No. 12-23

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES,

Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether as a matter of law a trial court may admit into evidence against a defendant in a criminal case the hearsay declaration of a murder victim under the doctrine of forfeiture-by-wrongdoing codified in Federal Rule of Evidence 804(b)(6), where there is no evidence that the defendant intended to procure the unavailability of the declarant, and the government relies on evidence that the defendant could reasonably have foreseen that his co-conspirator would murder the declarant in order to silence him.

II. Whether under Federal Rule of Evidence 501 an evidentiary privilege for information gathered in a journalistic investigation should be recognized, and if so, whether the privilege should be absolute or qualified.

III. Whether as a matter of law, under Federal Rule of Evidence 701 governing lay witness opinion testimony, a witness may testify to alleged code words and phrases in conversations, when the witness neither participated in nor observed the conversations, but merely read transcripts of them and reviewed the investigatory work of other law enforcement personnel.

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OPINIONS BELOW

The opinion of the court of appeals is unreported but available in the Record at 20-32 (July 12, 2012). The unreported opinion of the district court denying the government's motion in limine seeking to introduce the testimony of Daniel Best under the 804(b)(6) exception to the hearsay rule, recognizing a journalist's privilege under Rule 501, and denying the government's motion in limine seeking to introduce the testimony of Agent Simandy as lay witness opinion under Rule 701 is reprinted at Record 16-17 (May 2, 2012).

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rules of Evidence 804(b)(6), 501, and 701. Rule 804(b)(6) provides that: "The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . . A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." Rule 501 provides in relevant part that: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court." Rule 701 provides that: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

STATEMENT OF THE CASE

Defendant William Barnes has been the sole owner of Big Top Circus since May 2000. R. at 1. Although once highly profitable, Big Top has floundered under the defendant's control, and by July 2011, the Circus faced imminent and inevitable bankruptcy. Id. After learning that the business was financially unsalvageable, the defendant plotted to kill his elephants as well as elephants from two other circuses, and subsequently harvest and sell the elephants' expensive ivory tusks. R. at 1-2.

On July 12, 2011, the defendant first invited the owners of Boerum City Circus and Flying Feats Circus to participate in a holiday elephant show, which he claimed would feature the elephants from each of the three circuses; the owners agreed, and planned to deliver their elephants on December 2, 2011. R. at 2. Once he secured the commitment from the other circuses, the defendant solicited Alfred Anderson to participate in the scheme, and he agreed. Id. Anderson and Barnes agreed to invite a third party to participate in the elephant hunt, and on September 1, Anderson invited James Reardon to join them, although he did not disclose the full details until early November 2011. R. at 2 & 21.

On August 30, 2011, Barnes invited Kara Crawley, a reporter from the Boerum Times, to visit Big Top Circus, granting her unrestricted access to the circus grounds, in the hope that she would write an article that would raise the profile of the elephant spectacular. R. at 2. Crawley had an ulterior motive; she hoped to gain an inside look at the treatment of the circus animals. R. at 22. She first toured the circus on September 15, 2011, guided by the defendant. Id. Crawley returned to the circus nearly every day for the following two weeks, and was given unfettered access to the facilities. R. at 10. In the course of her time at the circus, she met an employee who approached her in an effort to reveal information he or she had overheard regarding Barnes'

elephant hunt scheme. Id. The employee requested to use a pseudonym and asked that Ms. Crawley not disclose his or her identity until after the employee left Big Top; the employee also agreed to be videotaped by Crawley for her records. Id.

Meanwhile, after discussing the scheme with Anderson, the defendant worked to procure assault rifles and a helicopter for the hunt. R. at 2. On October 2, 2011, Barnes contacted Weapons Unlimited, and although Barnes was unaware at the time, the "employee" at Weapons Unlimited was an undercover agent with the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), Jason Lamberti. Id. The defendant told Lamberti that he wanted to purchase three unregistered and fully automatic weapons, which the agent agreed to provide for $500 each. Id. Barnes gave Lamberti his credit card information, and they agreed that the weapons would be delivered on December 5, 2011. Id. Based on this conversation, the government obtained a warrant to wiretap the defendant's telephone; the warrant was executed on October 4, 2011. Id. On October 6, 2011, Barnes contacted Copters Corporation, spoke with sales associate Alan Klestadt, and arranged a one-day helicopter rental for December 15, 2011. R. at 3. On October 15, 2011, Barnes contacted Anderson to inform him that the arrangements had been made, and Anderson wired money to the defendant to cover the cost of the weapons for both himself and Reardon. Id.

Based on information retrieved by the wiretap, the government learned that by mid-November, 2011, Reardon expressed second thoughts about the hunt, specifically about its questionable legality. R. at 24. In two separate phone conversations between Barnes and Anderson, on November 15 and 29, 2011, Anderson expressed his belief that Reardon presented a potential liability. Pl. Exh. A, R. at 18-19. On November 28, 2011, Reardon called his friend, Daniel Best, shared with him the details of the conspiracy, and expressed his fear that Anderson

might harm him. R. at 24. The next day, after speaking with Barnes, Anderson went to Reardon's house and killed him; when he was apprehended, he confessed and indicated that he killed Reardon to prevent him from exposing the conspiracy. Id.

A few days later on December 1, 2011, Crawley published a story based on the information provided by the anonymous Big Top employee, and exposed Barnes' plan to poach the elephants and profit from their ivory. R. at 22. The defendant was taken into custody later that day. R. at 3. On December 4, 2011, Barnes was indicted and charged with two counts of conspiracy to deal unlawfully in firearms under 18 U.S.C. § 922, two counts of conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C. § 43, and one count of conspiracy to commit unlawful takings under the Endangered Species Act under 16 U.S.C. § 1538. R. at 3-4.

