the Circuit Court affirmed the decision of the District Court on all issues,

holding that: (1) the third email exchanged between Cook and Powers is admissible under Federal Rule of Evidence 106; (2) the writing made by Agent Hunt concerning information conveyed to her by Bosley is inadmissible under Rule 803(5); and (3) the statements made by Jones to her attorney Mallow are admissible as an exception to the rule of attorney-client privilege, or, alternatively, under the Due Process Clause. (R. 57.) The Government subsequently filed a petition for writ of certiorari, and on December 13, 2011, the United States Supreme Court granted certiorari for its October 2011 term. (R. 62.)

SUMMARY OF THE ARGUMENT

In the present case, the lower courts both correctly ruled that: (1) the third email exchanged between Cook and Powers is admissible under Federal Rule of Evidence 106; (2) the writing made by Bosley regarding information conveyed to him by Agent Hunt is inadmissible under Rule 803(5); and (3) the statements made by Jones to her attorney Mallow are admissible as an exception to the rule of attorney-client privilege, or alternatively, under the Due Process Clause. First, the third email from the conversation between Cook and Powers was properly admitted under Rule 106. Although the email contains otherwise inadmissible hearsay, its admission is necessary to ensure fairness to Powers. Without its admission, his statements from the first email would be taken out of context and would allow the jury to form a distorted impression of Powers' statements. Furthermore, Rule 106, unlike other exclusionary rules of evidence, makes no mention of admissibility under other rules. It only speaks to whether admission is necessary to ensure fairness.

Second, the writing made by Agent Hunt was properly excluded by the District Court. Agent Hunt never read the writing back to Bosley, and Bosley also never had the opportunity to examine it. Additionally, the information was not conveyed to Agent Hunt until more than

twenty hours had elapsed since Bosley viewed the workstation number. Thus, it was even more important that Agent Hunt read back the information to Bosley to ensure she had transcribed it correctly. Since Agent Hunt failed to do so, Bosley could not take the affirmative step of adopting the information; therefore, the writing fails to comply with Rule 803(5).

Lastly, the statements made by Jones to her attorney Mallow were properly admitted as an exception to the attorney-client privilege rule and under the Due Process Clause. First, the information is material to Powers' defense, as Jones' admission that she did not want Powers to get in trouble for her actions is clearly exculpatory. Without this information, the jury would likely draw the distorted inference that Powers was responsible for the leaks relating to the January 5 articles. Furthermore, Jones specifically stated that it was her intention to reveal what she had told Mallow. Thus, the typical concern that Powers may not have wanted her statements revealed is not present in this case, and Jones' statements should be admitted under a narrow exception to the attorney-client privilege rule. Alternatively, the statements should be admitted under the Due Process Clause because without their admission, Powers would be deprived of a fair trial as he would be unable to present a complete defense. Accordingly, this Court should affirm the ruling of the Circuit Court on all the issues.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 106 PERMITS THE ADMISSION OF OTHERWISE INADMISSIBLE HEARSAY EVIDENCE TO PLACE INTO CONTEXT A WRITING OFFERED BY THE GOVERNMENT BECAUSE ONLY FAIRNESS SHOULD GOVERN RULE 106 ADMISSIBILITY, AND THE STRUCTURE AND PURPOSE OF THE RULES OF EVIDENCE SUGGEST RULE 106 WAS DESIGNED TO ALLOW ADMISSION OF SUCH EVIDENCE.

Federal Rule of Evidence 106 provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other

part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Rule 106 serves dual purposes: it is meant to address both the distorted impression created when portions of writings are taken "out of context" and the "inadequacy" of delaying repair work to a later point in the trial. Fed. R. Evid. 106 advisory committee's note. Indeed, Rule 106 was designed to protect against "the twin pitfalls of creative excerpting and manipulative timing." *United States v. Boylan*, 898 F.2d 230, 256 (1st Cir. 1990).

