TWENTY-EIGHTH ANNUAL

DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 12-23

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

--against--

WILLIAM BARNES

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM

----------X
UNITED STATES OF AMERICA

No. 11-76 (NJT)

---against---

INDICTMENT

WILLIAM BARNES,

Defendant
----------X
The Grand Jury Charges:

RELEVANT PERSONS AND EVENTS

1. At all times relevant to this indictment, William Barnes ("Defendant") was the sole proprietor of Big Top Circus and co-owner of the unregistered charity "Boerum 4 Animals."

2. In or about May 2000, Defendant inherited Big Top Circus, a small business, from his father, Ben Barnes. Big Top Circus is located in rural southern Boerum, whose grasslands and tropical deciduous forests resemble the native habitat of Asian elephants, Big Top Circus's primary attraction. Big Top Circus is located on over a hundred acres of fenced land, providing ideal elephant grazing grounds. Although Big Top is nationally-known for its large herd of twenty elephants, by July 2011, it approached bankruptcy.

3. Boerum 4 Animals was established by Defendant and Alfred Anderson ("Anderson") in or about August 2008 after Defendant and Anderson met at a hunting convention in Billings, Boerum. At all times relevant to the indictment, Anderson was a resident of Billings, Boerum. In July 2010, Anderson was convicted of fraud in connection with Boerum 4 Animals and performed 100 hours of community service for soliciting donations on behalf of an unregistered charity and using the monetary donations to fund bear-hunting trips with Defendant. Defendant was not charged.

COMMON ALLEGATIONS

4. On or about July 10, 2011, Defendant was informed by Big Top Circus's accountant that Big Top needed to raise $500,000 dollars by December 2011 or file for bankruptcy.

5. On or about July 12, 2011, once he realized that the circus's finances were unsalvageable, Defendant contacted Boerum City Circus and Flying Feats Circus and invited them to join

Big Top Circus in staging the "greatest elephant show on earth," beginning that December. He proposed that the three circuses join forces for a month of special holiday performances. Boerum City Circus's and Flying Feats Circus's elephants would be quartered with his elephants and free to graze on his expansive acreage. Given that both Boerum City Circus and Flying Feats Circus are located in northern Boerum and typically traveled to the south to winter their elephants at significant expense, they agreed to join Big Top Circus. Boerum City Circus and Flying Feats Circus each anticipated bringing ten Asian elephants to perform with Big Top Circus. The elephants were to arrive on December 2, 2011.

6. On or about July 30, 2011, Defendant contacted Alfred Anderson and offered him the opportunity to "hunt" elephants on his property and offered him a share of the ivory in an attempt to reap what profit he could from the crumbling circus. Anderson agreed and suggested that they find a third hunter. Defendant agreed.

7. On or about August 30, Defendant contacted Kara Crawley, a reporter at the Boerum Times, and informed her of the planned elephant show. He offered her unrestricted access to the circus in exchange for an article that would raise the profile of the planned event in an attempt to wring what profit he could from Big Top before the elephant "hunt." Crawley accepted his offer.

8. On or about September 1, 2011, Alfred Anderson informed Defendant that his long-term acquaintance, James Reardon, who lived in Atlantis, a neighboring state, was interested in participating in the elephant-hunting scheme. Defendant agreed to involve Reardon.

9. During September 2011, Defendant discussed the details of the planned hunt with Anderson. Defendant recommended that the three men use a helicopter for the sake of rapidity and that they purchase assault rifles.

10. On or about October 1, 2011, Anderson accepted Defendant's proposal on behalf of himself and Reardon, contingent on Defendant providing the necessary equipment for the hunt.

11. On or about October 2, 2011, Defendant contacted Weapons Unlimited, located in the neighboring state of Texas, to inquire as to the price of three assault rifles. Unbeknownst to Defendant, his contact at Weapons Unlimited was an undercover Bureau of Alcohol, Tobacco, and Firearms ("ATF") agent, Jason Lamberti. The agent informed him that it would cost $1000 per weapon, plus $300 in fees, and that there was a three month waiting period to acquire a semiautomatic AK-47 legally in Boerum. The agent stated, however, that if he was willing to deal under the table, they could provide him with three fully automatic AK-47s immediately for $500 each. Defendant stated that he would prefer that the weapons were unregistered and fully automatic, and accepted the latter offer. He provided his credit card information, paid in full, and the agent agreed to deliver the weapons on December 5, 2011. Based on Agent Lamberti's information, the FBI obtained a warrant permitting interception of Defendant's telephone communications.