Agent Narvel Blackstock was the agent originally assigned to oversee the investigation of Barnes beginning on October 4, 2011. R. at 23. Blackstock listened contemporaneously to the intercepted phone conversations between Barnes and Anderson and Reardon, and transcribed them. Id. After Barnes' arrest but before the trial, Agent Blackstock died, and Agent Thomas Simandy was assigned to the case on December 15, 2011. Id. Agent Simandy reviewed the transcripts of these conversations, and advanced the investigation by interviewing ATF Agent Lamberti and Alan Klestadt from Copters Corporation regarding Barnes' phone calls and arrangements to procure assault weapons and a helicopter. Id. The government seeks to introduce Agent Simandy's lay witness opinion concerning alleged code words and phrases used during the intercepted telephone conversations between the defendant and his co-conspirators, as he is in a position to consider and interpret the whole of the evidence in the context of the conspiracy. Id.

On May 1 and 2, 2012, the district court heard evidence and argument regarding three separate motions. The first was a motion from the government moving to introduce out-of-court statements made by the late James Reardon to Daniel Best as an exception to the hearsay rules under Rule 804(b)(6). The second was a motion by Kara Crawley to quash a subpoena to testify and reveal her anonymous source, citing the journalists' privilege. The final motion, also by the government, seeks to introduce the testimony of Agent Thomas Simandy as a lay witness under Rule 701. In each of the three motions, the district court ruled against the government, and the Fourteenth Circuit affirmed. The United States now appeals these rulings as a matter of law.

SUMMARY OF ARGUMENT

This Court should hold that as a matter of law, conspiratorial liability is sufficient to establish the requisite elements of a forfeiture-by-wrongdoing exception to the hearsay rules. Forfeiture-by-wrongdoing is a widely recognized exception, identified in common law and codified in the Federal Rules of Evidence. Rule 804(b)(6) incorporates three distinct and necessary elements for the exception to attach: (1) the defendant engaged or acquiesced in wrongdoing; (2) the intent of the wrongdoing was to render the declarant unavailable as a witness; and (3) the declarant was in fact rendered unavailable as a witness. The issue before the Court is whether as a matter of law, *Pinkerton* conspiratorial liability can satisfy the first and second prongs of this rule. So long as the defendant's co-conspirator acted in furtherance of the criminal conspiracy by dispatching the witness and his actions were reasonably foreseeable to the defendant, the elements of the rule are satisfied, and the hearsay testimony is admissible. To find in the alternative would yield an absurd result whereby a defendant could be held criminally

responsible for the actions of his co-conspirator, but does not forfeit his hearsay and confrontation objections through the same set of actions.

This Court should not recognize a journalist's privilege under Federal Rule of Evidence 501. A testimonial privilege for journalists would not satisfy the three considerations set forth by this Court in *Jaffee* for the creation of new privileges. First, limited public and private interests would be served by allowing journalists to assert a privilege and avoid testifying in courts of law. Second, this privilege would impose a significant evidentiary burden by withholding relevant evidence from criminal trials. Third, a journalist's privilege does not hold the unanimous support of the states and was not included in the Advisory Committee's draft of potential evidentiary privileges. The press has operated without a testimonial privilege since the founding of this country and there is no evidence that lack of a privilege has impeded their ability to develop confidential sources and investigate matters of public concern. This lack of necessity is coupled with a strong tradition of disfavor towards evidentiary privileges.

Should the Court uphold a journalist's privilege, it should be limited to confidential information since applying a privilege to non-confidential information will advance no newsgathering function while imposing a more significant evidentiary burden. Further, the privilege should be qualified so that it may be overcome when the information sought is central to the case, when it cannot be reasonably obtained by alternative means, and when there is a compelling interest in the information.

Finally, the Court should find that a law enforcement agent can testify as a lay witness to the meanings of code words used between co-defendants in recorded conversations under Federal Rule of Evidence 701. Review of a transcript of a conversation gives the witness personal knowledge of the document, even if he did not personally observe or take part in the

conversation. The witness's testimony becomes helpful to the jury when his participation in the investigation enables him to draw conclusions regarding the code words that would not easily be discerned by linking the words to acts taken by the defendants. The agent's testimony does not become specialized as long as it draws on unique perceptions made during the investigation rather than the witness's broader knowledge as a law enforcement officer. This is especially so when the particular language used by co-defendants is unique to the conspiracy under investigation.

ARGUMENT

I. PRINCIPLES OF *PINKERTON* LIABILITY ARE APPLICABLE TO FORFEITURE-BY-WRONGDOING ANALYSIS AS CODIFIED BY FEDERAL RULE OF EVIDENCE 804(b)(6).

Hearsay, testimony that is given by a witness who relates not what he or she knows personally but what others have said, *Black's Law Dictionary* (9th ed. 2009), is typically inadmissible, Fed. R. Evid. 802, but Congress has enacted several exceptions to this rule. In particular, Rule 804(b)(6) codifies the forfeiture-by-wrongdoing exception, *Davis v. Washington*, 547 U.S. 813, 833 (2006), allowing the admission of 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).[1] Embedded within the text of the rule are three distinct elements: (1) the defendant engaged or acquiesced in wrongdoing; (2) the intent of the wrongdoing was to render the declarant unavailable as a witness; and (3) the

[1] The codification of the forfeiture-by-wrongdoing rule illustrates the need for a "prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" Fed. R. Evid. 804(b)(6) advisory committee's note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982)). This rule is derived from the common law, *Giles v. California*, 554 U.S. 353, 359 (2008), and the scope of the rule has been interpreted to hold that wrongdoing not only results in the forfeiture of hearsay objection rights but also in the forfeiture of the Sixth Amendment right of confrontation. *Davis*, 547 U.S. at 833.

declarant was in fact rendered unavailable as a witness. *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005).

The third prong of this analysis is easily established in the instant case, as the record indicates that Reardon has in fact been murdered. R. at 24. The issue before the Court regards the first and second prongs, the act and the intent, respectively, and because this is an issue of law regarding the Federal Rules of Evidence, this Court is entitled to de novo review. *United States v. Cherry*, 217 F.3d 811, 814 (10th Cir. 2000) ("[W]e review evidentiary decisions for an abuse of discretion, but legal conclusions concerning the Rules of Evidence or the Constitution de novo.") Despite contrary holdings by both the Southern District of Boerum and the Fourteenth Circuit, conspiratorial liability, also known as *Pinkerton* liability, is sufficient to satisfy both these requirements as a matter of law.[2] To find in the alternative would yield an absurd result whereby a defendant could be held criminally responsible for the actions of his co-conspirator, but does not forfeit his hearsay and confrontation objections through the same set of actions.

