
No. 12-23

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

October Term 2012

UNITED STATES OF AMERICA,

Petitioner

-- against --

WILLIAM BARNES

Respondent

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

- I. Does Federal Rule of Evidence 804(b)(6) provide an exception to the rule against hearsay when the defendant acquiesced in wrongdoing that rendered the witness unavailable to testify, or further, does the *Pinkerton* Doctrine make the defendant liable for his co-conspirator's wrongdoing, which rendered the unavailability of the witness?
- II. Does Federal Rule of Evidence 501 extend federal privilege law to journalists, qualified or absolute, even though neither common law courts nor the Supreme Court has ever recognized such a privilege?
- III. Does Federal Rule of Evidence 701 allow a lay witness to provide opinion testimony regarding code words and phrases used in transcribed conversations when the witness does have personal knowledge but did not participate or observe the conversations?

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OPINIONS BELOW

The United States District Court for the Southern District of Boerum decided on pre-trial motions on May 2, 2012, and that decision appears at *Appendix A*. The decision of the United States Court of Appeals for the Fourteenth Circuit, decided on July 12, 2012, appears at *Appendix B*.

STANDARD OF REVIEW

The standard of review for determining whether a district court erred in admitting or excluding evidence is reviewed for abuse of discretion. *Jones v. State*, 918 So.2d 1220, 1223 (2005).

STATEMENT OF THE CASE

Statement of Facts

In August 2008, William Barnes (“Defendant”) was co-owner with Alfred Anderson (“Anderson”) of an unregistered charity “sham” known as “Boerum 4 Animals”. (R. 1, 21.) In July 2010, Anderson was convicted of fraud for soliciting donations on behalf of Boerum 4 Animals and using the proceeds to fund bear-hunting trips with Defendant; Defendant was not charged. (R. 1.) Defendant was also the sole owner of Big Top Circus (“Big Top”). (R. 1.) Big Top is located in the southern part of the state of Boerum, which resembles the native habitat of Big Top’s main attraction, Asian elephants. (R. 1.) Big Top is known nationally for its large herd of twenty elephants, however in July 2011 the company approached bankruptcy. (R. 1.) In order to avoid the impending bankruptcy, Big Top needed \$500,000 by December 2011. (R. 1.) To achieve this monetary goal, Defendant contacted Boerum City Circus and Flying Feats Circus in early July 2011 to join in creating the “greatest elephant show on earth,” which would be

performed for a month during the holiday season. (R. 1, 2.) The two circuses accepted the offer and agreed to each bring ten (10) Asian elephants on December 2, 2011. (R. 2.) Defendant then contacted Kara Crawley (“Crawley”), a reporter for the local newspaper, to circulate press and attempt to make the holiday show appear legitimate. (R. 2, 22.) In exchange for an article in the newspaper, Crawley was given unrestricted access to the circus. (R. 2.) It was during Crawley’s research that the Defendant’s elephant-hunting scheme was uncovered. (R. 2.)

Defendant had contacted Anderson in July 2011 to “hunt” the elephants on his property in late December, after bringing in profits from the month long elephant show, in order to harvest and sell their ivory. (R. 2.) They contacted a third hunter, James Reardon (“Reardon”) to participate in the elephant-hunting scheme. (R. 2.) Defendant proposed to use a helicopter and assault rifles to carry out the scheme, and Anderson informed Reardon of these details; on October 1, 2011, Anderson accepted the proposal on behalf of himself and Reardon. (R. 2.) The next day, Defendant bought three assault rifles from Weapons Unlimited, a company in the neighboring state of Texas. (R. 2.) Defendant stated he wished to have unregistered firearms, so he elected to purchase the rifles “under the table” for half of the regular purchase price. (R. 2.) Unbeknownst to the Defendant, the Weapons Unlimited employee he was dealing with was actually undercover Bureau of Alcohol, Tobacco and Firearms (“ATF”) agent, Jason Lamberti (“Lamberti”). (R. 2.) Lamberti alerted the FBI, and they obtained a warrant to intercept Defendant’s telephone communications. (R. 2.) Four days later on October 6, 2011, Defendant contacted Alan Klestadt (“Klestadt”) at Copters Corporation, located in Texas, and scheduled to rent a helicopter for December 15, 2011. (R. 3.) Around October 15, 2011, Defendant informed Anderson that the arrangements were complete, and Anderson wired Defendant money to cover the costs of his and Reardon’s assault rifles. (R. 3.)

On December 1, 2011, Crawley published the exposé uncovering the elephant-hunt scheme. (R. 3.) While on Big Top grounds to gather information about the show, Crawley built a rapport with one of Big Top's employees. (R. 3.) The employee, who wished to remain anonymous, told Crawley that he/she had overheard a telephone conversation between Defendant and another party concerning a plan to kill the elephants for their ivory. (R. 10.) The employee was adamant that a pseudonym be used in the article because he feared for his safety if Defendant knew he was the informer. (R. 10.) The employee did, however, allow Crawley to videotape him/her with his/her face in plain sight. (R. 10.)

Due to the publication of Crawley's exposé, Defendant was taken into federal custody later that day. (R. 3.) The Federal Bureau of Investigation ("FBI") then provided the information they learned from intercepting Defendant's telephone communications from October 4, 2011 to December 1, 2011. (R. 6.) From these communications, FBI Agent Thomas Simandy ("Simandy") was able to decipher code words and phrases that further solidified the Government's position on the facts. (R. 13.) Simandy reviewed transcripts that FBI Agent Blackstock, who was originally assigned to the case, had transcribed while listening to the conversations contemporaneously. (R. 13.) Simandy then interviewed Lamberti and Klestadt; and by comparing code phrases and dates, Simandy deciphered that Anderson and Reardon were referring to the assault rifle purchases when they said "black cats", the helicopter rental when they said "Charlie tango," and ivory tusks when they said "blood diamonds". (R. 13.)

The transcripts also provided valuable information through a series of conversations between Anderson and Defendant regarding Reardon. (R. 18, 19.) At 2:00 a.m. on November 29, 2011, Anderson phoned Defendant and revealed that he believed Reardon wished to no longer be a part of the scheme. (R. 19.) And in order to protect the scheme, Anderson told

Defendant that he was "...gonna take care of [Reardon]," and Defendant ultimately responded, "I don't want anything to do with this" and hung up. (R. 19.) Later in the day on November 29, Anderson went to Reardon's home and killed him. (R. 7.)

The day before his murder, Reardon had spoken with his friend Daniel Best ("Best"); Reardon confided in Best that he was fearful of Anderson and told him the entire plan to kill the elephants for their ivory, sell it and split the profits. (R. 8.) Anderson also told Best that he had invited Anderson over the next day to discuss things. (R. 8.) Best drove to Anderson's home the next day and observed Anderson running out the front door; Best then entered the home and found Reardon dead. (R. 24.) Anderson was apprehended by the police the same day and confessed to killing Reardon to protect the elephant hunt conspiracy. (R. 7.)

Procedural History

On December 4th, 2011, William Barnes was indicted and charged for conspiracy to deal unlawfully with firearms under 18 U.S.C.A. §§ 371 and 922(a)(1)(a), conspiracy to commit a crime of violence against an animal enterprise under 18 U.S.C.A. §§ 43 and 371, and conspiracy to commit unlawful taking under the Endangered Species Act (16 U.S.C.A §§ 371 and 1538). (R. 3-4.). The Government filed two motions in limine prior to trial. (R. 16-17.) The first sought to introduce the testimony of Mr. Daniel Best under the 804(b)(6) exception to the hearsay rule. (R. 16.) The other motion in limine sought to introduce the testimony of Agent Thomas Simandy as lay witness opinion under Rule 701. (R. 17.) Both motions were denied by the District Court on May 2, 2012. (R. 16-17.) The District Court also granted Kara Crawley's motion to quash the Government's subpoena that was asking her to reveal her confidential source, finding that an absolute Journalistic Privilege existed under Federal Rule of Evidence 501. (R. 17.)

