CHERRY STILL ON TOP: HOW *PINKERTON* CONCEPTS CONTINUE TO GOVERN CO-CONSPIRATOR FORFEITURE OF CONFRONTATION RIGHTS POST-*GILES*

Abstract: To combat the ever-expanding problem of witness intimidation, courts have employed familiar concepts of conspiracy liability to justify the extension of the forfeiture by wrongdoing doctrine in the context of group criminality. Under what is known as the *Cherry* doctrine, one co-conspirator's misconduct in making a witness unavailable can generally be imputed to another co-conspirator defendant to forfeit the latter's Confrontation Clause rights. In 2008, in *Giles v. California*, the U.S. Supreme Court added a wrinkle to this forfeiture analysis that seemingly put the *Cherry* doctrine in jeopardy. By inserting a new element of intent, the *Giles* decision potentially limited forfeiture to situations in which a defendant personally possessed the intent to make a witness unavailable. Despite what some commenters have suggested, however, the *Cherry* doctrine survives the *Giles* Court's shift in emphasis. Even though *Giles* now requires the *intent* to make a witness unavailable, the scope of the forfeiture by wrongdoing doctrine remains unchanged in the co-conspirator context. So long as one co-conspirator possesses the intent to make a witness unavailable, this intent can be imputed to the defendant, thus allowing the *Cherry* doctrine to live on.

INTRODUCTION

The K Street Crew sold large quantities of marijuana across the greater Washington, D.C. area for two decades, protecting their trade with an astonishing amount of violence.[1] When the FBI finally found an informant, Robert "Buchie" Smith, who was willing to testify against this impenetrable criminal enterprise, the gang's enforcer tracked down this witness-to-be and murdered him in cold blood.[2] Before Smith was murdered, however, he made various

[1] Christopher Newton, *Urban Gangs in the United States Use Technology to Silence Witnesses*, STREETGANGS.COM, Mar. 28, 2001, http://www.streetgangs.com/news/032801-urban-gangs, *archived at* http://perma.cc/8CQE-9CSW. The K Street Crew was notorious for witness intimidation, reportedly murdering seven witnesses-to-be from 1993 to 1996. *D.C. Hit Man Convicted in 9 Murders*, DESERET NEWS, Aug. 16, 2001, http://www.deseretnews.com/article/858772/DC-hit-man-convicted-in-9-murders.html, *archived at* http://perma.cc/3R7B-LHJG.

[2] United States v. Carson, 455 F.3d 336, 339–40 (D.C. Cir. 2006). Smith was prepared to testify about the gang's several attempted and completed murders, as well as the details of the gang's criminal enterprise. *Id.* at 360.

statements to the FBI that incriminated gang members and detailed the Crew's criminal operations.[3]

During the trial of Samuel Carson—the so-called enforcer of the gang alleged to have murdered Smith—the government introduced prior statements that the deceased informant made to the FBI.[4] Despite Carson's claim that the introduction of these statements violated his constitutional right to face his accuser, the district court concluded that the defendant forfeited his right to confront this witness by way of his wrongdoing (murdering the informant) and, therefore, admitted the testimony.[5] This decision was hardly controversial, as the longstanding doctrine of forfeiture by wrongdoing dictated the result.[6] What was controversial, however, was the court's decision to allow Smith's statements to be used against *other* K Street gang members as well—members that did not participate in Smith's murder.[7] In 2006, in *United States v. Carson*, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision and held that Carson not only forfeited his own right to face his accuser, but his misconduct also forfeited the Confrontation Clause rights of his fellow K Street Crew co-conspirators.[8] Accordingly, the convictions of all of the K Street Crew members were upheld.[9]

The D.C. Circuit's holding in this case is representative of the trend among modern-day courts: when faced with witness intimidation in the context of group criminality, courts have relied on familiar concepts of conspiracy liability to define the limits of the forfeiture by wrongdoing doctrine.[10] In 2000,

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[3] *Id.* at 340, 370.

[4] *Id.* at 360. Carson was tried in the U.S. District Court for the District of Columbia for numerous crimes, including narcotics conspiracy, racketeering conspiracy, and murder. *Id.* at 347. Of particular importance for this Confrontation Clause analysis, Carson was charged for the murder of the informant, Robert "Buchie" Smith. *See id.*

[5] *Id.* at 340; *see* U.S. CONST. amend. VI ("In all criminal proceedings, the accused shall . . . be confronted with the witnesses against him . . . .").