A. The principles of *Pinkerton* liability can be applied within the forfeiture-by-wrongdoing context in order to impute a co-conspirator's *actions* to the defendant.

The first issue in understanding the relevance of *Pinkerton* liability in a forfeiture-by-wrongdoing analysis is the extent to which Rule 804(b)(6) supports an interpretation that would allow a co-conspirator's wrongful *acts* to be imputed to the defendant. Given the plain text, the overwhelming support from the federal circuit courts, and the scope of *Pinkerton* liability itself, it is evident that so long as the wrongful act by the co-conspirator was in furtherance of, within

[2] "*Pinkerton* liability" refers to a theory of vicarious liability wherein an individual can be held criminally liable for the actions of his co-conspirator so long as the co-conspirator's actions were in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

the scope of, and reasonably foreseeable as the consequence of the conspiracy, the act can be attributed to the defendant for the purposes of 804(b)(6).

1. The text of 804(b)(6) supports an interpretation in which a defendant need not directly cause the witness's unavailability for the exception to attach.

Because the Federal Rules of Evidence are the result of a legislative enactment, traditional tools of statutory construction should be used to best interpret the scope of a given provision, which requires first looking to the language of the rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). The text of Rule 804(b)(6) defines the requisite act of the defendant in two ways, indicating that both the defendant who "wrongfully caused" and the defendant who merely "acquiesced in wrongfully causing" may be found to have forfeited his right of confrontation and hearsay objections. Fed. R. Evid. 804(b)(6). This bifurcation of the act element lends support to the premise that forfeiture "can be imputed under an agency theory of responsibility to a defendant who 'acquiesced' in the wrongful procurement of a witness's unavailability but did not actually engage in wrongdoing apart from the conspiracy itself." *Cherry*, 217 F.3d at 816; *accord United States v. Rivera*, 292 F.Supp.2d 827, 837 (E.D.Va. 2003) ("[T]he government need not proffer evidence that [the defendant] was directly involved in [the witness's] murder or that [the defendant] took any affirmative steps to procure her silence.").

Every federal circuit court that has examined this issue, other than the Fourteenth Circuit ruling on the case currently under review, has upheld a plain reading of the text to find that a defendant need only *acquiesce* in the wrongful procurement of a declarant's unavailability for the purposes of 804(b)(6). *See, e.g., United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) ("The term 'acquiesce,' within the meaning of Rule 804(b)(6), encompasses wrongdoing that, while not directly caused by a defendant co-conspirator, is nevertheless attributable to that

defendant because he accepted or tacitly approved the wrongdoing"); *United States v. Johnson*, 495 F.3d 951, 971-72 (8th Cir. 2007) (upholding the admission of statements against a defendant who served as an aider and abettor in the witness's unavailability); *United States v. Carson*, 455 F.3d 336, 363-64 (D.C. Cir. 2006) (noting that the forfeiture-by-wrongdoing exception applies to defendants whose co-conspirators render the witness unavailable so long as their actions were within the scope of the conspiracy and reasonably foreseeable to the defendant); *United States v. Rivera*, 412 F.3d 562, 567 (4th Cir. 2005) ("[T]he plain language of [804(b)(6)] supports the district court's holding that a defendant need only tacitly assent to wrongdoing in order to trigger the Rule's applicability. Active participation or engagement, or . . . the personal commission of the crime, is not required."); *United States v. Thompson*, 286 F.3d 950, 964 (7th Cir. 2002) (defining 'acquiescence' for the purposes of 804(b)(6) as "to accept or comply tacitly or passively," and that "acquiescence itself is an act" that can result in application of forfeiture-by-wrongdoing exception); *Cherry*, 217 F.3d at 820 (holding that *Pinkerton* liability is a viable method in which to consider whether the defendant acquiesced in the wrongdoing that procured the witness's unavailability); *Mastrangelo*, 693 F.2d at 273 (holding that if the defendant was involved in the witness's death through "knowledge, complicity, planning or in any other way," the defendant has waived his objections to the use of the hearsay testimony). *Contra United States v. Barnes*, Cr. No. 12-647, R. at 27 (14th Cir. 2012) (holding that traditional principles of vicarious liability are inapplicable to a 804(b)(6) analysis).

2. *Pinkerton* liability is an appropriate analytic tool to establish whether or not a defendant acquiesced to wrongdoing for the purposes of 804(b)(6).

The formulation articulated by *Pinkerton* liability is an appropriate method for which to determine whether or not a defendant has *acquiesced* in wrongdoing that resulted in the

unavailability of a witness. Mere participation in a conspiracy will not result in voluntary forfeiture by the defendant; instead, the appropriate analysis to determine if the defendant has waived his right to confrontation and hearsay objections is whether "the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as the necessary or natural consequence of an ongoing conspiracy." *Dinkins*, 691 F.3d at 385; *accord Cherry*, 217 F.3d at 820. This not only is consistent with the Court's holding in *Pinkerton*, 328 U.S. at 648, but it also strikes the appropriate balance between the defendant's Sixth Amendment right to confrontation and the interest of courts in preventing witness tampering. *Cherry*, 217 F.3d at 820; s*ee also United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979). Application of conspiratorial liability to a forfeiture-by-wrongdoing analysis does not abrogate the defendant's rights, as any party that seeks to introduce hearsay testimony under this exception must prove to the trial court by a preponderance of the evidence that the defendant acquiesced to the wrongful act. *Dinkins*, 691 F.3d at 383. This standard of proof provides sufficient protection of the defendant's interests.

3. <u>The record clearly establishes that the Defendant acquiesced to the wrongdoing the resulted in the unavailability of the declarant at issue.</u>

In the instant case, the record illustrates by a preponderance of the evidence that Barnes and Anderson were co-conspirators in an ongoing plot to hunt elephants, R. at 4, and furthermore, that Reardon's murder was not only in furtherance of this conspiracy but was foreseeable by the Defendant. R. at 19 ("We need him out of the picture. . . . I'm doing it."). Although the defense may argue that Anderson killed Reardon despite Barnes' comments to the contrary, Id. ("Hold off. Just shut him up for a while."), Barnes tacitly approved Anderson's actions by failing to intercede. *See Dinkins*, 691 F.3d at 384; *Thompson*, 286 F.3d at 964;

Mastrangelo, 693 F.2d at 273-74 ("Bare knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.").