As a result of the District Court's rulings against the Government on the three pretrial evidentiary motions, the United States, pursuant to 18 U.S.C. § 3731, filed an interlocutory appeal in the United States Court of Appeals for the Fourteenth Circuit. (R. 20.) The Fourteenth Circuit Court of Appeals upheld the rulings of the lower court, with Judge Zhu dissenting. (R. 20, 32.) On October 1, 2012, the Government appealed to the United States Supreme Court. (R. 36.)

SUMMARY OF THE ARGUMENT

In the present case, the lower courts erred in: (1) denying the Government's motion to introduce the testimony of Mr. Daniel Best under the 804(b)(6) exception to the hearsay rule, (2) granting Ms. Kara Crawley's motion to quash the subpoena to reveal her sources, claiming Journalistic Privilege under Rule 501, and (3) denying the Government's motion to introduce the testimony of Simandy as a lay witness opinion under Rule 701. First, Federal Rule of Evidence 804(b)(6) is the forfeiture-by-wrongdoing exception to the hearsay rule. Evidence that would otherwise be inadmissible under hearsay may be introduced if it is being offered against the party who rendered the declarant unavailable to testify in person. Under the *Pinkerton* Doctrine, Defendant is liable for Alfred Anderson's wrongdoing. Anderson killed Reardon to protect the elephant-hunting scheme and evade police interference. The telephone conversation between Anderson and Defendant shows that not only are Anderson and the Defendant co-conspirators, but also that Anderson intended and Defendant complied to harm Reardon.

Second, Federal Rule of Evidence 501 gives certain witnesses privilege to not testify. The Rule does not explicitly state that it extends to cover journalists, and neither the United States Constitution nor the common law afforded this protection to journalists. Even though this privilege has never protected journalists, the press has not suffered nor have citizens been

dissuaded from disclosing information to the press. Thus here is no reason for the privilege to be applied broadly to journalists in the federal courts. However several states courts have passed laws regarding journalistic privilege, but nearly all held that the privilege is qualified. Therefore, if a qualified privilege is extended to protect Ms. Crawley's source it should be deemed as qualified. In which case, the need for the disclosure justly outweighs the reason for protection because it hinders the truth-finders in the pursuit of justice.

Lastly, Federal Rule of Evidence 701 allows a lay witness to offer opinions if it meets certain criteria. Officer Simandy's opinion testimony passes the three-part test because his testimony would help the trier of fact to determine the meaning of the code words used by Defendant and Anderson, which is a fact at issue in the case. Also, the knowledge he uses to decipher these code words is rationally based and not based on scientific knowledge. Further, it should not be a requirement that Agent Simandy directly participate or observe Defendant and Anderson's conversations.

ARGUMENT

I. FEDERAL RULE OF EVIDENCE 804(b)(6) PERMITS THE ADMISSION OF OTHERWISE INADMISSIBLE HEARSAY EVIDENCE WHEN THE PERSON THE EVIDENCE IS BEING OFFERED AGAINST WRONGFULLY CAUSED AN OUT OF COURT DECLARANT TO BE UNAVAILABLE; THIS EXCEPTION SHOULD BE APPLIED WHEN A CO-CONSPIRATOR RENDERS THE WITNESS UNAVAILABLE BY WRONGDOING.

Federal Rule of Evidence 804(b)(6), also known as the forfeiture-by-wrongdoing rule, is a long-recognized exception to the rule against hearsay. *See Crawford v. Washington*, 541 U.S. 36, 62 (2004). This exception allows for the testimony of an out-of-court declarant to be admissible in court if the statement is being “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). As outlined in *United States v. Gray*, in order to apply Rule 804(b)(6), the court must find by a preponderance of the evidence that: (1) the defendant engaged or acquiesced in wrongdoing, (2) the act was intended to render the declarant unavailable as a witness, and (3) the act did, in fact, render the declarant unavailable as a witness. 405 F.3d 227, 241 (4th Cir. 2005). Further, the Supreme Court in *Giles v. California* concluded that under common law, un-confronted testimony is not admissible under the forfeiture-by-wrongdoing exception unless there is a showing that the defendant *intended* to prevent the witness from testifying. 554 U.S. 353, 361 (2008) (emphasis added).

Furthermore, the forfeiture-by-wrongdoing exception’s true purpose is to prevent “abhorrent behavior which strikes at the heart of the system of justice itself.” Fed. R. Evid. 804(b)(6) advisory committee’s note. To effectuate this purpose, federal courts have broadly

construed the elements of the forfeiture-by-wrongdoing exception.¹ Rule 804(b)(6) has been extended to apply to the wrongful act and intent of a co-conspirator under the *Pinkerton* doctrine. *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000). Under this doctrine, a defendant may be held liable for the acts committed by his/her co-conspirator if the act was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). Further, even though a defendant may have not participated directly in planning or procuring the declarant's unavailability through wrongdoing, if the defendant's co-conspirator's wrongdoing passes the three-part *Pinkerton* test, then the defendant may be deemed to have waived his or her Confrontation Clause rights and hearsay objections to the out-of-court statements made by the unavailable witness. *Id.* at 820.

A. Daniel Best's Testimony Should Be Admissible Under The Forfeiture-By-Wrongdoing Exception Because The Language of Rule 804(b)(6) Permits Wrongfully Causing the Unavailability of a Witness Acquiescently.

In order for the forfeiture-by-wrongdoing rule to apply as an exception to the rule against hearsay, the three-part test laid out in *United States v. Gray* must be met. 405 F.3d 227, 241 (4th Cir. 2005). The first prong of the test requires the defendant to have directly engaged or acquiesced in wrongfully rendering the witness unavailable. *Id.* In the facts at hand, there is no contest that Defendant did not directly engage in the murder of James Reardon; however, there is strong evidence to support he acquiesced Alfred Anderson's plan to kill Reardon.

Acquiesce is defined as "to accept or comply tacitly or passively." *See, Black's Law Dictionary* 24 (9th ed. 2009). It is clear from the telephone transcript dated November 29, 2011,

¹ *See, United States v. Rodriguez-Marrero*, 390 F.3d 1, 17 & n.8 (1st Cir. 2004); *United States v. Dinkins*, 691 F.3d 358, 383 (4th Cir. 2012); *United States v. Gray*, 405 F.3d 227 (4th Cir. 2005); *United States v. Thompson*, 286 F.3d 950, 963 (7th Cir. 2002); *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007); *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Carson*, 455 F.3d 336, 360-365 (D.C. Cir. 2006).

that Defendant passively complied with Anderson's decision to kill Reardon. (R. 19.) When Anderson revealed to Anderson that he was "gonna take care of [Reardon]," Defendant at first tried to prevent Anderson from taking such drastic measures. But when Anderson said, "We have to. I'm doing it," Defendant accepted Anderson's plan to kill Reardon and merely stated, "I don't want anything to do with this" and hung up the phone. (R. 19.) Defendant counsel's acknowledged that Anderson is a "very mentally ill man;" therefore Defendant knew that Anderson was capable of such a crime, and instead of intervening and vocalizing his wishes for Anderson not to take such measures, he passively complied and accepted that Reardon would soon be "taken care of." (R. 7.)