This Court's opinion in *Beech Aircraft Corp. v. Rainey* left open the question of whether Rule 106 allows admission of otherwise inadmissible evidence. 488 U.S. 153, 171-72 (1988). In *Beech Aircraft*, a wrongful death suit, the District Court judge impermissibly restrained a plaintiff's cross-examination regarding a letter the plaintiff had written, after the defendant had introduced portions of the letter through testimony on direct examination. *Id.* at 170-71. The letter had been written by the plaintiff to the witness and concerned the plaintiff's theory of how his spouse had been killed. *Id.* Because the jury could have inferred that the plaintiff had developed his theory solely in anticipation of the lawsuit from the portions offered by the defendant, the plaintiff attempted to cross-examine the witness regarding other portions of the letter. *Id.* at 170.

This Court began by noting that Rule 106 is only a partial codification of the common law doctrine of completeness. *Id.* at 171-72. Thus, Rule 106 merely complements, and does not supplant, the doctrine of completeness.[1] *See id*; *see also* 21A Fed. Prac. & Proc. § 5072.1 (2d ed. 2011). However, because the defendant had read his offered portions of the letter into evidence, rather than introduce the letter itself as evidence, this Court held that the plaintiff's proffered

[1] Rule 106 can be distinguished from the common law doctrine of completeness in several regards, the most significant here being that Rule 106 provides for the immediate admission of completion evidence, whereas under the majority view of the doctrine of completeness, the opponent was forced to wait until cross-examination to introduce the evidence. See 21A Fed. Pra. & Proc. § 5078.1 (2d ed. 2011).

portions should have been admitted under the doctrine of completeness, thus avoiding the issue of whether the evidence would have been admissible under Rule 106.[2] *See Beech Aircraft*, 488 U.S. at 171-72.

In order to fully serve both of its purposes, Rule 106 should be construed to compel admission of evidence that would otherwise be inadmissible. This Court should hold that evidence offered under Rule 106 is only governed by a fairness standard. Accordingly, the District Court judge properly admitted the third email because: (1) excluding this evidence on hearsay grounds conflicts with the stated purposes of Rule 106; and (2) the context of the Rules of Evidence and the legislative history of Rule 106 suggest that the drafters intended to allow admission of such evidence under Rule 106 despite its inadmissibility on other grounds.

A. The Third Email Was Properly Admitted Because Only Fairness Should Govern Admissibility Of Evidence Under Rule 106.

"Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986). "A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court." *Id.*

In *Sutton*, the United States Court of Appeals for the District of Columbia Circuit found impermissible the District Court's refusal to admit completeness evidence under Rule 106, after the government had introduced portions of a conversation. *Id.* Several defendants were being tried for conspiring to bribe government officials. *Id.* at 1349. Although the court held the error to be harmless, it also held that Rule 106 must allow admission of otherwise inadmissible

[2] The "principle function of the common law completeness doctrine" was to allow admission of inadmissible evidence to be used for completeness. 21A Fed. Prac. & Proc. § 5072.1.

evidence to fully serve both of Rule 106's purposes.[3] *Id.* at 1368-69. It noted that "under this approach, the trial court can focus solely on issues of distortion and timing as mandated by Rule 106." *Id.* at 1369.

Similarly, in *United States v. LeFevour*, the defendant attempted to introduce completeness evidence from a recorded conversation. 798 F.2d 977, 980-81 (7th Cir. 1988). Although the Court of Appeals for the Seventh Circuit found the evidence inadmissible on other grounds, it nonetheless held that such completeness evidence offered under Rule 106 must be admitted if it "is necessary to correct a misleading impression"; otherwise, "the misleading evidence must be excluded too." *Id.* at 981. The court emphasized that Rule 106 exists to "make sure that a misleading impression created by taking matters out of context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.'" *Id.* (*quoting* Fed. R. Evid. 106 advisory committee's note).

Courts that have taken the contrary approach have done so without providing adequate justification. *See, e.g., United States v. Costner*, 684 F.2d 370 (6th Cir. 1982). In *Costner*, for example, the Court of Appeals for the Sixth Circuit offered the rationale that Rule 106 merely "covers an order of proof problem; it is not designed to make something admissible that should be excluded." *See id.* at 373. Similarly, in *United States Football League v. National Football League*, the Court of Appeals for the Second Circuit held, without explanation, that Rule 106 "does not compel admission of otherwise inadmissible hearsay evidence." 842 F.2d 1335, 1375-76 (2d Cir. 1988).