12. On or about October 6, 2011, Defendant contacted sales representative Alan Klestadt at Copters Corporation, incorporated and headquartered in Texas, and arranged the one-day rental of a helicopter for December 15, 2011.

13. On or about October 15, 2011, Defendant contacted Anderson and informed him that arrangements were complete. The Defendant and Anderson finalized the deal, and agreed that the hunt would take place on December 15, 2011. Anderson wired the defendant $1,000 on behalf of himself and Reardon to cover the cost of the weapons.

14. Based on information from an unidentified source, on December 1, 2011, Crawley published an exposé of the Defendant's plan to kill the elephants. Defendant was taken into federal custody later that day.

COUNTS ONE AND TWO
(Conspiracy to Deal Unlawfully in Firearms)
18 U.S.C.A. §§ 371 and 922(a)(1)(a)

15. The allegations contained in paragraphs 1 through 14 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

16. On or about October 2, 2011, Defendant did conspire to deal unlawfully in firearms when, without a dealer's license, he purchased two firearms for two individuals, namely Alfred Anderson and James Reardon, who he had reason to believe was not a resident of Boerum State.

COUNTS THREE AND FOUR
(Conspiracy to Commit a Crime of Violence Against an Animal Enterprise)
18 U.S.C.A. §§ 43 and 371

17. The allegations contained in paragraphs 1 through 14 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

18. On or about July 30, 2011; in or about September 2011; and on October 1 and 15, 2011, Defendant did unlawfully use a facility of interstate commerce, to wit, a telephone, to conspire, for the purpose of damaging or interfering with the operations of Boerum City Circus, an animal enterprise, to intentionally damage the personal property, namely ten Asian elephants, of that animal enterprise.

19. On or about July 30, 2011; in or about September 2011; and on October 1 and 15, 2011, Defendant did unlawfully use a facility of interstate commerce, to wit, a telephone, to conspire, for the purpose of damaging or interfering with the operations of Flying Feats Circus, an animal enterprise, to intentionally damage the personal property, namely ten Asian elephants, of that animal enterprise.

COUNT FIVE
(Conspiracy to commit unlawful takings under the Endangered Species Act)
16 U.S.C.A. §§ 371 and 1538

20. The allegations contained in paragraphs 1 through 14 of this Indictment are realleged and incorporated by reference as if fully set forth herein.

21. Defendant did conspire to unlawfully take forty animals protected under the Endangered Species Act, namely forty Asian elephants, when he arranged with two individuals, namely Alfred Anderson and James Reardon, on October 15, 2011, to kill the elephants on or about December 15, 2011; on or about October 2, 2011, conspired to procure firearms in furtherance of that conspiracy; and, on or about October 6, 2011, attempted to procure a helicopter in furtherance of that conspiracy.

DATED: December 4, 2011

A TRUE BILL

_____/s/ _____
Foreperson

Kevin Bayne
United States Attorney

_____/s/ _____
Assistant United States Attorney
Criminal Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA

- against - **Cr. No. 11-76**

WILLIAM BARNES
----------X

May 1, 2012 and May 2, 2012

TRANSCRIPT OF HEARING AND DECISIONS ON PRE-TRIAL MOTIONS BEFORE THE HONORABLE JENNIFER WU,
CHIEF JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES:

For the United States of America:	Kevin Bayne United States Attorney *by* Sheila Murphy Assistant United States Attorney 240 Federal Plaza Boerum City, Boerum 40322
For Defendant William Barnes:	Ian Shuster Shuster and Sylvester 3 Park Towers Billings, Boerum 40322
For Kara Crawley:	Tomas Wieczorek Wieczorek and Jarolzelski 33 Greenpoint Ave Boerum City, Boerum 40322
Court Reporter:	Melissa Aldito 240 Federal Plaza Santa Neila, Boerum 40322

CLERK: United States of America versus William Barnes. Counsel, note your appearance on the record.

MS. MURPHY: Sheila Murphy for the United States.

MR. SHUSTER: Ian Shuster of Shuster and Sylvester for the Defendant, William Barnes.

MR. WIECZOREK: Tomas Wieczorek for Kara Crawley.