[6] *See Carson*, 455 F.3d at 363–64; *see also, e.g.*, Crawford v. Washington, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . ."); Reynolds v. United States, 98 U.S. 145, 158 (1875) (asserting that the defendant was "in no condition to assert that his constitutional rights ha[d] been violated" when the witness's absence was due to his "wrongful procurement").

[7] *See Carson*, 455 F.3d at 347. These gang members, tried alongside Carson for several crimes relating to the K street criminal enterprise, were not alleged to have participated in the murder of Smith. *Id.* at 363–64. Nonetheless, the district court reasoned that Smith's prior statements were admissible against the gang members because the other K Street members jointly participated in the conspiracy to procure the absence of the would-be witness. *Id.* at 362.

[8] *Id.* at 364.

[9] *Id.*

[10] *See id.*; United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000) (holding that defendants forfeit their Confrontation Clause rights to face their accusers when a co-conspirator takes foreseeable

in *United States v. Cherry*, the U.S. Court of Appeals for the Tenth Circuit held that because defendants can be held liable for the misdeeds of their co-conspirators under conspiratorial liability theory,[11] defendants might also forfeit their Confrontation Clause rights when their co-conspirators make witnesses unavailable.[12] To impute this forfeiture to a co-conspirator, the government must demonstrate that the witness interference—here, in the form of murder—was: (1) done in furtherance of the conspiracy; (2) within the scope of the unlawful project; and (3) reasonably foreseeable as a necessary or natural consequence of the unlawful agreement.[13]

At first glance, the U.S. Supreme Court's 2008 decision in *Giles v. California* appears to have jeopardized the *Cherry* doctrine, for it added a new element of intent to the forfeiture analysis.[14] Justice Antonin Scalia, writing for the majority in *Giles*, opined that criminal defendants do not forfeit their Confrontation Clause rights simply upon a mere showing that they caused the unavailability of a witness.[15] In addition to this but-for causation, the government must also demonstrate that the defendant's actions were *designed* to prevent the witness from testifying.[16]

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action that renders a prospective witness unavailable); *see also* United States v. Thompson, 286 F.3d 950, 955 (7th Cir. 2002) (adopting the *Cherry* doctrine).

[11] *See* Pinkerton v. United States, 328 U.S 640, 647 (1946); *see also infra* notes 77−92 and accompanying text (describing, generally, conspiratorial liability theory). In the seminal 1946 case *Pinkerton v. United States*, the Supreme Court held that members of a criminal conspiracy may be liable for the offenses committed by their co-conspirators. 328 U.S. at 647–48. Under the *Pinkerton* doctrine, a member will be liable for the offenses of co-conspirators if the offenses were: (1) done in furtherance of the conspiracy; (2) within the scope of the conspiracy; and (3) reasonably foreseeable as a necessary or natural consequence of the unlawful agreement. *Id.* In the aftermath of *Pinkerton*, federal courts have continued to develop an extensive body of conspiracy law to address the unique issues posed by group criminality. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1369 (2003) (discussing the development of conspiracy law among federal courts).

[12] 217 F.3d at 821.

[13] *Id.* at 820 ("By analogy to *Pinkerton*, mere participation in a conspiracy does not suffice—yet participation may suffice when combined with findings that the wrongful act at issue was in furtherance and within the scope of an ongoing conspiracy and reasonably foreseeable as a natural or necessary consequence thereof.").

[14] *See* 554 U.S. 353, 359 (2008); *see* Adrienne Rose, Note, *Forfeiture of Confrontation Rights Post*-Giles*: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 285, 315–18 (2011) (concluding that the design requirement imposed by *Giles* limits the applicability of forfeiture by wrongdoing doctrine in the co-conspirator context). *But see infra* notes 139−207 and accompanying text (arguing that the *Cherry* doctrine survives the *Giles* decision unscathed).

[15] *See* 554 U.S. at 359, 367–68, 377 (holding that defendants must act with the design to make a witness unavailable in order to forfeit their Confrontation Clause rights).

[16] *Id.* at 359.