The facts of the present case illustrate why fairness is the only approach that can properly govern admissibility under Rule 106. Here, if the jury is presented only with the first two emails

[3] Rule 106 is meant to address both the distorted impression created when portions of writings are taken "out of context" and the "inadequacy" of delaying repair work to a later point in the trial. Fed. R. Evid. 106 advisory committee's note.

from the conversation between Powers and Cook, it would be much more likely to infer that Powers disclosed confidential information relating to Cook's January 5 article, "Feds Get Spectreia to Do Their Dirty Work." (R. 23, 24, 30.) In the third email, Powers stated that he overheard his colleague, Jones, discussing "how she fed someone at the National Times Post some information on the Natoristan worm situation." (R. 25.) Without admission of the third email, wherein Powers specifically stated he did not "want to get accused of doing anything that would cause [him] to go to prison," Powers would be deprived of the fairness guaranteed by Rule 106. (R. 25.)

Additionally, Rule 102 mandates that the Rules "be construed to secure fairness in administration . . . to the end that the truth be ascertained and proceedings be justly determined." Fed. R. Evid. 102. Only admission of the third email would sufficiently ensure "fairness in administration" because it places Powers' original comments into context. *See id.* Indeed, the District Court, in looking only to fairness, made the correct determination and avoided the danger of a "distorted and misleading" trial by properly leaving to the jury the appropriate question of how much weight to give the third email. *See Sutton*, 801 F.2d at 1368; *see also* McCormick on Evidence, § 56 (6th ed. 2000) ("The better view, and the only fair result, is that a party who offers an incomplete statement or document thereby forfeits any hearsay objection to completing evidence.").

B. <u>The Structure And Legislative History Of The Rules Of Evidence Suggest The Drafters Intended To Allow Admission Of Otherwise Inadmissible Evidence Under Rule 106.</u>

In deciding whether Rule 106 allows admission of otherwise inadmissible evidence, this Court should also look to the structure and design of the Rules of Evidence as a whole. *See K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). *See also Wilderness Soc'y v. U.S. Fish &*

Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (holding that interpreting courts should look to the overall "structure and purpose" when discerning drafters' intent).

The overall structure and purpose of the Rules of Evidence suggest the drafters intended to allow admission of otherwise inadmissible evidence under Rule 106. First, the plain language of Rule 106 refers only to fairness, and not to any other Rules of Evidence. *See* Fed. R. Evid. 106. Although Rule 106 is considered to be an exclusionary rule, it contains no "except as otherwise provided" clause, which other exclusionary rules contain. 21A Fed. Prac. & Proc. Evid. § 5078.1 (2d ed. 2011) (referencing Rules 402, 501, 602, 613(b), 702, 802, 806, 901(10), and 1002). Moreover, the Advisory Committee's Note to Rule 106 cites to McCormick on Evidence, a proponent of allowing otherwise inadmissible hearsay under Rule 106, as well as the California version of Rule 106, which allows admission of inadmissible hearsay for completeness. *Id.* The legislative history of Rule 106 also supports the interpretation that it was meant to allow admission of otherwise inadmissible evidence. "When the Preliminary Draft of the Rule was published, the Justice Department wanted to add the words 'which is otherwise admissible' to the clause describing material to be used for completeness," but "[t]he Advisory Committee rejected this proposal." *Id.* Thus, because Rule 106 is most reasonably interpreted as admitting otherwise inadmissible evidence, the District Court made the proper determination in admitting the third email from Cook and Powers' conversation.

II. THE WRITING MADE BY AGENT HUNT DOES NOT SATISFY THE REQUIREMENTS OF FEDERAL RULE OF EVIDENCE 803(5) BECAUSE IT WAS NOT ADOPTED BY BOSLEY AS HE NEITHER VIEWED IT NOR AFFIRMATIVELY APPROVED IT.

Federal Rule of Evidence 803(5) makes past recorded recollections admissible, provided the record: "(A) is on a matter the witness once knew about but cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh n

the witness's memory; and (C) accurately reflects the witness's knowledge." Fed. R. Evid. 803(5). "The touchstone for admission of evidence as an exception of the hearsay rule has been the existence of circumstances which attest to its trustworthiness." *United States v. Williams*, 571 F.2d 344, 349 (6th Cir. 1978). Rule 803(5)'s "guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." Fed R. Evid. 803(5) advisory committee's note (*citing Owens v. State*, 67 Md. 307, 316 (1887)).