B. The principles of *Pinkerton* liability can be applied within the forfeiture-by-wrongdoing context in order to impute a co-conspirator's *intent* to the defendant.

Rule 804(b)(6) requires not only that the witness is unavailable due to the defendant's wrongdoing or acquiescence to wrongdoing, but also that the wrongful acts were "*designed* to prevent the witness from testifying," *Giles*, 554 U.S. at 359, even if that is not the only purpose for the wrongful act. *Gray*, 405 F.3d at 242. In the instant case, as a matter of law, because the defendant knowingly and intentionally entered into a criminal conspiracy with Anderson, Anderson's actions and requisite intent, so long as they were both in furtherance of the conspiracy and reasonably foreseeable to the defendant, can be imputed to the defendant.

1. <u>The objective of the wrongful action must be to procure the witness's unavailability.</u>

The "intent" element of 804(b)(6) was clarified by this Court in *Giles*, a case in which the government sought to admit statements made by the defendant's ex-girlfriend regarding ongoing domestic abuse at the defendant's trial in which he was charged with her murder. 554 U.S. at 357. The Court objected to California's forfeiture-by-wrongdoing rule, which examined only whether the witness was unavailable by the defendant's wrongdoing (or acquiescence thereof) but did not inquire as to whether or not the wrongful act was "designed" to prevent the witness from testifying. *Id.* at 357.

The wrongdoing need not be motivated solely to cause the witness's unavailability; it is only necessary to show that the wrongful conduct was motivated *in part* to prevent the individual from testifying. *See, e.g.*, *Gray*, 405 F.3d at 242 ("Although the Rule requires that the

wrongdoing was *intended* to render the declarant unavailable as a witness, we have held that a defendant need only intend in part to procure the declarant's unavailability.") (internal citations omitted); *United States v. Dhinsa,* 243 F.3d 635, 654 (2d Cir.2001) ("The government need not, however, show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated *in part* by a desire to silence the witness.") (internal citations omitted); *Houlihan,* 92 F.3d at 1279 ("Moreover, it is sufficient in this regard to show that the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's *sole* motivation."); *see also United States v. Johnson,* 219 F.3d 349, 356 (4th Cir. 2000). Killing a witness to a crime could be, and often is, motivated by a number of factors, but so long as procurement of his or her silence was part of the calculation, this prong may be satisfied. *See United States v. Martinez,* 476 F.3d 961, 966–67 (D.C. Cir.), *cert. denied,* 552 U.S. 968 (2007). Furthermore, the fact that no criminal charges had been filed against either Barnes or Anderson at the time of Reardon's murder is irrelevant; Rule 804(b)(6) applies equally to witnesses who have been summoned for ongoing proceedings as to *potential* witnesses. *Houlihan,* 92 F.3d at 1279.

2. *Pinkerton* liability can impute the intent of the co-conspirator to the defendant for the purpose of 804(b)(6), and the instant case should be remanded so that the district court can make a fact-specific inquiry.

This Court held in *Pinkerton*:

> "[S]o long as the partnership in crime continues, the partners act for each other in carrying forward. It is settled that an overt act of one partner may be the act of all without any new agreement specifically directed to that act. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective."

328 U.S. at 646-47 (internal citations omitted). This holding establishes that so long as the wrongful act of one party is committed in furtherance of the conspiracy, the intent of that party can be imputed to a co-conspirator. Furthermore, the Fourth Circuit recently stated: the "proper application of *Pinkerton* liability standards in the forfeiture-by-wrongdoing context generally will be coextensive with the scope of forfeiture by wrongdoing as articulated in *Giles*." *Dinkins*, 691 F.3d at 385. That court went on to find that when vicarious liability is used as the justification to impute responsibility from a co-conspirator to the defendant, there must also be evidence that the wrongful act was conducted with an intent to make the witness unavailable to testify. *Id.*

In the instant case, both lower courts decided as an issue of law that *Pinkerton* liability standards were insufficient to establish the "intent" element defined by *Giles*, R. at 16 & 20, without inquiring further into the specific facts. However, because *Pinkerton* liability can impute criminal responsibility from one co-conspirator to another for an incident offense, it stands to reason that it is also sufficient to impute liability for the purposes of 804(b)(6). In the instant case, the record sufficiently establishes by a preponderance of the evidence that Anderson's intention in killing Reardon was to prevent him from divulging the criminal scheme to law enforcement. R. at 18-19. Because the wrongful act, Reardon's murder, was *designed* to silence him and prevent him from being a witness to the elephant hunt scheme, the statements he made prior to his murder should be admitted under 804(b)(6).

C. To hold *Pinkerton* liability insufficient to establish the requisite elements of 804(b)(6) would yield an absurd result.

Intent to participate in a criminal enterprise is sufficient to impute the intent of one co-conspirator to another for wrongful acts he alone committed, so long as those acts were in

furtherance of the conspiracy. *Pinkerton*, 328 U.S. at 647. Because of this, a co-conspirator can be held criminally liable for the acts of another co-conspirator. If Rule 804(b)(6) were not also to incorporate this doctrine, then a defendant could be held criminally liable for the actions of his co-conspirator, but if those wrongful acts resulted in the unavailability of a witness, the defendant would still benefit from the wrongdoing by suppressing at trial any statements that witness made out of court. If a defendant's role as a co-conspirator sufficed to hold that individual criminally liable, then "such conduct should also suffice for the forfeiture of hearsay and confrontation objections. In other words, it would make little sense to limit forfeiture of a defendant's trial rights to a narrower set of facts than would be sufficient to sustain a conviction and corresponding loss of liberty." *Johnson*, 495 F.3d at 971 (internal citations omitted).

In the instant case, Barnes could be held liable for homicide if a court found that Reardon's murder was committed in furtherance of the criminal conspiracy between Barnes and Anderson. To hold that Barnes does not also forfeit his confrontation rights and hearsay objections as a result of his participation in the conspiracy with Anderson would yield an absurd result and allow Barnes to benefit from his co-conspirator's wrongdoing.