Although some have predicted that this language will restrict the doctrine of forfeiture by wrongdoing in the co-conspirator context,[17] this Note argues that the *Giles* decision does not disturb the doctrine's continued application.[18] As suggested by the Tenth Circuit in *Cherry*, courts should freely make the logical inference that a conspiracy is *designed* to achieve all that is reasonably foreseeable to its members.[19] Accordingly, despite the change in language, the thrust of the *Cherry* doctrine survives *Giles* in the co-conspirator context: so long as one co-conspirator's actions were designed to make a witness unavailable, courts should freely find forfeiture for the other co-defendants if the wrongdoing was reasonably foreseeable and within the scope of the conspiracy.[20]

Part I of this Note presents the forfeiture by wrongdoing doctrine and explains how *Cherry* expanded this concept in the co-conspirator context using accepted ideas of conspirator liability.[21] Part II examines the current status of the *Cherry* doctrine across the U.S. Courts of Appeals in an effort to determine what effect, if any, the Supreme Court's decision in *Giles* might have on the doctrine's continued applicability.[22] Finally, Part III argues that the text of the *Giles* decision, other analogous doctrines, and the policies underlying the forfeiture doctrine all support the conclusion that the *Cherry* doctrine should survive the *Giles* decision unscathed.[23]

I. GROWTH OF THE *CHERRY* TREE: FROM SEEDS TO MARKET

The *Cherry* doctrine was not created in a vacuum: instead, the doctrine was a solution to the increasing problem of witness intimidation that flows from two well-established lines of Supreme Court jurisprudence.[24] First, since

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[17] *See* Rose, *supra* note 14, at 285 (concluding that the intent requirement imposed by *Giles* limits the applicability of the *Cherry* forfeiture by wrongdoing doctrine); *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 336, 341 (2008) (arguing that the Court's failure in *Giles* to articulate the standard by which courts must find the requisite intent for forfeiture will produce varying results across circuits); *see also* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 908 (2009) (arguing that hearsay rules are not consistent with the newfound *Giles* design requirement).

[18] *See infra* notes 139–207 and accompanying text.

[19] *See* 217 F.3d at 813; *infra* notes 139−207 and accompanying text (explaining that *Cherry* correctly aligned the scope of the forfeiture by wrongdoing doctrine with the limits of *Pinkerton* liability).

[20] *See Pinkerton*, 328 U.S. at 647; *Cherry*, 217 F.3d at 813; *infra* notes 139−207 and accompanying text.

[21] *See infra* notes 24−111 and accompanying text.

[22] *See infra* notes 112−138 and accompanying text.

[23] *See infra* notes 139−207 and accompanying text.

[24] *See* 217 F.3d at 816 (explaining that the *Cherry* doctrine is the product of "two important but sometimes conflicting principles: the right to confrontation is a fundamental right essential to a fair trial in a criminal prosecution, and courts will not suffer a party to profit by his own wrongdoing"

the mid-eighteenth century, the forfeiture by wrongdoing doctrine has provided an equitable limit to a defendant's right under the Confrontation Clause to face his or her accusers at trial.[25] At the same time, the law provides for expanded criminal liability where certain acts of one member of a conspiracy can be attributed to other members.[26] The *Cherry* doctrine naturally weds these concepts in recognizing that the scope of the forfeiture by wrongdoing doctrine should coincide with the limits of conspirator liability.[27]

Section A first examines the Confrontation Clause and the doctrine of forfeiture by wrongdoing.[28] Then, Section B details the development of conspirator liability, explaining its history, justifications, and widespread acceptance.[29] Finally, Section C discusses the *Cherry* doctrine, explaining its genesis and adoption across the Courts of Appeals.[30]

A. *The Confrontation Clause and the Doctrine of Forfeiture by Wrongdoing*

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[31] The clause contemplates that if a witness is unavailable, the witness's prior testimony shall not be introduced against a defendant unless that defendant had a prior opportunity to cross-examine the witness.[32]

The right of criminal defendants to face and question their accusers at trial has long been recognized as an important feature of the American criminal justice system.[33] The roots of this right date back to Sir Walter Raleigh's 1603

(internal quotation marks and citations omitted)); *see also* KELLY DEDEL, U.S. DEP'T OF JUSTICE OFFICE OF CMTY. POLICING SERVS., WITNESS INTIMIDATION 5 (2006) (explaining that "witness intimidation is pervasive and increasing").

[25] *See, e.g.*, Mattox v. United States, 156 U.S. 237, 242–43 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .").

[26] *See Pinkerton*, 328 U.S. at 647–48 (establishing the now-accepted principle that one can be held liable for the foreseeable misdeeds of co-conspirators).

[27] *See Cherry*, 217 F.3d at 820 (holding that defendants forfeit their Confrontation Clause rights if the conditions of *Pinkerton* liability are met).