Rule 803(5) does not preclude multiple participants from making the record so long as "[t]he person who witnessed the event [testifies] to the accuracy of his oral report to the person who recorded the statement," and "[t]he recorder [testifies] to the accuracy of his transcription." *See United States v. Williams*, 951 F.2d 853, 858 (7th Cir. 1992). Adoption where multiple participants are involved is ultimately determined on a case-by-case basis, and factors courts should look to include whether the declarant inspected the transcription, whether the individuals had a prior working relationship, and whether any formal acknowledgement of the writing was made, such as initialing by the declarant. *See, e.g., United States v. Porter*, 986 F.2d 1014 (6th Cir. 1993). However, "where the witness differs with the recorder in regard to whether or not the recorder's transcription of the witness's statement is correct, Rule 803(5)'s requirement that the report be made or adopted by the witness" cannot be satisfied. *United States v. Schoenborn*, 4 F.3d 1424, 1428 (7th Cir. 1993).

In order to satisfy Rule 803(5)'s adoption requirement, a declarant must be made aware of the content of the recorded recollection. *See United States v. Hernandez*, 333 F.3d 1168, 1177-78 (10th Cir. 2003). In *Hernandez*, the defendant challenged the admission of hearsay testimony regarding the serial number of a firearm he was charged with possessing. *Id.* at 1176.

The testimony was given by a witness who could no longer remember the serial number but testified that she accurately recited it to two other individuals, "who themselves testified that they accurately wrote down the serial number." *Id.* at 1177. Although at no time did the witness inspect the writings, one of the other individuals recited the number back to the witness after having written down what the witness told her. *Id.* The court found that the witness had adopted the writing and held that "a recorded recollection compiled through the efforts of more than one witness is admissible under Rule 803(5), where, as here, each participant in the chain testifies at trial as to the accuracy of his or her piece of the chain." *Id*. at 1179.

Furthermore, adoption of a statement under Rule 803(5) requires an affirmative act. *See Schoenborn*, 4 F.3d at 1427-29. In *Schoenborn*, the defendant was prosecuted for assault with a dangerous weapon for his role in a prison fight. *Id*. at 1426. Over the defendant's objection, the trial court improperly allowed portions of a report of the fight to be read into evidence by an FBI agent who prepared the report. *Id.* at 1427. The report was based on notes the agent had taken from an interview with an inmate who witnessed the fight. *Id*. In finding that the inmate did not adopt the agent's report, the Circuit Court emphasized that the inmate "did not tell [the agent] the report was accurate and had refused to sign it for that reason." *Id.* The court noted that "[a]doption or approval can be shown by demonstrating that the interviewer read back to the witness what he wrote and that the witness affirmatively stated his approval." *Id*. at 1428 (*quoting United States v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986)).

Conversely, in *Porter*, the District Court properly admitted a statement prepared by an FBI agent concerning an interview with the defendant's girlfriend. 986 F.2d at 1017. In so holding, the Circuit Court highlighted, *inter alia*, that "the statement was signed by [the girlfriend] on each of its five pages," and "the wording of the statement had been changed and

initialed by [the girlfriend] 11 times." *Id.* The court noted that admissibility under Rule 803(5) is "to be determined on a case-by-case basis upon consideration . . . of factors indicating trustworthiness, or the lack thereof." *Id.*

In the present case, Agent Hunt's writing is inadmissible under Rule 803(5) because it was not adopted by Bosley. First, Bosley was never made aware of the contents of Agent Hunt's writing, unlike in *Hernandez*, where the information was read back to the witness. *See Hernandez*, 333 F.3d at 1178. Agent Hunt never read back her transcription to Bosley. (R. 14.) Additionally, Bosley only briefly viewed the information and over 20 hours had elapsed between when Bosley first saw the workstation number and when he relayed that information to Agent Hunt. (R. 15.) Therefore, it was all the more imperative for Agent Hunt to have read the information back to Bosley in order to determine whether Agent Hunt had transcribed the information correctly. Although Bosley will testify that when he relayed the information, he believed it to be correct, this is insufficient to "attest to its trustworthiness" because he is the only person who could have had knowledge as to both the actual workstation number and the information transcribed by Agent Hunt. *See Williams*, 571 F.2d at 349. The accuracy of Agent Hunt's writing cannot be determined because not only did Agent Hunt fail to recite the information back to Bosley, but it is unknown whether Agent Hunt transcribed the information correctly from her conversation with Bosley.