II. FEDERAL RULE OF EVIDENCE 501 DOES NOT RECOGNIZE A PRIVILEGE THAT PROTECTS INFORMATION GATHERED IN A JOURNALISTIC INVESTIGATION.

Federal Rule of Evidence 501 provides that "the common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" unless otherwise specified by the United States Constitution, a federal statute, or rules proscribed by the Supreme Court. Fed. R. Evid. 501. Congress declined to enumerate specific rules on privileges and chose instead to allow them to be developed by the courts in line with common law

principles. H.R. Rep. (Judiciary Comm.) No. 93-650, 93d Cong. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082. This Court previously rejected a constitutional basis for a journalist's privilege, *Branzburg v. Hayes*, 408 U.S. 665 (1972), creating a circuit split regarding the existence of a common law privilege. *See McKevitt v. Pallasch*. 339 F.3d 530, 532 (7th Cir. 2003).

In light of the Court's disfavor towards creating evidentiary privileges, *Herbert v. Lando*, 441 U.S. 153, 175 (1979), and contemporary jurisprudence that rejects the necessity of a common law journalist's privilege, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1149-50 (D.C. Cir. 2006); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004), this Court should overturn the Fourteenth Circuit and find that no testimonial privilege should be recognized for journalists under 501.

A. A journalist's privilege does not satisfy the considerations set forth by the Court in *Jaffee*.

A journalist's privilege does not satisfy the considerations set forth by this court in *Jaffee v. Redmond* for the creation of privileges under Rule 501. 518 U.S. 1 (1998) (in which the Court recognized a psychotherapist-patient privilege under Rule 501). There is an assumption "that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Id.* at 9 (internal citations omitted). Therefore, the Court identified three prongs to consider before a privilege should be adopted: (1) the extent to which the privilege serves public and private interests; (2) the likely evidentiary burden that the privilege would create; and (3) the states' recognition of a similar privilege. *Id.* at 9-14. Applying these three criteria, it is clear that a journalist's privilege does not implicate sufficient benefits so as to outweigh the significant

burden it would create upon the judicial system, and thus it should not be recognized under Rule 501.

1. A journalist's privilege would serve only limited public or private ends.

The first analytic consideration regarding the identification of a common law privilege is to weigh the impact that privilege would have on public and private interests. In *Jaffee*, there was a distinct concern that the psychotherapist-patient relationship was rooted in confidence, and it would be "difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication." 518 U.S. at 10 (internal citations omitted). The Court further saw a public benefit in ensuring citizens' confidence in mental health services, and recognized that the psychotherapist privilege facilitated mental health treatment. *Id.* These benefits can be compared to those promoted by other common law privileges, such as the attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."), and the spousal privilege, *Trammel v. United States*, 445 U.S. 40, 53 (1980) (the privilege "furthers the important public interest in marital harmony").

There is no evidence that a journalist's privilege would yield the same expanse of public and private benefits. In fact, this Court in *Branzburg* asserted that the press has operated without any legal protection for their sources since the founding of this country and yet has *thrived*, finding the lack of a testimonial privilege to be no obstacle to the development or retention of sources. 408 U.S. at 698-99. This Court rejected the argument that "the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes . . . ." *Id.* at 695. While some circuits

have asserted that a journalist's privilege would ensure the free flow of information to the public, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), there is no indication that sources will shy away from cooperating with the press because of a journalist's duty to turn over materials to the government if subpoenaed. *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998). A glance at the headlines makes it clear that the media has flourished in its reporting on corruption and public scandal regardless of the lack of a recognized journalist's privilege under Rule 501.[3]

In the instant case, Kara Crawley was investigating at the Big Top Circus with the hopes of uncovering information about the mistreatment of circus animals. R. at 9. During her exploration of the circus' practices, a circus employee approached her, knowing she was a journalist, and shared critical information about the defendant's elephant hunt scheme, presumably due to an interest in the truth being discovered and harm to the elephants being prevented. Now the reporter seeks to claim privilege under Rule 501, and refuses to reveal her source who could contribute information valuable to the government's case against the defendant. There is no evidence that the source asked that his or her name to be withheld in a court of law, or that he or she would have declined to speak with the Crawley absent legal protection; the employee asked only that Crawley not "reveal the tip while he or she was still working at the circus." R. at 10. In fact, the conversation between the circus employee and Crawley took place despite the ambiguities around a journalist's privilege (or lack thereof), illustrating that the murky legal status of the asserted privilege did not deter the source's

[3] *See, e.g.*, Barbara Laker & Wendy Ruderman, *After Daily News Investigation, Lawyers, Cops, D.A. Take Hard Look at Drug Arrests*, Philadelphia Daily News, Feb. 10, 2009, http://www.philly.com/philly/news/local/20090210_After_Daily_News_investigation__lawyers__cops__D_A__take_hard_look_at_drug_arrests.html; Jeff Gottlieb & Corina Knoll, *Robert Rizzo, Aide Accused of Conspiracy in Bell Corruption Scandal*, L.A. Times, Mar. 31, 2011, http://articles.latimes.com/print/2011/mar/31/local/la-me-0331-bell-indictment-20110331; Lydia Polgreen, *In South Africa, Lethal Battles for Even Smallest of Political Posts*, N.Y. Times, Nov. 30, 2012, http://www.nytimes.com/2012/12/01/world/africa/south-africa-corruption-fuels-battle-for-political-spoils.html.

cooperation with the press, an interaction that serves a valid public interest. In direct contrast, however, the concealment of the source is now negatively impacting the public's interest in prosecuting the defendant for these heinous crimes.

2. A testimonial privilege for journalists would create an unjustified evidentiary burden.

Evidentiary privileges are disfavored within the law. *Herbert*, 441 U.S. at 175 (denying the existence of an absolute privilege to protect against questions regarding the editorial process during a libel suit). This Court has further expressed concern over allowing privileges that withhold demonstrably relevant evidence in a criminal trial. *United States v. Nixon*, 418 U.S. 683, 712 (1974) (denying the existence of an unqualified executive privilege). The public has an extremely compelling interest in effective law enforcement, and a journalist's privilege that withholds relevant information from criminal trials while placing an uncertain burden on newsgathering should be rejected. *Branzburg*, 408 U.S. at 690.