The District Court applied the holding of *Giles v. California*, which requires the Defendant to engage or acquiesce in wrongdoing with the *intent* of rendering the witness unavailable in wrongdoing in order for the Rule 404(b)(6) exception to apply. 554 U.S. 353 (2008). However, it has been construed in other courts that the Supreme Court in *Giles* meant for the forfeiture-by-wrongdoing exception to apply "only when the defendant engaged [or acquiesced] in conduct *designed* to prevent the witness from testifying." See *United States v. Dinkins*, 691 F.3d 358, 383 (4th Cir. 2012). Defendant acquiesced Anderson's conduct, which was knowingly designed to prevent Reardon from testifying. Best's testimony regarding statements Anderson made about Defendant and the elephant hunt should be admitted into evidence.

Nevertheless, even if the Court finds that *Giles* requires that Defendant himself intended to render the witness unavailable to testify, some circuits have held that under Rule 804(b)(6), a defendant waives his hearsay objection when he "acquiesces in conduct intended to procure the unavailability of a witness." *United States v. Thompson*, 286 F.3d 950, 963 (7th Cir. 2002). By

using the term “acquiesce,” the drafters of Rule 804(b)(6) intended to allow for waiver; the term “acquiesce” itself is an act. *Thompson*, 286 F.3d at 963. “And when that act is done intentionally...it is no less valid as a means of waiver than the decision to more directly procure the unavailability of a witness by, for example, murdering a witness oneself.” *Id.* at 964.

B. Defendant Is Responsible For Anderson’s Wrongdoing Under the Pinkerton Doctrine of Conspiratorial Liability, and Therefore the Defendant Is Deemed to Have Waived His Hearsay Objection to Reardon’s Out of Court Statements.

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing ... the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices.²

Under the *Pinkerton* Doctrine of Conspiratorial Liability, “the overt acts of one partner in crime is attributable to all.” *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). Such acts or declarations made by some of the conspirators may prove motive or intent for other conspirators. *Id.* The formation of the conspiracy establishes intent to commit the crime, and the act of committed is done “in the execution of the enterprise.” *Id.* The Court in *Pinkerton* held that, “the rule which hold responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle [as conspiratorial liability].” *Id.* Therefore, the act one conspirator does in furtherance of the conspiracy will hold other co-conspirators responsible for the substantive offense. *Id.* Applying the facts of the case under this doctrine, Defendant is responsible for Anderson’s wrongdoing.

Defendant was conspiring with Anderson to illegally hunt elephants and sell their ivory for a profit. They sought help from a third party, James Reardon, to join in the hunt. Once Reardon showed signs of uncertainty, Anderson killed him. Hence, Reardon is unavailable as a

² *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

witness due to Defendant's co-conspirator's wrongdoing. However, before Reardon was killed, he informed his friend Best about the elephant scheme. Best's testimony regarding Reardon's out-of-court statements should be admissible under Rule 804(b)(6) and the *Pinkerton* doctrine. If Anderson's act of killing Reardon was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of the conspiracy, then Defendant is liable for his co-conspirator's wrongdoing of rendering Best unavailable to testify.

Anderson's act of killing Reardon was within the scope of the conspiracy; he killed Anderson to protect the elephant-hunting scheme. Anderson killed Reardon to ensure that the conspiracy would not be thwarted; this was in furtherance of the conspiracy. Anderson feared that if Reardon did not participate, he would go to the authorities and expose them. Anderson told Defendant in their telephone conversation on November 29, 2011 that he was "going to take care of" Reardon, and Defendant could not persuade him otherwise; therefore Defendant could reasonably foresee the actions Anderson was going to take. Since all three parts of the test are satisfied, Defendant is liable for the actions of his co-conspirator under the *Pinkerton* doctrine, and the forfeiture-by-wrongdoing exception to the rule against hearsay applies.

It is also important to note that Defendant did not, at any point, withdraw from the elephant hunting conspiracy. It is a well-established rule that when a defendant joins a conspiracy, he remains a member of that conspiracy unless he takes affirmative action to withdraw or disavow from the conspiracy to defeat its purpose. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463 (1978). Defendant intended to continue with the plan despite Reardon's apprehensions. Further, Defendant did not alert the authorities or thwart Anderson's plan to kill Reardon.

The murder of Reardon was in furtherance of the elephant hunt conspiracy and was intended to render a witness unavailable for testimony. Defendant was a member of this conspiracy and should be held liable for his co-conspirator's wrongdoing. Thus, Best's testimony should be admitted in order to ensure that Defendant does not benefit from wrongdoing.

II. THE SUBPOENA SEEKING TO INTRODUCE JOURNALIST KARA CRAWLEY'S SOURCES SHOULD HAVE BEEN GRANTED BECAUSE NEITHER COMMON LAW NOR THE SUPREME COURT HAS RECOGNIZED A JOURNALISTIC PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501.

Federal Rule of Evidence 501 deals with the privilege of a witness not to testify and states that, "common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege..." Fed. R. Evid. 501. Prior to the adoption of this rule, there was a definite list of recognized privileges, and among the enumerated privileges, one for a reporter or journalist did not exist. *Trammel v. United States*, 445 U.S. 40, 47 (1980). Congress has since abolished this list to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." *Id.* Common law courts consistently refused to recognize the existence of a journalistic privilege, and the Supreme Court has yet to extend federal privilege law to journalists beyond that of a normal citizen under the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972). Thus, the Fourteenth Circuit's finding that "federal common law recognizes a journalist's privilege under Rule 501," was unsupported. (R. 30.) However since *Branzburg*, some state courts have recognized a journalistic privilege either by statute or court decision. Therefore, if the Supreme Court decides to establish a hard and fast rule that journalists are protected under Rule 501, the privilege should be qualified – *a partial First Amendment shield* – not absolute. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

A. Neither the Constitution Nor Common Law Extends Rule 501 Privilege to Journalists; Such A Privilege Would Present A Great Burden In The Pursuit of Justice.

The Supreme Court in *Branzburg v. Hayes* refused to find that a testimonial privilege applied to journalists within the First Amendment of the Constitution or at common law. 408 U.S. 665, 689. In deciphering whether or not Rule 501 extends to protect journalists, the Supreme Court had to determine whether there was a compelling interest at stake that needed protection. *Id.* at 725. The interest at stake was deemed to be the free flow of information between the American people and the press. *Id.* However, the Supreme Court found that since the beginning of our nation’s history, the press has never had the protections of this privilege, and as a result, the press has flourished, not suffered. *Id.* at 700. The Supreme Court made sure to note that in the vast majority of cases, absent a journalistic privilege, there is no evidence that the rulings have negatively affected the free flow of information between the press and the people. *Id.*

The Fourteenth Circuit looked to the following three considerations from *Jaffee v. Redmond*, 518 U.S. 1 (1996), to determine that a privilege existed under common law to protect Journalist Kara Crawley’s confidential sources:

- (1) the significant public and private interests that would be served by the privilege;
- (2) the relative weights of the interests to be served by the privilege and the burden on truth-seeking that might be imposed by it, and
- (3) “reason and experience” – that is, the extent to which the privilege is recognized by the states.³

For the first prong, the Fourteenth Circuit found that the public interest was that “[t]he press would be limited in its ability to report on government if sources could not be protected from exposure.” (R. 29.) However, as stated above, the Supreme Court in *Branzburg v. Hayes*

³ (R. 28-9.)

found that even though this privilege has not been extended to journalists in the past, the press has not suffered in America's history. *Branzburg*, 408 U.S. at 689. The Fourteenth Circuit also hinged on the following quote from *Mills v. Alabama*, a Supreme Court case, to determine that a journalistic privilege is necessary to protect the press: "the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve." 384 U.S. 214, 219 (1996). While the free flow of information to the press is important to keep elected public officials honest, the case at hand does not involve a public official. It involves Defendant, an owner of a private business. Therefore the Fourteenth Circuit's determination that there is a heavy public interest in protecting journalists in order to keep public officials honest is irrelevant and in error.