THE COURT: Good afternoon. I understand we have three separate motions before us today. One motion from the government moving to introduce out-of-court statements made by the late James Reardon to a Mr. Daniel Best, as an exception to the hearsay rules under Rule 804(b)(6). And the defense is arguing that 804(b)(6) is inapplicable, correct?

MR. SHUSTER: Yes, Judge.

MS. MURPHY: Yes, Judge. Pre-marked as Government's Exhibit A for identification is a transcript of two telephone calls recorded between the defendant and Anderson on November 15, 2011 and November 29, 2011 . . . .

THE COURT: (*interrupting*) Just to be clear, am I correct in assuming that these conversations are part of a larger body of conversations intercepted by the FBI?

MS. MURPHY: Yes. Defendant's telephone calls were intercepted pursuant to warrant during the FBI's investigation. The government intends to offer a series of these calls at trial. The two conversations that make up our Exhibit A are part of that series and are offered here in support of our motion to admit Mr. Best's testimony concerning his conversation with Reardon.

THE COURT: Does the defendant concede that the document offered by the government is an accurate transcript of the phone calls and that party one is Barnes and party two is Anderson?

MR. SHUSTER: Yes, your Honor, though we dispute the legal implications of the conversation.

THE COURT: Of course, counsel. The transcript of phone calls is admitted into evidence as Government's Exhibit A. We'll come back to that motion. I believe the second motion is by a third party, a witness subpoenaed to testify by the government, Ms. Kara Crawley of the Boerum Times. Ms. Crawley is moving to quash the subpoena, citing the journalist's privilege. Yes?

MS. MURPHY: Yes, Judge.

MR. SHUSTER: Yes, Judge.

THE COURT: The final issue is also witness-related – I believe the government is seeking to introduce the testimony of Agent Thomas Simandy as a lay witness under Rule 701. And the

31 defense contends that the testimony of Agent Simandy does not meet the requirements of Rule
32 701, specifically, that the testimony is not based on the witness's perception, correct?
33 MS. MURPHY: Yes, Judge.
34 MR. SHUSTER: Yes, Judge.
35 THE COURT: Okay, let's start with the 804(b)(6) issue. You may proceed.
36 MS. MURPHY: Thank you, Judge. The government contends that the defendant conspired with
37 James Reardon and Alfred Anderson to kill forty Asian elephants belonging to Big Top Circus,
38 Boerum City Circus, and Flying Feats Circus on December 15, 2011. Defendant conceived of the
39 scheme to kill the elephants and profit from the ivory and contacted his long-time business
40 partner in other fraudulent schemes, Mr. Anderson, for assistance. In pursuit of additional
41 manpower, Mr. Anderson solicited James Reardon to join them in the scheme. In the first
42 telephone call, recorded between Defendant and Anderson on November 15, 2011, Anderson
43 voices his concerns that Reardon is having second thoughts about going through with the
44 scheme, and says to the defendant, "Let's get rid of him." In the second telephone call, recorded
45 between Defendant and Anderson at 2:00 a.m. on November 29, 2011, Anderson expresses to the
46 defendant his concern that Reardon will betray them. Anderson states, "We're out of time. We
47 need him out of the picture." Later on November 29, 2011, at approximately 7:30 p.m., Daniel
48 Best observed Anderson running from Reardon's apartment. Best entered the apartment to find
49 Reardon dead on the floor. Anderson was apprehended by the police later that evening and
50 confessed to killing Reardon in order to prevent him from exposing the scheme to the police.
51 THE COURT: Counsel, are these facts in dispute?
52 MR. SHUSTER: Mr. Reardon's death is a matter of public record. Anderson confessed to killing
53 Reardon, and we do not argue that he was not Mirandized or that the confession was involuntary.
54 Anderson, however, was a very mentally ill man. This entire outlandish "elephant hunt" was a
55 delusion. The defendant never had any intention of harming his own elephants because they were
56 vital to his business. He solicited Anderson to join him on an ordinary hunting expedition.
57 Anderson invited Reardon to join them – and concocted a fantastical story that they would be
58 hunting the defendant's elephants.
59 THE COURT: Thank you, counsel. Ms. Murphy, what are the statements you seek to admit on
60 this motion?