Moreover, Bosley never affirmatively acted to adopt the writing made by Agent Hunt. (R. 14.) Because Bosley could not see Agent Hunt's transcription, he could not tell Agent Hunt whether or not the information she recorded was correct. This is unlike the case in *Schoenborn*, where a witness was able to review a prepared report containing his alleged statements. *See* 4 F.3d at 1427. Therefore, Bosley could not and did not adopt the information transcribed by

Agent Hunt. *Cf.* S.Rep No. 93-1277 (1974) ("When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible."). Indeed, "the emphasis is on whether the statement can fairly be deemed to reflect fully and without distortion the witness's own words." *Allen*, 798 F.2d at 994. Without being made aware of the contents of Agent Hunt's writing, Bosley cannot fairly attest that it "reflect[s] fully and without distortion" his own words; therefore, the writing fails to satisfy the requirements of Rule 803(5). *See Boehmer v. LeBoeuf*, 650 A.2d 1336, 1340 (ME 1994) ("The requirement . . . that the contents of the memoranda be affirmed or adopted or verified by the witness himself or herself assures reliability of information that is otherwise hearsay.")

III. AN EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE RECOGNIZED FOR STATEMENTS MADE BY A SUBSEQUENTLY DECEASED WITNESS THAT EXCULPATE ANOTHER PERSON AND WHERE THERE IS NO OTHER SOURCE FOR THAT INFORMATION.

Federal Rule of Evidence 501 provides that claims of privilege are to be governed by the common law "as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980). However, "[i]n light of the heavy burden that they place on the search for truth, 'evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.'" *Swindler & Berlin v. United States*, 524 U.S. 399, 411 (1998) (O'Connor, J., dissenting) (*quoting Herbert v. Lando*, 441 U.S. 153, 175 (1979)).

No posthumous exception to the attorney-client privilege exists where the privileged

information is not exculpatory. *See Swindler & Berlin*, 524 U.S. at 401. *Swindler* concerned statements made by a White House employee regarding firings of other White House employees. *Id*. The Office of the Independent sought the statements during its investigation "into whether various individuals made false statements, obstructed justice, or committed other crimes during the investigations of the 1993 dismissal of [the employees]." *Id*. at 401-02. Although this Court held the statements to be protected by attorney-client privilege, it emphasized that the rationale for the general rule that privileged communications survive death "is that it furthers the client's intent." *Id.* at 405. Indeed, "[c]lients may be concerned about reputation, civil liability, or possible harm to friends of family." *Id*. at 407. "[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." *Id.* at 408.

In dissenting, Justice O'Connor pointed out that "a criminal defendant's right to exculpatory evidence . . . may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality." *Swindler & Berlin*, 524 U.S. at 411 (O'Connor, J., dissenting). Justice O'Connor began by noting that this Court has "long recognized that '[t]he fundamental basis upon which all rules of evidence must rest-if they are to rest upon reason-is their adaptation to the successful development of the truth.'" *Id.* (*quoting Funk v. United States*, 290 U.S. 371, 381 (1933)). Thus, "an invocation of the attorney-client privilege should not go unexamined 'when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise.'" *Swindler & Berlin*, 524 U.S. at 412 (*quoting Cohen v. Jenkintown Cab Co.*, 283 Pa. Super. 456, 464 (PA 1976)).

To demonstrate, Justice O'Connor specifically emphasized that "[e]xtreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's

confession to the offense." *Swindler & Berlin*, 524 U.S. at 413. Accordingly, "the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidence." *Id.* "'[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.'" *Id.* (*quoting United States v. Nixon*, 418 U.S. 683, 709 (1974)). Therefore, Justice O'Connor would have held that "[w]hen the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege." *Swindler & Berlin*, 524 U.S. at 413-14; *see also* 2 C. Mueller & L. Kirkpatrick, Federal Evidence, § 199, p. 380 (2d ed. 1994) ("[I]f a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences.").