Regarding the second prong, the Fourteenth Circuit noted that the burden on truth-seekers is "modest" since lack of privilege could result in a decrease in evidence. Thus, "potential sources will be reluctant to disclose sensitive information." (R. 29.) Once again, the press has flourished, not suffered. *Branzburg*, 408 U.S. at 689. Therefore, there is no reasonable argument that citizens, from this point forward, would be reluctant to disclose information to the press. Further, "the consequential, but uncertain, burden on news gathering" that supposedly results from reporters answering questions in the course of a criminal trial is not enough to override the public interest of law enforcement. *Id.* at 690-91. The Supreme Court also made sure to note that in the vast majority of cases, absent a journalistic privilege, there is no evidence that the rulings have negatively affected the free flow of information between the press and the people. *Branzburg*, 408 U.S. at 691. Therefore, the burden on truth-seeking that will be imposed by excluding the revelation of Crawley's confidential source far out weighs the

significant public or private interest that the privilege may serve. Revealing this confidential informant is paramount to the Government's case, and applying a journalistic privilege would hinder the pursuit of justice in the case at bar. The record does not provide any inclination that the information uncovered by Crawley could be found by any other means.

For the last prong under the *Jaffee* analysis, the Fourteenth Circuit found that a majority of state courts recognize a journalistic privilege by either statute or judicial decision. However, the Supreme Court should not establish a hard and fast rule to extend Rule 501 privilege to all journalists. Testimonial privileges, when not carefully construed can be “derogation in the search for truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974). This has led courts to be hesitant to expand or create testimonial privileges under 501. *Jaffee v. Redmond*, 518 U.S. 1, 20 (1996) (Scalia and Chief Justice dissenting). And when privileges are created, they tend to be “new, vast, and ill defined.” *Id.* Journalistic Privilege should be limited for the public policy reason of protecting the pursuit of justice, and in order to prevent injustice, the Supreme Court should hold that Rule 501 does not extend to journalists. Thus, the subpoena seeking to require Kara Crawley to reveal her confidential information should have been granted. In light of the facts at hand and application of the *Jaffee* analysis, the Fourteenth Circuit not have grounds to find that the privilege extended to journalists under common law.

B. If A Journalistic Privilege Is Found Under Federal Rule of Evidence 501, The Privilege Should Be Qualified, Not Absolute.

However, if the Court upholds the District Court's decision and recognizes the existence of a journalistic privilege under Rule 501, it should be deemed as qualified, not absolute. The Supreme Court was quite clear in the holding of *Branzburg v. Hayes* that in regards to criminal investigations, journalists will not have an absolute privilege under the First Amendment to refuse to answer questions relevant to that investigation. *Farr v. Pitchess*, 522 F.2d 464, 467-68

(9th Cir.1975). Nine circuits have explicitly ruled since *Branzburg* that if a privilege attaches to the facts a journalist acquires in the course of gathering the news, the privilege is qualified, not absolute.⁴ Therefore, when a journalistic privilege has been applied in lower courts, it is qualified. For example, the Ninth Circuit found that the privilege discussed in *Branzburg* was only a “*partial* First Amendment shield that protects journalists ... in all judicial proceedings.” *Farr v. Pitchess*, 522 F.2d. at 467-68 (emphasis added).

In Justice Powell’s *Branzburg* concurrence, the Supreme Court “etched out a case-by-case approach to the protection of news sources.” *Altemose Constr. Co. v. Bldg. & Constr. Trades Council*, 443 F. Supp. 489, 491 (E.D. Pa. 1977); *See also, Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). The court must balance the policies, which give rise to the privilege and their applicability to the facts at hand, against the need for the evidence sought. *Riley*, 612 F.2d at 716. Thus, the “materiality, relevance and necessity of the information sought must be shown.” *Id.* Further, there must be a “specific need for evidence” for the privilege to be overcome. *United States v. Nixon*, 418 U.S. 683, 713, (1974).

Applying the facts of the case at hand to the balancing test above, the policy behind affording a journalistic privilege is to protect the free flow of information to the press. The information sought is the revelation of Ms. Crawley’s confidential informant, and it is paramount to the Government’s case. The confidential informant revealed in the article that he overheard Defendant and Anderson conspiring to kill the elephants. (R. 10.) On the same day the article was published, Defendant was taken into federal custody. (R. 3.) Thus, the confidential

⁴ *See e.g., Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2nd Cir. 1982); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980); *Miller v. Transamerican Press*, 621 F.2d 721, 725 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir 1972); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *SilkWood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

informant's information is directly linked to the arrest, investigation, and indictment of the Defendant. Without accessing this source, the court would have difficulty determining the facts of the case. The Government needs to determine the credibility of the informant in order to successfully build their case at trial. Further, the crucial information provided by the confidential informant cannot be found by any other reasonable means. Therefore, the need for this information, which if not disclosed hinders the pursuit of justice, outweighs the interest in keeping the information protected.

III. THE DISTRICT COURT'S DECISION TO EXCLUDE AGENT SIMANDY'S OPINION TESTIMONY BECAUSE HE WAS A LAY WITNESS WHO HAD NOT DIRECTLY PARTICIPATED OR OBSERVED DEFENDANT'S CONVERSATIONS WAS IN ERROR.

Rule 701 allows a lay witness to offer opinions or inferences if they are, "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of 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. Some circuits have held that a lay witness's testimony concerning alleged code words or phrases is admissible only if the agent has first-hand knowledge either as (1) a participant in a conversation, or (2) as a listener to a conversation who contemporaneously observes the speakers. *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001).⁵ While other circuits have held that a lay witness does not need to be a participant or observer of the conversation in order to satisfy Rule 701. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).⁶ A lay witness with personal knowledge

⁵ See also, *United States v. Parsee*, 128 F.3d 374, 379 (5th Cir. 1999); *United States v. Sautler*, 60 F.3d 270, 276 (7th Cir. 1995) (witness had first hand knowledge of the facts).

⁶ See also, *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995); *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008); *United States v. Garcia*, 994 F.2d 1499 (10th Cir. 1993).

may give opinions as to the meaning of code words used in recorded conversations. *See United States v. Lizardo*, 445 F.3d 73, 83 (1st Cir. 2006).

A. Agent Simandy’s Testimony Is Admissible Because It Passes the Requirements For a Lay Witness Offering Opinion Testimony As Laid Out in Federal Rule of Evidence 701.