MS. MURPHY: We seek to admit hearsay statements from Daniel Best. On the evening of November 28, 2011, Reardon called Mr. Best and described the planned scheme. Reardon described not only speaking to Anderson, but speaking directly with the defendant earlier on November 28, 2011. We do not have a recording of that phone call because it was not made from the defendant's phone. Mr. Reardon recounted the phone call to Mr. Best, specifically stating that the defendant described how they would kill the elephants and split the ivory. He indicated that he had invited Anderson to come to his house later that day, although he was fearful of Anderson. The testimony is highly relevant to the government's case. Given that the defendant and Mr. Anderson were co-conspirators, Reardon was killed in furtherance of the conspiracy, and his death was foreseeable, Mr. Best's hearsay testimony should be admissible against the defendant.

THE COURT: *Pinkerton*, Counsel?

MS. MURPHY: Yes, Judge. We would argue that the *Pinkerton* doctrine of conspiratorial liability is applicable to forfeiture-by-wrongdoing analysis under Rule 804(b)(6). Under the rule, hearsay statements are admissible against a defendant who has acquiesced in wrongful acts intended to cause the declarant's absence from trial. The reasonable foreseeability required for conspiratorial liability is a sufficient showing of acquiescence according to every court that has considered the matter. Here, it was reasonably foreseeable that Anderson would wrongfully cause Reardon's unavailability by killing him.

THE COURT: The response from the defense?

MR. SHUSTER: Judge, as a matter of law, *Pinkerton* liability cannot be extended to forfeiture-by-wrongdoing analysis. In *Giles v. California*, the Supreme Court considered the contours of the forfeiture-by-wrongdoing hearsay exception and concluded that the exception requires a showing that the defendant intended to procure the declarant's unavailability. Under this ruling, *Pinkerton's* reasonable foreseeability is simply not enough. And since Mr. Barnes plainly told Anderson to "hold off" on silencing Reardon, the *Giles* requirement is not satisfied here.

THE COURT: Thank you, counsel. Next issue? I understand that counsel for Ms. Crawley has made a motion to quash the subpoena.

MR. WIECZOREK: Yes, your Honor, we would argue that the conversations at issue are protected by a journalist privilege under Rule 501. I would like to call Ms. Crawley to the stand.

* * * *

MR. WIECZOREK: Would you please state your name for the record?

MS. CRAWLEY: Kara Crawley, last name C-R-A-W-L-E-Y.

MR. WIECZOREK: Where do you work, Ms. Crawley?

MS. CRAWLEY: I work for the Boerum Times as a staff writer and associate producer for the local Boerum news section.

MR. WIECZOREK: Did you write a story on Big Top Circus?

MS. CRAWLEY: Yes.

MR. WIECZOREK: How did that project come about?

MS. CRAWLEY: Mr. Barnes, the owner of Big Top, initially contacted me on August 30, 2011 about doing a piece on the circus in order to increase publicity for an upcoming event.

MR. WIECZOREK: Did you record this conversation?

MS. CRAWLEY: Yes, we record all of our calls at Boerum Times.

MR. WIECZOREK: Did you agree to do the story?

MS. CRAWLEY: Yes, I did. I have a strong interest in animal rights and I was hoping to gain some inside information on how the animals were treated at Big Top.

MR. WIECZOREK: Did Mr. Barnes agree to let you tour Big Top in order to gather information for the story?

MS. CRAWLEY: Yes, he promised to give me unlimited access to Big Top. I went for my first day of touring on September 15, 2011.

MR. WIECZOREK: And when you went to Big Top that day, did you ask Mr. Barnes to sign anything?

MS. CRAWLEY: Yes, I asked him to fill out a standard release form that says he retains no legal control over the final product.

MR. WIECZOREK: Once you began the tour, what parts of the circus did you see?

MS. CRAWLEY: First, I saw the press office and the ticket sales office. After that, Mr. Barnes took me to see the animals and meet their trainers.

MR. WIECZOREK: Was this your final stop in the tour?

MS. CRAWLEY: Yes. Mr. Barnes offered to show me different parts of the circus but I said that I would prefer to stay at the training ring.

MR. WIECZOREK: Did you spend any additional days at the training ring after this first day?

MS. CRAWLEY: Yes. I came to watch the animals train every day for about two weeks.

MR. WIECZOREK: Did you meet anyone in the training ring?

MS. CRAWLEY: Yes, I met several trainers and a few other various employees.

MR. WIECZOREK: Is there any one employee you gained particularly interesting information from?