[28] *See infra* notes 31−76 and accompanying text.

[29] *See infra* notes 77−92 and accompanying text.

[30] *See infra* notes 93−111 and accompanying text.

[31] U.S. CONST. amend. VI.

[32] *Giles*, 554 U.S. at 358; *Crawford*, 541 U.S. at 68.

[33] *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 404 (1965) (stating that the right to confront witnesses is "a fundamental right essential to a fair trial in a criminal prosecution"). The Supreme Court has reinforced a defendant's right to confront his or her witnesses as far back as 1875. *See Reynolds*, 98 U.S. at 158 (acknowledging that a defendant has the right to face his or her accusers in court unless the witness's absence was due to the defendant's "wrongful procurement").

trial for treason, when Raleigh unsuccessfully argued that it was unjust for a key witness to provide testimony ex parte without providing Raleigh the opportunity to cross-examine him.[34] Although Raleigh was ultimately convicted and executed, his tragic story inspired the inclusion of a Confrontation Clause in the U.S. Constitution.[35]

As presently conceived, the purpose of the confrontation right is to prevent the "principal evil" of using ex parte testimonial examinations as evidence against the criminally accused.[36] The skepticism regarding out-of-court statements stems from the belief that their introduction in a criminal trial deprives the factfinder of the full story.[37] Part of the jury's function is to evaluate the credibility of a witness's testimony, which requires consideration of how the witness acts and responds to questioning.[38] Additionally, through cross-examination a defendant may clarify confusing or misleading portions of the witness's testimony.[39] Cross-examination may even expose a witness's secret

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[34] *See Crawford*, 541 U.S. at 44 (discussing Raleigh's case). In this case, Raleigh protested the admission of an inculpatory letter from Lord Cobham—Raleigh's alleged accomplice in crime—when Cobham did not testify at Raleigh's trial. *Id.* Throughout much of the sixteenth and seventeenth centuries, such ex parte procedures were permissible and even required by the Marian bail and committal statutes. *See id.* at 43–44. Despite the normalcy of such ex parte proceedings, Raleigh famously pled at his trial for the opportunity to face his accuser, proclaiming that, "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." *Id.* at 44.

[35] *See id.* at 43–44 (discussing the influence of Raleigh's trial on the Founding Fathers and the subsequent inclusion of the right to confront witnesses in the U.S. Constitution).

[36] *Id.* at 50. An examination is "ex parte" if the adverse party is not given a fair opportunity to challenge or cross-examine the testimony. BLACK'S LAW DICTIONARY 657 (9th ed. 2009).

[37] Judson F. Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 194 (1940). Professor Judson F. Falknor explained:

> The utility of an intelligent and carefully planned cross-examination lies in its efficacy in bringing to light deficiencies, first, in the witness' observation or in his opportunity or capacity for observation of the facts about which he testifies; second, in the quality of his present recollection of the impressions resulting from that observation; third, in his testimonial expression or narration as a faithful, accurate and complete reproduction of his present recollection; and finally, in the veracity of the witness, that is to say, his determination—at least his willingness and desire—to faithfully, accurately and completely communicate to the tribunal his present recollection.

Id.

[38] *Id.*

[39] *Id.*; *see* California v. Green, 399 U.S. 149, 158 (1970) (referring to the right of cross-examination as "the greatest legal engine ever invented for the discovery of truth") (internal quotation marks omitted) (citing 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (3d ed. 1940)). Any fan of legal drama is well aware of the potential exculpatory effect of skillful cross-examination that was demonstrated in the 1992 film *A Few Good Men*. *See* A FEW GOOD MEN (Columbia TriStar 1992) (Tom Cruise's character: "I want the truth!"; Jack Nicholson's character: "You can't handle the truth!").

motive to lie.[40] In recognizing that cross-examination potentially remedies various testimonial infirmities, the Supreme Court has regarded the confrontation right as essential to ensure a fair criminal trial.[41]

As with all constitutional rights, however, the Confrontation Clause right to confront witnesses is not absolute.[42] One well-established common law exception to the Confrontation Clause right is the doctrine of forfeiture by wrongdoing.[43] Through this doctrine, the government can introduce prior statements of an unavailable witness against the defendant if the defendant participated in making the witness unavailable for trial.[44]