Agent Simandy’s testimony regarding the code words and phrases used in the conversations between Defendant and Anderson is lay witness testimony because it satisfies Federal Rule of Evidence 701(a). The term “rationally based” entails that the lay opinion be based on the Simandy’s personal knowledge. *United States v. Saulter*, 60 F.3d 270, 276 (7th Cir. 1995). Further, personal knowledge upon which Agent Simandy’s testimony rests may be “gained during the course of [the witness'] investigation.” *United States v. Weaver*, 281 F.3d 228, 231 (D.C. Cir. 2002). Nothing in Rule 701 prohibits Agent Simandy from offering a lay opinion about transcripts he examined based upon the firsthand knowledge he gained as a result of that examination. *See, e.g., United States v. Rollins*, 544 F.3d 820, 831-32 (7th Cir. 2008). There has been no contest that these records do not accurately reflect Defendant and Anderson’s conversations, and Agent Simandy is only giving his opinion about the transcriptions he personally examined. Thus his testimony is, and is limited to, firsthand knowledge. Therefore after reviewing and studying the transcripts, Agent Simandy’s lay opinion testimony was rationally based on the perception he gained while investigating the case.

The second prong of Rule 701 requires that when a lay witness offers an opinion, the opinion be helpful to understand the witness' testimony or determine a fact in issue. Fed. R. Evid. 701(b). A lay witness may provide opinions regarding the meaning of code words when the meaning of the words is “not ‘perfectly clear’ without [the witness's] explanations.” *United States v. Janyousi*, 657 F.3d at 1103. Agent Simandy’s opinion would assist the trier of fact in determining that the code words divulged a plan between Defendant and Anderson to hunt

elephants. He had a familiarity with the investigation, which was crucial to perceive the meaning of the coded language. Agent Simandy thoroughly studied the transcribed conversations between Defendant and Anderson; he also looked at the dates of those conversations in conjunction with the dates of the helicopter rentals and rifle purchases. Without studying this information intently, the jury could not have readily discerned the meaning of the coded language used in those conversations.

Third, Agent Simandy's opinion was "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). A lay witness is capable of offering opinion testimony without drawing upon any prior specialized knowledge. *See, e.g., Rollins*, 544 F.3d at 832. Agent Simandy did not draw upon any prior specialized knowledge that he gained from "extensive experience" with other people engaged in similar activities. Fed. R. Evid. 701 advisory committee's note. He studied transcripts and testimony, and through this linked the Defendant's code words to the helicopter rental and gun purchases. During the pretrial hearing in the district court, Agent Simandy admits to defense counsel that he has never been involved in an animal poaching investigation. (R. 14.) Therefore, an argument cannot be made that he has extensive experience on which his opinion is based; his opinion is only based upon what he learned in this specific investigation.

B. Agent Simandy, As A Lay Witness, Need Not Directly Participate or Observe Conversations In Order to Provide Testimony Regarding His Opinion As To The Meaning Of The Code Words and Phrases.

Many circuits have allowed a lay witness to base his opinion testimony on examination of documents even when the witness was not involved in the activity about which he testifies.⁷

⁷ *See., United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995); *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008); *United States v. Saulter*, 60 F.3d 270 (7th Cir. 1995); *United States v. Garcia*, 994 F.2d 1499 (10th Cir. 1993); *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).

Despite this, the Fourteenth Circuit excluded Simandy's lay testimony based on an Eighth Circuit case, which held that a law enforcement officer's "testimony is admissible as a lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001). However, the facts in *Peoples* are distinguishable from the facts at hand. Thus, the holding in *Peoples* should be applied narrowly, and the Fourteenth Circuit erred by applying it to this case.

In *Peoples*, FBI Special Agent Joan Neal offered testimony regarding plain English words and phrases coupled with her theory on the true meaning of the terms. 250 F.3d at 640. For example, when Peoples said in a taped recording he bought a plane ticket for the victim, she interpreted those words as meaning he needed to kill the victim. *Id.* And when Peoples said, "I done already gave my loot," Agent Neal stated, "I contend that he has already paid the killers to do the job." *Id.* Since it was plain language and ordinary activities Peoples was referencing, it would have been pertinent for Agent Neal to observe or participate in those conversations in order to understand the true context. However, in the facts at hand, the Defendant and Anderson were not using ordinary phrases. Unlike a common practice of plane ticket purchases, Defendant and Anderson made references to the following out of the ordinary phrases: black cats, blood diamonds, and Charlie tango. (R. 13.) Since these phrases are not the common English phrases, Agent Simandy was able to discern that these phrases meant more than their definitions, and there is no need to require Agent Simandy to have listened or participated in the conversation.

Further, Agent Neal's testimony was found to be inadmissible because she ultimately testified as to her "opinions about what the defendants were *thinking* during the conversations, phrased as contentions supporting [the agent's] conclusion." *Peoples*, 250 F.3d at 640 (emphasis

added). Agent Simandy offered no testimony that alluded to Defendant's frame of mind. He merely offered his opinion as to what he believed to be the true meaning of the code words and phrases. Therefore the Supreme Court should align with the holding of *United States v. Jayyousi* and hold that a lay witness is not required to be a participant or observer of a conversation to provide testimony about the meaning of coded language used in the conversation. 657 F.3d 1085, 1102 (11th Cir. 2011).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court REVERSE the decision of the United States Court of Appeals for the Fourteenth Circuit and: (1) grant the Government's motion to introduce the testimony of Mr. Daniel Best under the Federal Rule of Evidence 804(b)(6) exception to the hearsay rule, (2) deny Ms. Kara Crawley's motion to quash the subpoena to reveal her sources, claiming Journalistic Privilege under Federal Rule of Evidence 501, and (3) grant the Government's motion to introduce the testimony of Agent Thomas Simandy as a lay witness opinion under Federal Rule of Evidence 701.

Respectfully Submitted,

Team 11
Counsel for Petitioner

Date: February 20, 2013

APPENDIX

Appendix A

The United States District Court for the Southern District of Boerum's Decision on Pre-trial Motions.

DECISION ON PRE-TRIAL MOTIONS

May 2, 2012, 9:00 a.m.

321 THE COURT: Good morning, counselors. After careful consideration of the issues presented, I
322 have reached a decision on the motions. Since counsel has indicated that they have no objection
323 to my announcing my decision from the bench, I will do so. You may pick up copies of the
324 formal order and decision from my clerk tomorrow.

325 First, the government's motion in limine seeking to introduce the testimony of Mr. Daniel Best
326 under the 804(b)(6) exception to the hearsay rule is denied. Constrained by the decision of the
327 Supreme Court in *Giles v. California*, I hold that as a matter of law, the forfeiture-by-
328 wrongdoing exception of 804(b)(6) applies only when the defendant intended to prevent the
329 witness from testifying and that mere foreseeability and participation in a conspiracy do not of
330 themselves show that a defendant has intended, or as the Court also puts in its *Giles* opinion, has
331 designed to render the witness unavailable. Therefore, conspiratorial liability does not satisfy
332 804(b)(6)'s requirement that a defendant cause or acquiesce in causing the declarant's
333 unavailability. Since no more than foreseeability and conspiracy are alleged here, the hearsay
334 evidence in question is inadmissible. Second, rejecting the government's contentions, this Court
335 recognizes a journalist's privilege under Rule 501. The public interest in a robust press would be
336 served by recognition of such a privilege. In contrast, the overall evidentiary benefit resulting
337 from the denial of a journalist's privilege would be very modest. Finally, and perhaps most
338 importantly, a majority of states have recognized such a privilege. In addition, I find that the
339 privilege is absolute, not qualified. Its overriding purpose is to encourage people to speak to the
340 press, and a qualified privilege would discourage sources from speaking freely. Moreover,
341 although it is therefore irrelevant here whether the employee's need for confidentiality is
342 stronger than the government's need for more evidence, I am of the opinion that the evidence

343 obtained would be purely cumulative, cutting against a finding of need. Accordingly, I am
344 granting Ms. Crawley's motion to quash the subpoena. Finally, the government's motion in
345 limine seeking to introduce the testimony of Agent Thomas Simandy as lay witness opinion
346 under Rule 701 is denied. Lay witness opinion must be rationally based on the perception of the
347 witness, a requirement long understood to mean that it must come from first-hand knowledge or
348 experience. This court holds that as a matter of law, a witness's testimony as to the meaning of
349 alleged code words and phrases in a conversation is admissible as lay opinion only if the witness
350 has first-hand knowledge either as (1) a participant in the conversation, or (2) as a listener to the
351 conversation who contemporaneously observes the speakers. Where, as here, the witness has
352 merely reviewed transcripts of conversations and otherwise reviewed the investigative work of
353 other agents, the requirement of first-hand knowledge is not satisfied.