MS. CRAWLEY: Yes. I developed a rapport with one particular employee.

MR. WIECZOREK: Did this employee know who you were?

MS. CRAWLEY: Yes. The employee knew my name and knew that I was working in conjunction with the circus's press office to publish a story about the circus.

MR. WIECZOREK: Did this employee help you gather any information?

MS. CRAWLEY: Yes. I asked the employee to show me where the elephants were kept. The employee brought me to the private caging area.

MR. WIECZOREK: What happened next?

MS. CRAWLEY: The employee asked my advice on something of a sensitive, delicate nature. The employee spoke in hushed tones and revealed to me that he or she had overheard a certain conversation between Mr. Barnes and another party concerning a plan to kill the elephants for their ivory.

MR. WIECZOREK: Did the employee give you permission to reveal his or her identity along with this tip?

MS. CRAWLEY: No. The employee asked me not to reveal the tip while he or she was still working at the circus. The employee requested that a pseudonym be used in place of a real name in the article and the employee also requested not to be identified as an employee at Big Top. The employee was very concerned for his or her safety if Mr. Barnes found out what he or she had revealed to me.

MR. WIECZOREK: I have nothing further.

THE COURT: Any cross, Ms. Murphy?

MS. MURPHY: Ms. Crawley, the employee you spoke to agreed to be videotaped by you, right?

MS. CRAWLEY: Yes, but only so I could have a tape of our conversation for my notes.

MS. MURPHY: But the employee's face was visible during the recording, right?

MS. CRAWLEY: Yes. However, the video was for my eyes only.

MS. MURPHY: Was the story ever published?

MS. CRAWLEY: Yes. It was published in the Boerum Times on December 1, 2011.

MS. MURPHY: Did this article reveal what you had learned from the employee about the elephant poaching plan at Big Top?

MS. CRAWLEY: Yes, it did.

MS. MURPHY: Nothing further, your Honor.

MR. WIECZOREK: Nothing on redirect, your Honor.

THE COURT: Thank you for your testimony, Ms. Crawley. You may step down. Mr. Wieczorek, why should this court recognize a journalist's privilege?

MR. WIECZOREK: Your Honor, the relationship between a journalist and her sources rests on trust. The lack of a privilege will dissuade people from talking to the press, which ultimately hurts the public. Further, even if people do agree to talk to the press, the lack of a privilege will cause them to self-censor their stories, potentially leaving out important information and thus providing the public with an incomplete or distorted account. For these reasons and for the other reasons set out in my brief, it is essential that this court recognize the journalist's privilege under Rule 501.

THE COURT: Ms. Murphy?

MS. MURPHY: Your Honor, the Supreme Court explicitly declined to recognize a journalist's privilege in *Branzburg v. Hayes*. The press should not be exempt from the duty to give evidence. The privilege would work against the public interest by keeping critical evidence from the jury. For this reason, and for the other reasons in my brief, this court should not recognize a journalist's privilege. Moreover, if this court does decide to recognize a journalist's privilege, the privilege should be qualified rather than absolute. Where a court determines that the interests furthered by disclosure outweigh the interests furthered by the privilege, the privilege should give way. This case is a prime example of evidence that would not deserve protection under the privilege. The testimony here relates to non-confidential information and therefore there is not a strong interest in protecting it. The employee appeared on camera without asking for his or her face to be hidden. A person who was truly concerned with confidentiality would have requested that Ms. Crawley take handwritten notes rather than risk having the videotape fall into the wrong hands. In light of the heinousness of the crimes charged, the interest in further evidence clearly outweighs the need for this employee to remain anonymous.

THE COURT: Mr. Wieczorek?

MR. WIECZOREK: Your Honor, the privilege should be absolute. A qualified privilege would not provide potential sources with the confidence that they need in order to speak freely to reporters. The existence of a privilege will provide little comfort to sources if they know that a judge can simply take it away if he or she deems that competing interests are more important than the source's anonymity. Further, even if the court does decide to make the privilege qualified, Ms. Crawley's testimony is clearly deserving of protection. The employee plainly indicated to Ms. Crawley that their conversation should remain private and took care to prevent anyone else from hearing. Out of fear of reprisals by the defendant, the source also asked Ms. Crawley not to tell the defendant about the conversation and requested that the information not be disclosed until the employee no longer worked at the circus.