The Court in *Jaffee* found that the evidentiary burden of a psychotherapist privilege would be modest because psychotherapy patients would be unlikely to speak freely if their conversations were protected by privilege, and therefore "[t]his unspoken 'evidence' [would] serve no greater truth-seeking function than if it had been spoken and privileged." 518 U.S. at 11-12. In contrast to the situation described in that case, there is support for the proposition that sources will continue to speak with the media regardless of the lack of a testimonial privilege. *Branzburg*, 408 U.S. at 698-99. Therefore it seems unlikely that sources who furnish information about wrongdoing will cease to do so if a privilege is not created, meaning that this evidence *will* continue to come into existence and result in an evidentiary burden on the government if it were protected.

The reporter, Kara Crawley, investigated effectively without a clear journalist's privilege, given the confidential source approached her and this source's testimony was used as the basis of Crawley's exposé published on December 1, 2011. R. at 10-11. Now that this evidence exists, finding a journalist's privilege would create an undue evidentiary burden on the government by restricting law enforcement's access to this witness's testimony.

3. A privilege should not be created under Rule 501 without the unanimous support of the states or a recommendation from the Advisory Committee.

Because the journalist's privilege is not granted unanimous support by the states and was not included in the Advisory Committee's draft of evidentiary privileges, it should not be recognized under Rule 501. This Court has stated that policy decisions of the states should be taken into account when considering the addition of an evidentiary privilege due to the "reason and experience" requirement of 501. *Jaffee*, 518 U.S. at 12-13. Additionally, when a privilege has not been proposed by the Advisory Committee or the Judicial Conference, it suggests that the claimed privilege is not "indelibly ensconced in our common law or an imperative of federalism." *United States v. Gillock*, 445 U.S. 360, 367-68 (1980).

The Court in *Jaffee* concluded that a psychotherapist privilege was necessary due to the "uniform judgment" of its adoption in all 50 states and the District of Columbia. 518 U.S. at 14. This consensus was considered fortified by the adoption of the privilege by the Advisory Committee in its draft of proposed privileges. *Id.* Conversely, this Court refused to award a privilege for legislative acts in *Gillock* by relying in part upon the fact that neither the Committee nor the Judicial Conference had included the privilege in its draft. 445 U.S. at 367-68.

There is currently no "shield" law that protects a journalist's right to conceal his or her sources in at least eight states.[4] One of these states, Wyoming, also has not established any form of common law privilege for journalists. *Id.* In contrast to the uniformity that was favored by this Court in *Jaffee*, 518 U.S. at 14, in this case, voices of dissent still reverberate among the states regarding the status and necessity of a privilege for reporters. In addition, the Advisory Committee's draft of revised evidence rules, as approved by this Court, contained no mention of a journalist's privilege. Fed. R. Evid. 501 advisory committee's note. This is further evidence that the journalist's privilege is not considered inherently embedded in our country's common law, *Gillock*, 445 U.S. at 367, and thus should not be recognized pursuant to Rule 501.

B. Existing Protections Available to Journalists Render Any Privilege Superfluous.

Journalists have several other protections against subpoenas that sufficiently protect their interests. Courts ensure that government subpoenas are reasonable in the circumstances, preventing harassment of the media as they do harassment of other citizens. *McKevitt*, 339 F.3d at 533. Courts also ensure that subpoenas are issued in good faith and not in an attempt to disrupt a journalist's relationship with their sources. *In re Grand Jury Proceedings, Storer Commc'ns, Inc.*, 810 F.2d 580, 586 (6th Cir. 1987).

The Department of Justice has issued guidelines that illustrate the government's commitment to avoid prosecutorial interference with members of the media except in circumstances in which the information sought is of critical importance. 28 C.F.R. § 50.10. These guidelines require prosecutors to balance "the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair

[4] No legislation that protects journalists from revealing their sources has been passed in Idaho, Iowa, Massachusetts, Mississippi, South Dakota, Vermont, Virginia and Wyoming. *State by State Guide to the Reporter's Privilege for Student Media*, Student Press Law Center (2010), http://www.splc.org/knowyourrights/legalresearch.asp?id=56.

administration of justice." *Id.* In addition they require the approval of the Attorney General before a member of the media may be subpoenaed. *Id.* at § 50.10(e).[5] These guidelines along with the powers of the courts to protect against harassment have developed sufficient protections for journalists, rendering a privilege unnecessary. In the instant case, Crawley has blindly asserted privilege without alleging that the subpoena was an effort by the prosecutor to interfere with her relationship with her source or an attempt to obtain information that is unrelated to a legitimate criminal investigation.

In addition to the existing protections available to journalists, protections also exist to protect journalists' sources. Law enforcement agencies have ways to protect informants and guarantee their safety, including in camera proceedings and sealed records, which could allay a journalist's source's concerns and alleviate the need to continue concealing their identity from the court. *Branzburg*, 480 U.S. at 695. Given Crawley's statement that her source was "very concerned for his or her safety," R. at 10, these protections are especially relevant, and apply regardless of whether or not a journalist's privilege exists independently.

C. Should this Court find a journalist's privilege, it should be limited to confidential information and qualified by a balancing test in keeping with the precedent of the federal circuit courts.

In the event that this Court grants a journalist's privilege under Rule 501, it should not be absolute, applicable only to confidential information, and should require the application of a balancing test in order to best protect relevant public and private interests in light of a pressing government need.

[5] The Guidelines "are not intended to create or recognize any legally enforceable right in any person." 28 C.F.R. § 50.10(n). Therefore, courts have concluded that no private right of action exists to enforce the guidelines. *See In re Special Proceedings*, 373 F.3d at 44 n.3.

1. A privilege for non-confidential information is unnecessary.

If a journalist's privilege exists, it should be limited to confidential information, since allowing non-confidential information to be privileged will advance no newsgathering function and will further restrict relevant evidence. *See Smith*, 135 F.3d at 970-71. Both this Court and the Sixth Circuit have expressed concern about obstructing the search for truth with additional privileges, and relied upon the premise that any privileged communications "must originate in a confidence that they will not be disclosed." *Storer Commc'ns, Inc.*, 810 F.2d at 584; *accord Branzburg*, 408 U.S. at 743.