Appendix B

Decision of the United States Court of Appeals for the Fourteenth Circuit

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

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**UNITED STATES OF AMERICA,
Appellant,**

--against--

Cr. No. 12-647

**William Barnes,
Defendant-Appellee.**

-----X

July 12, 2012

Before: JOHNSON, RODRIGUEZ and ZHU, Circuit Judges:

OPINION OF THE COURT

RODRIGUEZ, Circuit Judge.

This interlocutory appeal, brought by the United States pursuant to 18 U.S.C. § 3731, arises directly from the District Court’s rulings against the government on three pretrial evidentiary motions. Specifically at issue are: 1) whether *Pinkerton* conspiratorial liability is applicable to forfeiture-by-wrongdoing analysis under Federal Rule of Evidence 804(b)(6); 2) whether there is a journalist’s privilege under Rule 501, and if so, whether it is absolute or qualified; and 3) whether under Rule 701, a law-enforcement agent may provide lay opinion testimony concerning the meaning of code words and phrases based on a review of intercepted and transcribed telephone conversations. Upon our review of these issues, we affirm the district court’s rulings that conspiratorial liability is not applicable to forfeiture-by-wrongdoing analysis; that a journalist’s privilege exists and is absolute; and that under Rule 701, lay opinion testimony as to the meaning of code words is inadmissible where, as here, the agent neither participated in the conversation nor observed it.

I. Factual Background

On December 4, 2011, defendant-appellee William 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. A summary of the facts leading to Barnes's arrest and indictment follows, drawn from the allegations in the indictment and the record of the pretrial motions.

The "Elephant Hunt" Scheme

Defendant William Barnes inherited Big Top Circus from his father, Ben Barnes, in May 2000. With its renowned one-of-a-kind elephant show, Big Top Circus was a highly profitable enterprise for decades, until defendant assumed control. By July 2011, Big Top Circus faced imminent and inevitable bankruptcy. Determined to wring what little profit he could from Big Top Circus before it collapsed, the defendant conceived of a scheme to invite two smaller circuses to "winter" on his sizeable elephant grazing grounds. He then planned, with the assistance of two co-conspirators, to kill the elephants, harvest their extremely valuable ivory, and sell it.

The Co-Conspirators

In late July of 2011, defendant solicited Alfred Anderson, his collaborator in a sham charity called "Boerum 4 Animals," to join his scheme and asked him to provide additional manpower. Anderson invited an acquaintance, James Reardon, to join in a domestic big game hunt. Reardon did not learn the full nature of the conspiracy until early November, 2011.

The Journalist

In an effort to make the planned holiday spectacular appear legitimate, on August 30, 2011, the defendant invited reporter Kara Crawley from the Boerum Times to visit Big Top Circus. She agreed, hoping to gain an inside look at the treatment of Big Top Circus's animals. Her first day of touring the circus was September 15, 2011. The defendant allowed her unlimited access to the circus's employees, facilities, and animals. These facilities normally required extensive security clearance. At first, the defendant guided Ms. Crawley in her tour of the circus. Eventually, Ms. Crawley took charge of the tour by requesting access to the caging areas of the circus. In the course of her visits to Big Top Circus, Ms. Crawley met an employee who wished to reveal information the employee had learned regarding the defendant's plans for the elephants. The employee asked to use a pseudonym. The employee also requested that Ms. Crawley not reveal his or her identity until after the employee left the Circus. However, the employee allowed Ms. Crawley to videotape the employee without altering the employee's appearance or voice. The video was intended solely for Ms. Crawley's notes and was not intended to be shown to the public.

On December 1, 2011, Ms. Crawley published an exposé of defendant and his elephant-poaching plot, including information obtained from the anonymous employee.

Purchasing Weapons

On October 2, 2011, the defendant contacted Weapons Unlimited, a registered and licensed Texas firearms dealer, to purchase automatic weapons for the "hunt." Unbeknownst to the defendant, the "employee" he spoke with at Weapons Unlimited was an undercover agent from the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), Jason Lamberti. The defendant informed the undercover agent that he wanted unregistered and fully automatic

weapons. The agent agreed to provide the defendant with three AK-47s, for \$500 per piece, payable immediately, with delivery on December 5, 2011. The defendant provided his credit card information. Based upon that exchange, the government obtained a warrant to tap the defendant's telephone line. The government executed that warrant on October 4, 2011 and the defendant's conversations were intercepted through December 1, 2011, when he was arrested.

Testimony of Agent Thomas Simandy

The government intercepted numerous telephone conversations between the defendant and Alfred Anderson and James Reardon, from October 4, 2011 until December 1, 2011. Agent Narvel Blackstock was originally assigned to the investigations relating to this case. Agent Blackstock listened to these conversations contemporaneously and transcribed them. In unrelated events, Agent Blackstock died on December 14, 2011. Agent Thomas Simandy was assigned to this case on December 15, 2011. Agent Simandy reviewed the transcripts of the conversations between the defendant and his alleged co-conspirators. Additionally, Agent Simandy interviewed ATF Agent Lamberti and Alan Klestadt from Copters Corporation. Agent Lamberti told Agent Simandy about his October 2, 2011 conversation with the defendant. Alan Klestadt told Agent Simandy that on October 6, 2011, the defendant contacted Copters Corporation and arranged a one-day rental of a helicopter for December 15, 2011.

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 Alfred Anderson and James Reardon. At the hearing on the government's motion in limine, Agent Simandy testified that the defendant's repeated references to "blood diamonds" referred to elephant ivory tusks. Agent Simandy also testified that the defendant and his associates made repeated references to "Charlie tango." Simandy testified that on October 8,

2011 the defendant stated “Charlie tango is ready,” which he believed was a reference to the helicopter that the defendant had arranged to rent from Copters Corporation. Finally, Agent Simandy testified that the defendant and his alleged co-conspirators referred to a “black cat.” Simandy testified that on October 4, 2011, the defendant stated “black cat was arranged,” which 2011 Simandy believed was a reference to the three AK-47s defendant had agreed to purchase from Agent Lamberti at Weapons Unlimited.

Murder of James Reardon

Conversations recorded by the government reveal that by mid-November, 2011, Reardon had serious second thoughts about the “hunt,” concerned about its legality. He voiced these thoughts to Anderson, who called the defendant to say that Reardon was a security risk who should be put “out of the picture.” Defendant replied, “Just shut him up for a while... I don’t want anything to do with this.” On November 28, 2011, Reardon called his friend, Daniel Best, and related to him a narrative of the conspiracy and his concerns that Anderson might harm him. He informed Best that he intended to invite Anderson to his home to speak again the following day. Best drove to Reardon’s home on the evening of November 29, 2011 and observed Anderson running out of Reardon’s front door. Best entered the home to find Reardon dead. Anderson was apprehended shortly thereafter and confessed to killing Reardon to prevent him from exposing the conspiracy.