THE COURT: But didn't the employee agree to go on camera? That doesn't sound very confidential.

MR. WIECZOREK: Your Honor, although the employee did agree to go on camera, the tape was only to be used by Ms. Crawley as notes for her article. The employee also requested that a pseudonym be used in the article. Finally, the government has not shown that this information is needed to secure a conviction.

THE COURT: Thank you, counselor. Now I would like to turn to the government's motion seeking to introduce the testimony of Agent Thomas Simandy as a lay witness under Rule 701.

MS. MURPHY: Yes, your Honor. The government would like to call Agent Thomas Simandy to the stand.

* * * *

MS. MURPHY: Would you please state your name for the record?

MR. SIMANDY: Thomas Simandy, last name S-I-M-A-N-D-Y.

MS. MURPHY: And where do you work?

MR. SIMANDY: I have been an agent for the Federal Bureau of Investigation for the past five years.

MS. MURPHY: When were you assigned to this case?

MR. SIMANDY: I was assigned to handle the case relating to Mr. Barnes on December 15, 2011. I took over the case after Agent Narvel Blackstock died.

MS. MURPHY: Please generally describe your investigation.

MR. SIMANDY: As part of my investigation, I thoroughly reviewed the transcripts of conversations between the defendant and his co-conspirators, Alfred Anderson and James Reardon. There were about a dozen conversations, and they took place from October 4, 2011 until the defendant's arrest on December 1, 2011. Agent Blackstock, who was originally assigned to the case, transcribed the conversations after listening to them contemporaneously. Additionally, I interviewed Agent Jason Lamberti from the Bureau of Alcohol, Tobacco, and Firearms and Alan Klestadt from Copters Corporation.

MS. MURPHY: And what did you learn from your interviews with Agent Lamberti and Mr. Klestadt?

MR. SIMANDY: Agent Lamberti told me that on October 2, 2011 the defendant contacted him at Weapons Unlimited, where he was working undercover, to inquire as to the price of three assault rifles. Alan Klestadt told me that on October 6, 2011, the defendant contacted Copters Corporation and arranged a one-day rental of a helicopter.

MS. MURPHY: What conclusions did you come to regarding the telephone conversations?

MR. SIMANDY: I concluded that certain code words and phrases were used. The defendant and his co-conspirators made repeated references to blood diamonds. I believe that these references throughout the conversations actually referred to elephant ivory tusks. The defendant and his colleagues also made reference to Charlie tango. On October 8, 2011, the defendant stated, quote, Charlie tango is ready, unquote. I believe that the references to Charlie tango actually referred to the helicopter that the defendant arranged to have ready from Copters Corporation to assist with their plan to poach the elephants. Also, the defendant and his co-conspirators made repeated references to a black cat. For example, on October 3, 2011, the defendant stated, quote, black cat was arranged, unquote, I believe that the references to black cat referred to the three AK-47s purchased from Agent Lamberti at Weapons Unlimited.

MS. MURPHY: How did you come to these conclusions?

MR. SIMANDY: I came to these conclusions by thoroughly reviewing the transcripts transcribed by Agent Blackstock and becoming familiar with the various discussions between the parties. Additionally, by interviewing Agent Lamberti and Alan Klestadt, I was able to put the conversations into context because of the dates of the conversations and the dates that the defendant contacted the two witnesses regarding the AK-47s and the helicopter. The context of the conversations allowed me to decipher the meaning of the words and phrases used. Everything

that I have learned by extensively investigating this case allowed me to come to these conclusions.

MS. MURPHY: I have nothing further, your Honor.

THE COURT: Any cross?

MR. SHUSTER: Just a few questions. Mr. Simandy, approximately how many cases have you been assigned to as an agent for the FBI?

MR. SIMANDY: Approximately 50.

MR. SHUSTER: Isn't it true that none of the previous cases you were assigned to involved poaching or other crimes against animals?

MR. SIMANDY: Yes, this is not a typical case.

MR. SHUSTER: What types of cases have you investigated?

MR SIMANDY: All types of general crimes, mostly drug-related cases.

MR. SHUSTER: And, Agent Simandy isn't it also true that you were not a participant in any of the conversations between the defendant and Mr. Anderson and Reardon.

MR. SIMANDY: That is correct.

MR. SHUSTER: And isn't it also true that you did not even listen to these conversations as they occurred? Instead you reviewed transcripts of conversation recorded by another agent?