To illustrate the application of this doctrine, suppose Dennis Defendant is arrested and charged with a bank robbery.[45] Prior to Dennis's trial, the police question Carrie Clerk—the woman who worked the bank register on the day of the robbery—and Carrie provides a detailed description of the perpetrator as a man matching Dennis's description.[46] While out on pre-trial release, Dennis—aware of the government's plan to call Carrie as a witness against him—tracks down Carrie and murders her.[47] In this situation, courts have allowed Carrie's prior statements to the police to be introduced against Dennis.[48]

As this hypothetical illustrates, forfeiture by wrongdoing is a sensible, common law doctrine with an equitable basis.[49] In 1997, Congress codified the

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[40] Falknor, *supra* note 37, at 194 (explaining how skillful cross-examination can expose and remedy common the testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory); *see Green*, 399 U.S. at 158 (reasoning that the right to confront witnesses through cross-examination "protects against the lie").

[41] *See Crawford*, 541 U.S. at 61–62 (explaining that the Confrontation Clause ensures the reliability of evidence by guaranteeing criminal defendants the right of cross-examination); *see also* Douglas v. Alabama, 380 U.S. 415, 418 (1965) (stating that a "primary interest secured by [the Confrontation Clause] is the right of cross-examination"); Katherine W. Grearson, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 473 (2004) (explaining that cross-examination provides a defendant the opportunity to challenge a witness's memory, perception, and sincerity).

[42] *See* Maryland v. Craig, 497 U.S. 836, 848 (1990) ("[A] literal reading of the Confrontation Clause would 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.'" (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36)); Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1313 (2007) ("Although its purpose is to protect the accused in criminal cases, the Sixth Amendment right to confront one's accuser is not without exception and must flex to accommodate compelling rule of law concerns.").

[43] *Giles*, 554 U.S. at 359.

[44] 23 C.J.S. *Criminal Law* § 1174 (2013).

[45] *See id.* The author notes that this hypothetical is meant to elucidate the principles discussed at length in the *Corpus Juris Secundum* section on criminal law. *See id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See Crawford*, 541 U.S. at 62 (stating that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"); United States v. White,

common law doctrine of forfeiture by wrongdoing in Rule 804(b)(6) of the Federal Rules of Evidence.[50] In language quite similar to its common law counterpart, the doctrine is an exception to the general rule that bars the admission of hearsay evidence.[51] Although the Supreme Court has made clear that the Confrontation Clause and Rule 804(b)(6) are not coextensive,[52] both rely on the principles of equity, witness protection, procedural integrity, and truth seeking.[53]

In recent years, however, the Supreme Court has altered its understanding of the forfeiture by wrongdoing doctrine, reconceiving the Confrontation Clause right as not simply a means of ensuring *reliability*, but as also as a matter of constitutional right.[54] The Supreme Court first articulated its understanding of the forfeiture by wrongdoing doctrine in 1980 in *Ohio v. Roberts*.[55] According to the Court in *Roberts*, the primary purpose of the Confrontation Clause was to ensure the reliability of out-of-court statements when used as evidence against criminal defendants.[56] To that end, the Court established a two-part test to determine the admissibility of an unavailable witness's prior statements when offered against a criminal defendant: first, the declarant must

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116 F.3d 903, 911 (D.C. Cir. 1997) (noting that "[s]imple equity supports a forfeiture principle"); United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) (stating that "courts will not suffer a party to profit by his own wrongdoing"); United States v. Mastrangelo, 693 F.2d 269, 272–73 (2d Cir. 1982) (reasoning that to allow a defendant to benefit from witness tampering would "mock the very system of justice the confrontation clause was designed to protect"). Effectively, the doctrine of forfeiture by wrongdoing prevents defendants from benefiting from their egregious misconduct (i.e., witness tampering). *See Crawford*, 541 U.S. at 62.

[50] FED. R. EVID. 804(b)(6). This exception to the general hearsay bar provides for the admission of "statement[s] 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." *Id*.

[51] *See id.* Hearsay, defined by the Federal Rules of Evidence as any out-of-court statement offered for the truth of the matter asserted, is generally inadmissible because such a statement is perceived as untrustworthy and unreliable. *See id.* 801(c). There are, however, a number of exceptions and exemptions that provide for the admissibility of certain out-of-court statements. *See, e.g.*, *id.* 803(1)–(24); *id.* 804(b)(1)–(6).

[52] *See Cherry*, 217 F.3d at 816 ("While the Confrontation Clause and the hearsay rules are not coextensive it is beyond doubt that evidentiary rules cannot abrogate constitutional rights.").