II. Procedural Background

The defendant was taken into federal custody on December 1, 2011. On December 4, 2011, the Grand Jury returned an indictment charging the defendant with conspiracy to deal unlawfully in firearms, conspiracy to commit crimes of violence against an animal enterprise, and one count of conspiracy to commit unlawful takings under the Endangered Species Act.

On May 1 and May 2, 2012, the district court heard evidence and argument concerning three motions: the government's motion to admit Daniel Best's conversation with James Reardon under FRE 804(b)(6), the forfeiture-by-wrongdoing hearsay exception; a motion to quash the government's subpoena seeking journalist Crawley's sources; and the government's motion to admit the lay witness opinion testimony of Agent Simandi. On May 2, the district court ruled against the government on all three issues. The government now appeals these determinations.

III. Analysis

A. Pinkerton Conspiratorial Liability and Rule 804(b)(6)

The government first argues that the district court erred by denying its motion to admit Reardon's hearsay statements to Best into evidence under Rule 804(b)(6) of the Federal Rules of Evidence. The defendant contended, and the district court held as a matter of law, that under the holding of *Giles v. California*, 554 U.S. 353 (2008), the forfeiture-by-wrongdoing exception to the hearsay rule is inapplicable where, as here, a defendant does not engage or acquiesce in wrongdoing with the intent of rendering the witness unavailable.

The Reardon hearsay statements are highly relevant to the government's case. At issue is a statement made by Reardon to Best on November 28, 2011, the eve of Reardon's murder. In that statement, Reardon provided Best with a narrative of the alleged events, describing the defendant's role in soliciting Reardon and Anderson to "hunt" the elephants in order to harvest and sell their ivory. Reardon's statements are also probative of defendant's intent to acquire illegal weapons for Reardon and Anderson. The government argued that the disputed statements were admissible under the hearsay exception of forfeiture by wrongdoing because Reardon was

killed by the defendant's co-conspirator in furtherance of the conspiracy, and his death was reasonably foreseeable to the defendant.

Forfeiture by wrongdoing is a long-recognized exception to the rule against hearsay. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004). In *Reynolds v. United States*, the Court stated that “[t]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” 98 U.S. 145, 158 (1878). All circuits recognize the common law doctrine of forfeiture by wrongdoing, and Rule 804(b)(6) codified this doctrine as an exception to the general rule barring admission of hearsay evidence. In order to apply the forfeiture-by-wrongdoing rule, the court must find, by a preponderance of the evidence that (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness. See, e.g., *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005).

In *Giles v. California*, the Supreme Court took up the forfeiture-by-wrongdoing exception, concluding that the exception required that the defendant “intended to prevent a witness from testifying.” 554 U.S. 353, 361 (2008). Accordingly, the Court held that California's version of the exception permitted the admission of testimonial evidence in violation of the Confrontation Clause, because the exception required that the defendant commit a wrongful act that procured the witness's unavailability but, in contrast to the founding-era exception, contained no requirement that the defendant intend the witness's absence. *Id.* at 358, 366.

The defendant contends, and the district court held, that *Giles* requires that the defendant himself must have intended to render the witness unavailable to testify. The government does not

dispute that the defendant was neither present at Reardon's murder, nor ordered Anderson to kill Reardon. The government, however, contends that defendant should be held responsible for the actions of his co-conspirator Anderson, who killed Reardon in order to prevent him from exposing the conspiracy to the authorities, under the doctrine of conspiratorial liability articulated in *Pinkerton v. United States*, 328 U.S. 640 (1946). Under the doctrine of conspiratorial liability, "the overt act of one partner in crime is attributable to all." *Id.* at 647. "Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective." *Id.* The substantive offense need only be shown to have been reasonably foreseeable as a natural and necessary consequence of the conspiracy. *Id.* at 647-648. The government argues that by his participation in the conspiracy, defendant "acquiesced" in wrongdoing intended to render Reardon unavailable.

Whether hearsay statements may be admitted under the forfeiture-by-wrongdoing exception pursuant to a conspiracy theory of liability is a matter of first impression in this circuit. We hold that traditional principles of vicarious liability are inapplicable to forfeiture-by-wrongdoing analysis. We interpret Rule 804(b)(6), consistent with *Giles*, to require proof that the defendant intended to procure the unavailability of the witness. The plain, clear words of the Court in *Giles* require such a result; in order to forfeit the right to cross-examination, a defendant must have engaged in conduct "designed to prevent the witness from testifying." *Giles*, 554 U.S. at 359 (emphasis added). Forfeiture through conspiratorial liability is inconsistent with this requirement. That a defendant could have reasonably foreseen that a co-conspirator would silence a witness does not mean that the defendant intended or designed that outcome.

Here, the defendant himself not only took no affirmative act to silence Reardon, but there is no evidence that he intended to do so or intended for Anderson to do so. The government in

fact concedes that mere hours prior to Reardon’s murder, the defendant instructed Anderson to “hold off” from harming Reardon. Therefore, we conclude that the district court properly excluded the Reardon hearsay statements against the defendant, and we find them inadmissible.

B. The Journalist’s Privilege

1. Existence of the Journalist’s Privilege

The government contends that neither the Constitution nor the common law grant a testimonial privilege to journalists. The Supreme Court decided the former issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972), when it declined to “interpret the First Amendment to grant newsmen a testimonial privilege.” However, *Branzburg* contemplated other measures to protect the confidentiality of journalists’ sources:

At the federal level, Congress has the freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate. *Id.* at 706.

In 1975, three years after *Branzburg*, Congress passed Federal Rule of Evidence 501. Rather than outlining specific privileges (as an earlier draft of the proposed rule had), the rule takes an open-ended approach providing that “[t]he common law—as interpreted by United States Courts in the light of reason and experience—governs a claim of privilege ...” Fed. R.Evid. 501. Accordingly, where federal law provides the rule of decision, privileges continue to be developed by the courts of the United States.

The Supreme Court first recognized a privilege under Rule 501, the psychotherapist-patient privilege, in *Jaffee v. Redmond*, 518 U.S. 1 (1996). There, the Court articulated three considerations governing the recognition of such privileges: (1) the significant public and private interests that would be served by the privilege; (2) the relative weights of the interests to be

served by the privilege and the burden on truth-seeking that might be imposed by it, and (3) “reason and experience” – that is, the extent to which the privilege is recognized by the states. It is under this framework that we consider the journalist’s privilege. *Id.* at 9-14.

The public good to be served by recognition of the journalist privilege is manifold. Like the psychotherapeutic relationship, the relationship between a journalist and her source is dependent on trust. By protecting sources from exposure, the privilege will encourage the disclosure of sensitive information to the press. This is especially important, given that “the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press would be limited in its ability to report on government if sources could not be protected from exposure.

Under the second prong of the *Jaffee* analysis, the evidentiary benefit resulting from denial of the journalist’s privilege is modest. Indeed, the lack of a privilege could well result in a decrease in evidence. Without some confidence that compelled disclosure is unlikely, potential sources will be reluctant to disclose sensitive information. Thus, much of the evidence that parties desire would never come into existence.