MR. SIMANDY: That's correct.

MR. SHUSTER: So you are basing your interpretation of everyday words and phrases simply on reviewing pre-collected and transcribed information?

MR. SIMANDY: I came to my conclusions based on everything that I learned in the investigation. This included thoroughly reviewing the transcribed conversations and interviewing Agent Lamberti and Mr. Klestadt. The context of the conversations made it apparent what the defendant and his co-conspirators were discussing.

MR. SHUSTER: That's all, your Honor.

MS. MURPHY: I have no redirect, your Honor.

THE COURT: Thank you for your testimony, Mr. Simandy. You may step down. Ms. Murphy, how does this proposed testimony qualify as lay witness opinion?

MS. MURPHY: Judge, Agent Simandy's testimony clearly falls within Rule 701. The testimony is rationally based on his perception as required by the rule. The testimony is based on his first-

hand review, over a period of several months, of transcripts of the intercepted phone calls and interviews with Agent Lamberti and Mr. Klestadt.

THE COURT: Counselor, isn't what Agent Simandy did during his investigation the same as reading a book and then asserting first-hand knowledge to the events the book describes?

MS. MURPHY: No, Judge. Agent Simandy did not pretend first-hand knowledge of anything he did not personally observe. Instead, he testified about the records that he had personally examined. Further, because his first-hand knowledge will be limited to those materials, the government, at trial, will separately prove that those materials accurately represent the content of the defendant's conversations.

THE COURT: Isn't it the jury's job to come to its own conclusions regarding the meaning of the words used?

MS. MURPHY: Judge, the defense will be free to challenge Agent Simandy's testimony through cross-examination and on summation. However, the critical point for Rule 701 purposes is that Agent Simandy possessed first-hand knowledge of the materials about which he will testify. Further, as noted in the government's brief, courts have allowed testimony of this nature in cases with similar facts. For example, the Eleventh Circuit has held that an agent may testify as a lay witness to the meaning of code words and phrases after reviewing intercepted telephone conversations.

THE COURT: Okay, counselor. Can you speak to the other requirements of Rule 701?

MS. MURPHY: Yes, judge. The second requirement is that the testimony be helpful to a clear understanding of the witness's testimony or to determining a fact in issue. Agent Simandy's testimony will be helpful to the jury because his familiarity with the investigation allows him to perceive the meaning of coded language that the jury will not be able to easily discern. Finally, the testimony is not expert testimony. Agent Simandy is basing his testimony only on what he learned in this specific investigation.

THE COURT: Thank you counselor, anything else?

MS. MURPHY: No, your Honor.

THE COURT: Okay, the defense response?

MR. SHUSTER: Thank you, your Honor. The testimony of Agent Simandy does not meet the basic requirements of lay witness opinion under Rule 701. First, Agent Simandy's review of pre-collected information does not constitute the first-hand knowledge necessary to establish that his

testimony is rationally based on his perception. Second, lay opinion testimony is only admissible to help the jury understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make.

THE COURT: Counselor, could you elaborate on the business of first-hand knowledge.

MR. SHUSTER: Yes, judge. When courts permit witnesses to give their lay opinion about an event, it is because the witnesses personally perceived the events as they occurred, drawing on their sensory and experiential observations. Agent Simandy may have spent a significant amount of time investigating the case, but he was not a personal participant to the conversations and only reviewed the transcribed conversations long after they took place. In a similar case, the Eighth Circuit held that when 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.

THE COURT: Anything else counselor?

MR. SHUSTER: Nothing further. Thank you, judge.

DECISION ON PRE-TRIAL MOTIONS

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

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

First, the government's motion in limine seeking to introduce the testimony of Mr. Daniel Best under the 804(b)(6) exception to the hearsay rule is denied. Constrained by the decision of the Supreme Court in *Giles v. California*, I hold that as a matter of law, the forfeiture-by-wrongdoing exception of 804(b)(6) applies only when the defendant intended to prevent the witness from testifying and that mere foreseeability and participation in a conspiracy do not of themselves show that a defendant has intended, or as the Court also puts in its *Giles* opinion, has designed to render the witness unavailable. Therefore, conspiratorial liability does not satisfy