[53] *See Giles*, 554 U.S. at 374 (explaining that the doctrine of forfeiture by wrongdoing was, at common law, "aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings'" (quoting Davis v. Washington, 547 U.S. 813, 834 (2006))).

[54] *Compare Crawford*, 541 U.S. at 61, 65 (focusing on whether the statement was *testimonial* to determine its admissibility), *with Roberts*, 448 U.S. at 66 (focusing on whether the out-of-court statement was *reliable* to determine its admissibility).

[55] *See* 448 U.S. at 66.

[56] *Id.*

have been unavailable to testify on the day of trial; [57] and second, the witness's statements must have carried adequate "indicia of reliability."[58]

The *Roberts* approach guided the practice of lower courts for nearly twenty-five years, until the Supreme Court drastically altered its analysis in its 2004 decision in *Crawford v. Washington*.[59] In 1999, Michael Crawford was charged with assault and attempted murder for stabbing Lee, a man who allegedly tried to rape his wife.[60] Crawford claimed self defense, but his wife made a statement to the police that undermined his theory by equivocating about whether Lee reached for a weapon.[61] When Crawford's wife was later unavailable to testify at Crawford's trial for assault, the government sought to introduce her prior tape-recorded statement.[62]

Justice Scalia, writing for the majority, denounced the *Roberts* approach as overly vague and highly unpredictable.[63] Accordingly, the Court abandoned the *Roberts* approach entirely and replaced it with a standard that protects the ability of criminal defendants to exclude an unavailable witness's prior testimonial statements as a matter of constitutional right, regardless of their reliability.[64] The only limitation imposed on the *Crawford* standard relates to the nature of the prior statement: the admissibility of the statement turns on whether the prior statement was testimonial.[65] Accordingly, the Court abrogated *Roberts* and held that the admission of an unavailable declarant-witness's

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[57] *Id.* Witnesses are unavailable when they cannot be present at the trial because of death or serious illness, or when process or other reasonable means to bring them to court were unsuccessful. FED. R. EVID. 804(a)(4)–(5). Additionally, witnesses are unavailable in a number of other situations, even when they are present in the courtroom. *See, e.g.*, *id.* 804(a)(1)–(3) (explaining that witnesses are considered unavailable if a privilege applies exempting their testimony, they refuse to testify despite a court order to do so, or they testify to not remembering the subject matter).

[58] *Roberts*, 448 U.S. at 66. Under the *Roberts* approach, the admissibility of hearsay generally required a showing that the statements were admissible under a "firmly rooted hearsay exception" or that they had "particularized guarantees of trustworthiness." *Id.*

[59] *Compare Crawford*, 541 U.S. at 61, 65 (focusing on whether the statement was *testimonial*), *with Roberts*, 448 U.S. at 66 (focusing on whether the statement was *reliable*).

[60] *Crawford*, 541 U.S. at 38.

[61] *Id.* at 39–40.

[62] *Id.* at 40. Crawford's wife was unavailable to testify at trial because of Washington's marital privilege rule. *Id.*

[63] *See id.* at 62–65. The unpredictable nature of the *Roberts* approach was exposed by the plight of the *Crawford* case through the Washington courts. *See id.* at 40–41. Applying the *Roberts* test, the trial court admitted the wife's tape-recorded statement, finding that it evinced "particularized guarantees of trustworthiness." *Id*. at 40. The Washington Court of Appeals reversed the trial court, and held that the testimony was not reliable based on its application of a *Roberts*-based nine-factor test. *See id*. at 41. The Washington Supreme Court, however, reversed the appeals court based on its own analysis, which also was ostensibly guided by *Roberts*. *Id*. With this as a backdrop, the U.S. Supreme Court abandoned the *Roberts* test. *Id.* at 68–69.

[64] *Id*. at 60, 68–69.