The plaintiff in *Smith* was a television station that had taped interviews with an individual who was under suspicion for setting fires at his place of employment. 135 F.3d at 963. The government subpoenaed the outtakes of the interview that was aired on television—evidence that was non-confidential—but the station refused, asserting a reporter's privilege. *Id.* The Fifth Circuit concluded that denying a privilege for non-confidential information would not hurt the process of procuring news, especially when it was "information obtained from a person who wanted it aired when he gave it." *Id.* at 969. This is analogous to the instant case; the source must have intended for the information to be made public or the source would not have disclosed it to a known reporter. R. at 10. The source then appeared on camera with his or her face visible, a step unlikely to be taken by someone unwilling to risk that their identity might be revealed, and never asserted that his or her identity must be kept "confidential," merely that a pseudonym should be used in the article. Id.

2. A qualified privilege would limit the evidentiary burden on the legal system.

Every federal court that has considered a common law journalist's privilege has concluded that an absolute privilege is inappropriate. *The New York Times Co. v. Gonzales*, 459 F.3d 160, 169 (2d Cir. 2006); *see, e.g.*, *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Cuthbertson*, 630 F.2d at 146; *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). Elements to consider when evaluating the extent to which the journalist's privilege should be recognized, in light of the public interest in law enforcement, include: (1) whether the information is central to the case; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling interest in the information. *LaRouche*, 780 F.2d at 1139.

In *Gonzalez v. Nat'l Broad. Co., Inc.*, the plaintiffs sought unedited tapes from NBC that they believed could be used to show a pattern of misconduct by a police department that would support their civil rights action. 194 F.3d 29, 31 (2d Cir. 1998). The Second Circuit allowed a qualified journalist's privilege to be overcome since the tapes were vital to the plaintiff's case and were not reasonably obtainable by another source. *Id.* at 36. The court further stated that since the protection of confidentiality was not at stake, the showing needed to overcome the privilege was diminished. *Id.*

In the instant case, the source in question witnessed a conversation between the defendant and a co-conspirator regarding his intent to commit the charged crime. R. at 10. Although Crawley has argued that the government must show that the information is necessary for conviction, R. at 12, this argument is unpersuasive; this requirement has not been recognized by federal courts and would create an unnecessarily extreme standard. None of the aforementioned considerations are independently dispositive, and currently, many jurisdictions require only a

showing that the information is not reasonably obtainable by alternative means. *See, e.g.*, *Gonzalez*, 194 F.3d at 36. This emphasis ensures that the government pursues other methods of obtaining the information without requiring the government to expend unnecessary resources. *Id.*

III. UNDER FEDERAL RULE OF EVIDENCE 701, A WITNESS CAN TESTIFY TO CODE WORDS USED BY DEFENDANTS WHEN THE WITNESS'S FAMILIARITY WITH THE INVESTIGATION ALLOWS HIM TO PERCEIVE MEANINGS THAT THE JURY COULD NOT EASILY DISCERN.

Federal Rule of Evidence 701 mandates that lay witness testimony "in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. In the case before the Court, Agent Simandy's testimony meets these three criteria of lay opinion due to the fact that it is based on his rational perception of the transcripts, will provide the jury with meanings that they would not easily perceive, and is not based on his specialized training as a law enforcement agent.

A. A witness's personal perceptions include observations made when reviewing transcripts of recorded conversations.

A lay witness does not need to personally observe or participate in conversations to testify about the meaning of particular words and phrases contained in those conversations. *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011). When a witness reviews a transcript of conversations during an investigation, his or her testimony regarding the meaning of code words is rationally based on his "first-hand perception" as per Federal Rule of Evidence 701(a). *United States v. Rollins*, 544 F.3d 820, 831-32 (7th Cir. 2008). Further, a lay witness may

base his opinion testimony "on his examination of documents even when the witness was not involved in the activity about which he testified." *Jayyousi*, 657 F.3d at 1102.

In *Jayyousi*, the Eleventh Circuit held that an FBI agent's testimony was admissible when the agent listened to previously recorded conversations and drew conclusions about the language used by the members of a conspiracy. 657 F.3d at 1102. The agent was using his "perception" by reviewing both the telephone calls and the additional documents surrounding the investigation, and was not merely delivering an argument from the witness stand. *Id.* at 1103. In *United States v. Hamaker*, the court admitted the testimony of an FBI financial analyst who reviewed several thousand financial documents and testified as to discrepancies between employee time sheet records and the clients charged for their work. 455 F.3d 1316, 1331 (11th Cir. 2006). The court found that the analyst's perceptions and conclusions regarding the documents constituted his "rational perception," although he was not involved in the keeping of the financial records. *Id.* at 1332.

In the instant case, Agent Simandy has reviewed the transcripts of the recorded conversations between the co-conspirators. R. at 23. Similarly to the agent in *Jayyousi*, Simandy came to his conclusions regarding the code after "extensively investigating" the case against the defendants, R. at 14, including interviewing both ATF Agent Lamberti and Alan Klestadt from Copter Corporation. R. at 13. The fact that Agent Simandy was not present when the conversations at issue were being recorded does not negate his personal knowledge of the transcripts made by Agent Blackstock. R. at 15. Similar to the law enforcement agent in *Hamaker*, Agent Simandy spent time analyzing these documents and should be permitted to testify as to the conclusions he made based on his review of their contents. Id.

B. A witness's testimony that uses contextual events to draw conclusions about the meaning of code words is helpful to the jury.