Determinations of privilege must ultimately be made on a case-by-case basis. *Upjohn*, 449 U.S. at 386. In *Upjohn*, this Court rejected the rigid, bright line "control group" test and "decline[d] to lay down a broad rule or series of rules to govern all conceivable future questions" of privilege. *Id.* Although the communications in *Upjohn* were held to be protected by attorney-client privilege, this Court emphasized that a "case-by-case" approach better "obeys the spirit of the Rules."[4] *Id.* at 396-97. Indeed, the contrary approach "would violate the spirit of Federal Rule of Evidence 501." *Id.* at 396. While holding that the communications were privileged, this Court highlighted that "the Government was free to question the employees who communicated with [counsel]." *Id.*

[4] The communications at issue in *Upjohn* were questionnaires filled out by non-managerial employees regarding "questionable payments" to foreign governments in exchange for business. 449 U.S. 383, 386 (1981).

Similarly, in *Trammel*, this Court refused to adopt a bright line rule concerning spousal privilege and rejected the defendant's claim of privilege where his spouse consented to giving testimony against him. 445 U.S. at 47. This Court first noted that "[t]estimonial evidentiary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Id.* at 50 (*quoting United States v. Bryan*, 339 U.S. 323, 331 (1950)). "As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Trammel*, 445 U.S. at 50. (*quoting Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). This Court then emphasized that in "enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege." *Trammel*, 445 U.S. at 47. "Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. . . .'" *Id.* (*quoting* 120 Cong. Rec. 40891 (1974)).

In the present case, Jones' statements to Mallow should be admitted as an exception to the attorney-client privilege because they are material to Powers' defense and because Jones herself would have disclosed them had she not died. Alternatively, the Due Process Clause mandates that the statements be admitted because they could potentially exculpate Powers.

A. Jones' Statements To Mallow Should Be Excepted From the Ordinary Rule Of Attorney-Client Privilege Because They Are Material To Powers' Defense And Because Jones Herself Intended To Disclose The Statements.

"To deny a criminal accused the right to offer evidence that the testimony of his accusers is false is to fly in the face of all concepts of fairness and presumed innocence." *Salem v. North Carolina*, 374 F. Supp. 1281, 1283 (W.D. N.C. 1974).

Given the facts of the present case, this Court should recognize an exception to the

attorney-client privilege where the evidence is material. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Although the outcome of the present case has yet to be determined, it is highly likely that admission of Jones' statements to Mallow would have a determinative impact on the jury's verdict, or at the very least cast reasonable doubt on a guilty verdict. *See id*. Indeed, if allowed, Mallow will testify that Jones, just two days after the January 5 story was published, specifically told him, "I'm so afraid for my friend [Powers]. I think they're going to arrest him for something that I did. They should be coming after me, instead. I'm going to tell the U.S. Attorney everything right now. There's just no other way." (R. 40.)

Without this evidence, the jury would likely form the distorted impression that Powers was responsible for the leak relating to the January 5 article by Cook, and thus that he impermissibly leaked confidential information. However, if the statements are admitted, the jury presumably would be less likely to conclude that Powers disclosed the confidential information. Additionally, unlike the case in *Upjohn*, Jones is the only source of the exculpatory evidence. *See Upjohn*, 449 U.S. at 396. As Justice O'Connor emphasized in *Swindler & Berlin*, "the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidence" because "'[o]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.'" 524 U.S. at 401 (O'Connor, J., dissenting) (*quoting Nixon*, 418 U.S. at 709). Since exclusion of the statements would not serve "'a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth,'" this Court should hold the statements

admissible as an exception to the typical rule of attorney-client privilege. *See Trammel*, 445 U.S. at 50 (1980) (*quoting Elkins* 364 U.S. at 234 (Frankfurter, J., dissenting)).