804(b)(6)'s requirement that a defendant cause or acquiesce in causing the declarant's unavailability. Since no more than foreseeability and conspiracy are alleged here, the hearsay evidence in question is inadmissible. Second, rejecting the government's contentions, this Court recognizes a journalist's privilege under Rule 501. The public interest in a robust press would be served by recognition of such a privilege. In contrast, the overall evidentiary benefit resulting from the denial of a journalist's privilege would be very modest. Finally, and perhaps most importantly, a majority of states have recognized such a privilege. In addition, I find that the privilege is absolute, not qualified. Its overriding purpose is to encourage people to speak to the press, and a qualified privilege would discourage sources from speaking freely. Moreover, although it is therefore irrelevant here whether the employee's need for confidentiality is stronger than the government's need for more evidence, I am of the opinion that the evidence obtained would be purely cumulative, cutting against a finding of need. Accordingly, I am granting Ms. Crawley's motion to quash the subpoena. Finally, the government's motion in limine seeking to introduce the testimony of Agent Thomas Simandy as lay witness opinion under Rule 701 is denied. Lay witness opinion must be rationally based on the perception of the witness, a requirement long understood to mean that it must come from first-hand knowledge or experience. This court holds that as a matter of law, a witness's testimony as to the meaning of alleged code words and phrases in a conversation is admissible as lay opinion only if the witness has first-hand knowledge either as (1) a participant in the conversation, or (2) as a listener to the conversation who contemporaneously observes the speakers. Where, as here, the witness has merely reviewed transcripts of conversations and otherwise reviewed the investigative work of other agents, the requirement of first-hand knowledge is not satisfied.

GOVERNMENT EXHIBIT A

INVESTIGATION NO.	[Redacted]
DATE OF RECORDING:	November 15, 2011 1:03 A.M.
RECORDING OFFICER:	Agent [ ]
TRANSCRIBER:	Maria Earnest, Goldstone Transcription Services
LANGUAGE:	English
TRANSLATOR:	N/A
PHONE NO.	919-647-9000 / William Barnes

[Incoming call from 607-656-9134]

PARTY 1: You better have a good reason for waking me up, Anderson.

PARTY 2: I do. [pause] Listen, I made a mistake with Reardon.

PARTY 1: What kind of mistake?

PARTY 2: He's having second thoughts. Shouldn't have used him.

PARTY 1: What the hell. I thought you said he'd follow through?

PARTY 2: That's what I thought. [pause] Let's get rid of him.

PARTY 1: [pause] Well, what did he say?

PARTY 2: He keeps asking questions. Keeps saying how he needs to stay out of trouble. Can't lose his job at the hardware store.

PARTY 1: What kind of questions?

PARTY 2: Legal ones, about permits and stuff.

PARTY 1: That's it?

PARTY 2: Yeah, but I've got a feeling.

PARTY 1: Yeah, well, don't do anything. Not yet.

PARTY 2: And if he says he's going to –

PARTY 1: Let me think about it. You're worried over nothing. [ends call]

INVESTIGATION NO.	[Redacted]
DATE OF RECORDING:	November 29, 2011 2:00 A.M.
RECORDING OFFICER:	Agent [ ]
TRANSCRIBER:	Maria Earnest, Goldstone Transcription Services
LANGUAGE:	English
TRANSLATOR:	N/A
PHONE NO.	919-647-9000 / William Barnes

[Incoming call from 607-656-9134]

PARTY 1: What?

PARTY 2: It's Reardon. I was right about him.

PARTY 1: What? I called him yesterday. Thought I smoothed it over.

PARTY 2: Apparently not. We're out of time. We need him out of the picture.

PARTY 1: Just tell him we called it off and not to worry about it.

PARTY 2: He might buy that, but when he sees the news –

PARTY 1: Yeah, yeah, you're right.

PARTY 2: I'm gonna take care of him.

PARTY 1: [pause] That's gonna make things a lot messier.

PARTY 2: Things are gonna be messy. What if people show up as we're in the process of …while we're at your place next month? You think of that?

PARTY 1: Yeah, well, that would be unavoidable. This is different.

PARTY 2: We have to. I'm doing it.

PARTY 1: Hold off. Just shut him up for a while.

PARTY 2: We're out of time.

PARTY 1: I don't want anything to do with this. [ends call]

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
----------X
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." Unbeknowst 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, s*ee, 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 Tranps. 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.

No. 12 - 23

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

WILLIAM BARNES,

Respondent.

October 1, 2012

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following certified questions:

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.