Lay witness testimony satisfies 701(b) when the witness's knowledge of an investigation enables him to draw conclusions regarding code words, not otherwise easily discernible, by linking particular words and phrases to acts taken by defendants. *Jayyousi*, 657 F.3d at 1103. This testimony is useful to the jury when the meanings of these words are not "perfectly clear" without the witness's explanation. *Id.* (citing *United States v. Awan*, 966 F.2d 1415, 1430-31 (11th Cir. 1992)). In *Jayyousi*, an agent's lay witness testimony regarding code words used by defendants in a plot to aid terrorism was admissible at trial because it "helped the jury better understand the defendant's conversations." *Id.* at 1103. The agent was able to reference financial statements, wire transfers and other acts of material support that put the code into context. *Id.* Similarly, the law enforcement agent in *Awan* was allowed to testify regarding the coded meaning of comments made by defendants charged with drug trafficking since the comments would not have been "perfectly clear" to the jury without the agent's analysis. *Awan*, 966 F.2d at 1430.

Agent Simandy testified at the pre-trial hearing that the "context of the conversations allowed [him] to decipher the meaning of the words and phrases used" in the recorded calls. R. at 13. He discovered that the defendant made reference in a recorded call to the "black cat" being arranged one day after calling an undercover agent at Weapons Unlimited to purchase assault rifles. Id. He then discovered a reference to "Charlie tango" being ready two days after the defendant arranged for the rental of a helicopter. Id. These conclusions were possible only through a thorough review of the transcripts and interviews with individuals at the various vendors the defendant contacted. Analogous to the situations presented in both *Jayyousi* and *Awan*, Agent Simandy is able to draw connections that would not have been evident to the jury

without his explanation. It is unlikely that the jury could intuitively have discerned the meaning of these code words from listening to the calls alone, and it would help their understanding of the facts to hear testimony from a witness who spent time deciphering the meaning of these phrases in the larger context of the investigation.

C. An agent is not offering an opinion based on specialized knowledge when he draws on experience from a specific investigation rather than his training as a whole.

The "distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir.2008) (citations and internal quotations omitted). Lay testimony is admissible when it is not based on any specialized law enforcement training but rather on perceptions made during the course of an investigation. *Rollins*, 544 F.3d at 832.[6] Even when a witness's testimony requires some specialized knowledge, it is still admissible under Rule 701 so long as it was based on first-hand observations made during a specific investigation. *El-Mezain*, 664 F.3d at 514; *United States v. Jackson*, 549 F.3d 963, 975 (5th Cir. 2008) (finding a lay witness's testimony that is based not only on first-hand perceptions but also draws from his past observations as an investigative agent is admissible).

In *El-Mezain*, a law enforcement agent was permitted to interpret a telephone call between co-defendants based on information he learned from other documents in the investigation. 664 F.3d at 514. The Fifth Circuit found that this opinion was not based on the

[6] The Respondent may argue that the intention behind Rule 701 was to prevent the introduction of witnesses who would serve as experts but not be subject to the same rigorous scrutiny described in Rule 702. The Petitioner does not dispute this. The circumstances of this case are consistent with the holdings of the Fifth, Seventh, and Eleventh Circuits, each of which held a federal agent may testify regarding his observations during a specific investigation so long as this testimony does not draw on his expertise as a law enforcement officer. *See, e.g., United States v. El-Mezain*, 664 F.3d 467, 514 (5th Cir. 2011); *Jayyousi*, 657 F.3d at 1103 (Eleventh Circuit); *Rollins*, 544 F.3d at 832 (Seventh Circuit).

agent's general training, but was a straightforward conclusion based on the investigation as a whole. *Id.*[7] Similarly, in *Rollins*, the agent conducted surveillance and interviewed witnesses who were familiar with the conspiracy to aid his understanding of language being used in recorded conversations. 544 F.3d at 832. The Seventh Circuit focused on the fact that code words being analyzed were unique to the conspiracy. *Id.* at 831. The Fifth Circuit agreed with this logic, and allowed lay witness testimony from agents when their knowledge of a particular crime ring gives them personal perception regarding the code used by that set of defendants. *United States v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2011). These circumstances have been distinguished from cases in which an officer is relying upon his knowledge of jargon that is commonly used throughout an illegal industry. *See, e.g.*, *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997) (noting there is a "specialized jargon endemic to the illegal drug distribution industry," which requires an expert familiar with the industry to interpret).

Agent Simandy based his testimony on his experience investigating the defendant, not on his wider experiences as a law enforcement agent. He specifically testified at the pre-trial hearing that he came to his conclusions regarding the code words "by thoroughly reviewing the transcripts" and "interviewing Agent Lamberti and Alan Klestadt." R. at 13. Furthermore, the instant case has presented Agent Simandy with a unique set of facts, as he has testified that crimes against animals are not "typical" cases, R. at 14. The conversations that he analyzed included code words that stood for "elephant ivory tusks" and "helicopter." R. at 13. Agent Simandy has never worked on a case involving animals, R. at 14, and these are words that were

[7] The facts in *El-Mezain* are easily distinguished from cases such as *United States v. Oreido*, in which an officer described how drug dealers typically use baggies to package drugs. 498 F.3d 593, 602-03 (7th Cir. 2007). The Seventh Circuit held that this constituted expert testimony since the witness "brought the wealth of his experience" as an agent to bear on his observations. *Id.* at 603. *See also*, *United States v. Watson*, 260 F.3d 301, 307 (3rd Cir. 2001) (finding that testimony regarding whether a quantity of drugs was consistent with distribution drew on an agent's expertise regarding narcotics dealers); *United States v. Boissoneault*, 926 F.2d 230, 233 (2d Cir. 1991) (holding that testimony regarding the typical behavior of persons involved in cocaine transactions constituted expert testimony).

likely not implicated in the previous drug cases that Agent Simandy has investigated. There is also no evidence this code has *ever* been used by another criminal conspiracy or that it would be familiar to any law enforcement agent. This lends credence to the determination that Agent Simandy's testimony constituted a "straightforward conclusion based on his observations in this case," *El-Mezain*, 664 F.3d at 514, n.13, not otherwise based on his law enforcement expertise.

CONCLUSION

As a matter of law, this Court should hold that conspiratorial liability is applicable to forfeiture-by-wrongdoing analysis; that a journalist's privilege does not exist; and that under Rule 701, lay opinion testimony as to the meaning of code words is admissible where, as here, the agent neither participated in the conversation nor observed it. For the reasons stated above, the judgment of the court of appeals should be reversed, and the case should be remanded to that court for further proceedings consistent with that ruling.