Additionally, the statements should be admitted because Jones intended to disclose them publicly. As Mallow indicated in his affidavit, Jones specifically stated that she was "going to tell the U.S. Attorney everything right now. There's just no other way." (R. 40.) Thus, this case lacks the typical concern that the subsequently deceased client may not have wanted their communications disclosed. *See Swindler & Berlin*, 524 U.S. at 407-08. Undeniably, Jones specifically stated that she wanted to confess in order to save her friend, Powers. (R. 40.) Therefore, in order to fulfill Jones' intent and further the spirit of the Rules of Evidence, the case-by-case approach used to decide Rule 501 issues should govern in this case. Accordingly, this Court should hold, under the extraordinary facts of this case, that Jones' statements are admissible as an exception to the rule of attorney-client privilege because there is no danger that Jones "may not have made such communications in the first place." *Swindler & Berlin*, 524 U.S. at 408. Indeed, "[t]he fundamental basis upon which all rules of evidence must rest-if they are to rest upon reason-is their adaptation to the successful development of the truth." *Funk*, 290 U.S. at 381.

B. <u>Even If Jones' Statements To Mallow Are Inadmissible Under Attorney-Client Privilege, The Due Process Clause Mandates Their Admission Because They Are Reliable And Constitute Evidence That Could Exculpate Powers.</u>

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process Clause . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations omitted). Thus, statements that are

otherwise inadmissible should nonetheless be admitted when their exclusion infringes on a defendant's right to present a complete defense. *See Chambers*, 410 U.S. at 302-03*; see also* Tyson A. Ciepluch, *Overriding the Posthumous Application of the Attorney-Client Privilege: Due Process for a Criminal Defendant*, 83 Marq. L. Rev. 785, 800 (2000) ("A court that is unwilling to compel the testimony of an attorney who has learned of exculpatory information from a deceased client can also violate the due process concerns of a criminal defendant."). *Chambers* concerned a confession by a third party to the murder for which the defendant had been charged. 410 U.S. at 287-88. "One month later, at a preliminary hearing, [the third party] repudiated his prior sworn confession." *Id.* at 288. At trial, the court not only declined to allow testimony by three separate individuals to whom the third-party had separately confessed—on the grounds that the statements were inadmissible hearsay—but also declined to allow the defendant to cross-examine the third-party as an adverse witness. *Id*. at 291-92.

In holding that the statements should have at least been examined to determine whether exclusion would contravene the Due Process Clause, this Court emphasized that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id*. at 294, 302-03. First, the statements should have been admitted because, *inter alia*, "each [statement] was corroborated by some other evidence in the case," and "each confession . . . was in a very real sense self-incriminatory and unquestionable against interest." *Id.* at 301-02. Additionally, not only did "[t]he testimony rejected by the trial court . . . [bear] persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest," but the "testimony also was critical to [the defendant's] defense." *Id.* at 302. Thus, this Court "conclude[d] that the exclusion of this critical evidence, coupled with the State's refusal to permit [the defendant] to

cross-examine [the third party], denied him a trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302.

Even if this Court declines to recognize a posthumous exception to the rule of attorney-client privilege for exculpatory evidence, Jones' statements to Mallow should nonetheless be admitted to comply with the mandates of the Due Process Clause, given their indicia of reliability. Similar to the statements made in *Chambers,* Jones' statements were heard by Mallow and were declarations against interest. (R. 40.) Additionally, as was the case in *Chambers*, Mallow's testimony regarding Jones' statements can be presumed to be "critical to [Powers'] defense" given the explicitness by which she exculpated Powers. *See Chambers*, 410 U.S. at 302. Because Jones' statements are reliable, and since no other source for the evidence exists other than through Mallow's testimony, Due Process mandates the statements' admission "in accord with traditional and fundamental standards of due process." *See id*; *see also* Ciepluch, *supra*, at 806 ("The facts of some cases are so compelling . . . that a criminal defendant must be allowed to access otherwise privileged exculpatory information and offer such information as evidence in court."); *Morales v. Portuondo*, 154 F.Supp.2d 706, 731 (S.D. N.Y. 2001) ("Under these remarkable circumstances, the attorney-client privilege must not stand in the way of truth."). In order to comply with Due Process, this Court should admit the statements made by Jones to Mallow.

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: (1) the third email exchanged between Powers and Cook is admissible under Rule 106; (2) the writing made by Agent Hunt does not satisfy the requirements of Rule 803(5); and (3) Jones'

statements to Mallow are admissible as an exception to the rule of attorney-client privilege, or, alternatively, under the Due Process Clause.

Respectfully Submitted,

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Counsel for Respondent

Date: February 24, 2012.