Finally, analysis under the third prong of *Jaffee* supports the common law privilege. A majority of states have recognized a journalist’s privilege, whether by statute, *see, e.g.*, N.J. Stat. Ann. 2A:84-A-21 (West 2010), or by judicial decision. *See, e.g., Connecticut State Bd. Of Labor Relations v. Fagin*, 370 A.2d 1095, 1097 (Conn. Super. Ct. 1976). Thus, reason and experience also support recognition of a journalist’s privilege. For all of these reasons, we find that the federal common law recognizes a journalist’s privilege under Rule 501.

2. The Journalist's Privilege is Absolute

The government argues that even if a common law journalist's privilege is appropriate, it must be a qualified privilege balancing the need for confidentiality against the need for disclosure. This court refuses to take such a narrow view of the privilege. Like the Court in *Jaffee*, we conclude that "making the promise of confidentiality contingent upon a trial judge's later evaluation" of the relative importance of the need for evidence and the need for confidentiality would "eviscerate" the privilege. 518 U.S. at 17. Faced with uncertainty as to whether a journalist's promise would be honored, sources would become reluctant to speak. Such a result is plainly inimical to the public good. Thus, we find that the privilege is absolute and may not be overcome by a showing of need. However, like the district court, we would be inclined to sustain the privilege even under a balancing test. The government has not made a strong showing of need for the evidence in question.

C. Lay Witness Testimony

The government also challenges the district court's decision to exclude the lay witness opinion testimony of Agent Simandy under FRE 701. This court agrees with the district court and holds that a witness's testimony concerning alleged code words or phrases in a conversation is admissible as lay opinion only if the agent has first-hand knowledge either as (1) a participant in a conversation, or (2) as a listener to a conversation who contemporaneously observes the speakers.

Under Federal Rule of Evidence 602, a witness may not testify unless "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The Rule is explicit that the only exceptions to the requirement of personal knowledge are those permitted by Rule 703, relating to expert witnesses. Rule 701 allows a lay witness to offer

opinions only if they are “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. Subsection “(a) is the familiar requirement of first-hand knowledge or observation” and the limitation in (b) is phrased in terms of requiring that the lay witness's testimony be helpful in resolving issues. *Id.* advisory committee's note. Accordingly, a court may not admit lay opinion testimony unless it is “based upon his or her personal observation and recollection of concrete facts.” *United States v. Peoples*, 250 F.3d 630, 639 (8th Cir. 2001) (quoting *Wactor v. Spartan Transp. Corp.*, 27 F. 3d 347, 350 (8th Cir. 1994).

In *Peoples*, the trial court permitted an FBI agent who had not heard or observed conversations to give her opinion concerning the meaning of words and phrases used, testifying to “hidden meanings.” For example, she opined that “buying a plane ticket” meant “killing.” 250 F.3d at 640. Relying on the plain language of Rules 602 and 701, the Eighth Circuit concluded that the testimony was erroneously admitted, ruling that “[w]hen a law enforcement officer is not qualified as an expert by the court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.” *Id.* Rather than helping the jury understand the evidence, the agent’s lay opinion in *Peoples* was mere argument from the witness stand, as the trial court conceded. Moreover, in cases where such evidence is necessary to explain the meaning of criminal jargon, agents use their particular expertise to decipher it for the jury. But to permit such testimony as lay opinion is to permit an end run around the more exacting requirements for expert testimony. *See id.*

Here, like the agent in *Peoples*, Agent Simandy lacked first-hand knowledge of the matters about which the government wished him to testify. His opinions were based on his investigation after the fact, largely his second-hand review of transcripts of conversation, and were not based on personal experience of those conversations. Accordingly, the district court did not err in excluding Agent Simandy's opinion about the "hidden meanings" in the intercepted telephone conversations.

ZHU, Circuit Judge, dissenting.

A. Pinkerton Conspiratorial Liability and Rule 804(b)(6)

First, the application of Pinkerton conspiratorial liability in the context of 804(b)(6) is accepted by every circuit that has considered the issue. These courts correctly conclude that traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis. *See, e.g., United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000).

The majority reads *Giles v. California*, 554 U.S. 353, too literally, and I would hold, consistent with all those circuits that have considered this matter, that Pinkerton vicarious liability is applicable to Rule 804(b)(6). The forfeiture-by-wrongdoing exception prevents "abhorrent behavior which strikes at the heart of the system of justice itself." Advisory Committee Note to Fed.R.Evid. 804(b)(6). This purpose supports a broad reading of the elements of the exception. *See, e.g., Gray*, 405 F.3d at 241-42.

The government has met its burden of proving by a preponderance of the evidence that co-conspirator Anderson's wrongful procurement of James Reardon's unavailability was within the scope of the conspiracy and reasonably foreseeable by defendant as a necessary or natural consequence of the conspiracy. *See Cherry*, 217 F.3d at 820.

Finally, I would note that if a defendant may be convicted of murder based upon the foreseeable act of a co-conspirator, it is at the very least incongruous that hearsay evidence may not be admitted against him on the same basis.

B. The Journalist's Privilege

Like the Court in *Branzburg*, I “perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news-gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.” 408 U.S. at 690-91. The argument that the press’s ability to collect and disseminate news will be undermined in the absence of a testimonial privilege is pure fear-mongering. The common law recognized no such privilege, yet from the beginning of our nation, a vibrant, independent press has flourished. *Id.* at 698-99. Although it is often said that informants will not speak without assurance of confidentiality, proponents of this popular wisdom provide no data. I would follow the Seventh Circuit in forgoing a journalist’s privilege, even a qualified privilege. *See McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). Like that court, I believe that “rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances.” *Id.* Although declining to recognize a testimonial privilege in *Branzburg*, the Court was clear that bad-faith use of the subpoena power “undertaken not for purposes of law enforcement but to disrupt a journalist’s relationship with his news sources” would violate the First Amendment. 408 U.S. at 707-08. To my mind, that is protection enough.

C. Lay Witness Testimony

The majority's ruling – that testimony concerning the meaning of words in a conversation is inadmissible as lay opinion unless the witness participated in the conversation, or observed it contemporaneously – is simply wrong. When a witness like Agent Simandy reviews certified transcripts of conversations and then testifies as to his conclusions concerning the use of terms in those conversations, that testimony is based on first-hand knowledge of the records. That is all that is meant by the requirement of Rule 701(a) that opinion be “rationally based on the witness's perception.” *See, e.g., United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).

In *Jayyousi*, an agent's lay opinion regarding the meaning of code words used in intercepted telephone conversations was deemed admissible. The agent was not a participant to the conversations and did not listen to them contemporaneously. Instead, he reviewed transcripts of the conversations after they occurred. The agent in *Jayyousi* was allowed to testify to the defendant's use of code words such as “football” and “soccer” for “jihad,” “sneakers” for “support,” and “dogs” for the “U.S. government.” Our case cannot be meaningfully distinguished from *Jayyousi*. *Id.* at 1097.

Moreover, as required by Rule 701(b), testimony like Agent Simandy's is helpful to the jury. As in *Jayyousi*, the agent's familiarity with the investigation allowed him to perceive coded meanings not easily discernible by the jury. *See id.* at 1103. For example, the defendant stated that “black cat was arranged” just two days after purchasing three AK-47s from Weapons Unlimited. Finally, testimony like that here is not based on scientific, technical, or other specialized knowledge within the scope of expert testimony under Rule 702(c). Agent Simandy did not base his conclusions on his extensive experience, but only on what he learned in this specific investigation.

Accordingly, the district court erred in excluding the lay opinion testimony of Agent Simandy.

The majority today issues three wrong-headed decisions on the law, gratuitously restricting the government's ability to do justice.

I dissent.