[65] *Id.* at 68–69.

non-testimonial statements would not offend the Confrontation Clause because the original purpose of the Clause was to prevent the use of testimonial ex parte examinations as evidence against the accused.[66]

To elucidate the impact of the *Crawford* shift in emphasis—from whether the statements are reliable to whether they are testimonial—consider the following hypothetical.[67] Wanda Witness sees Donny Defendant flee the scene of a crime.[68] When questioned by Paul Policeman five minutes later, Wanda—still flustered by what she just saw—excitedly provides a description of Donny that ultimately leads to his arrest.[69] When Wanda is then unavailable to testify at Donny's subsequent criminal trial, the government attempts to introduce the statement that Wanda previously made to Paul.[70]

According to the *Roberts* approach, Wanda's statement would likely be admissible.[71] As Wanda was still flustered by the sight of the fleeing suspect, her statement was arguably an excited utterance, which is admissible under a deeply rooted hearsay exception.[72] Further, the circumstances under which the

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[66] *Id.* at 50. After declaring the Court's new focus on whether a statement was testimonial, the Court held that the admission of the tape-recorded statement of Crawford's wife violated the Confrontation Clause. *Id.* at 61. Although the Court admittedly failed to define the limits of what should be considered testimonial, the Court has since provided further guidance. *Compare id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"), *with* Williams v. Illinois, 132 S. Ct. 2221, 2228 (2011) (holding that the defendant's Confrontation Clause rights were not violated when an expert witness for the prosecution testified about the results of a DNA test conducted by a different out-of-state analyst because the informal conveyance of the DNA test was not testimonial); Melendez-Dias v. Massachusetts, 557 U.S. 305, 310 (2009) (holding that the admission of affidavits showing the results of a forensic analysis performed on seized drug samples violated the defendant's Confrontation Clause rights because the affidavits were testimonial); *Davis*, 547 U.S. at 820 (holding that the Confrontation Clause does not apply to non-testimonial statements, and that the witness's statements made during a 911 call were not testimonial because they described an ongoing emergency and were not intended to be used in a future criminal prosecution). Nonetheless, what qualifies as testimonial remains imprecise. *See, e.g.*, Paul W. Grimm et al., *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?*, 40 U. BALT. L.F. 155, 157 (2010) ("[W]hile the Court has not articulated a comprehensive test for whether a statement is testimonial, a common attribute to all testimonial statements is the objective likelihood that they be used in trial.").

[67] *See* Jerome C. Latimer, *Confrontation After* Crawford*: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 338 (2006) (discussing the impact of the *Crawford* decision on Confrontation Clause analysis). This hypothetical is meant to explain the implications of the *Crawford* decision that are discussed at length in Professor Jerome C. Latimer's article *Confrontation After* Crawford*: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*. *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.*

[71] *See* 448 U.S. at 66.

[72] *See id*. The *Roberts* Court acknowledged four hearsay exceptions that qualify as firmly rooted: appropriately administered business and public records, dying declarations, and previously cross-examined former testimony. *Id.* at 66 n.8. The Court, however, made clear that it did not intend this

statement was made suggest its reliability, as only ten minutes had passed since she witnessed the escape.[73]

After the *Crawford* decision, however, it is possible that Wanda's statement to the police would not be admissible even if it were considered an excited utterance; rather than consider its reliability, a court would now evaluate whether Wanda's statement was testimonial.[74] Although the Court has not provided a clear standard to determine whether a statement is testimonial, a statement to the police is generally considered testimonial unless—as the Court held in its 2006 decision in *Davis v. Washington*—its "primary purpose" was to respond to an ongoing emergency.[75] Regardless, if Wanda's statement was testimonial, then it would not be admissible against Donny unless an exception—like forfeiture by wrongdoing—applied.[76]

B. *The Development of* Pinkerton *Liability*

Even after the *Crawford* decision, the Supreme Court has given little guidance on how the Confrontation Clause is meant to operate in the context of conspiracy cases.[77] Entirely independent from the Confrontation Clause jurisprudence discussed above, courts have developed a rich body of conspiracy law in order to deal with the unique problem of group criminality.[78] In 1946, in *Pinkerton v. United States*, the Supreme Court outlined the concept of imputable liability in the context of criminal conspiracy.[79] The doctrine of *Pinkerton* liability holds that a member of a criminal conspiracy may be liable for all offenses committed by co-conspirators so long as those offenses were: (1) done in furtherance of the conspiracy; (2) within the scope of the conspiracy; and (3) were reasonably foreseeable as a necessary or natural consequence of the unlawful

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list to be exhaustive, and stated that other exceptions—including the one for excited utterances—are commonly accepted as "firmly rooted" as well. *Id.*; *see, e.g.*, Puleio v. Vose, 830 F.2d 1197, 1205 (1st Cir. 1987) (concluding that the spontaneous exclamation exception is a "firmly rooted" hearsay exception). *But see* Stanley A. Goldman, *Distorted Vision: Spontaneous Explanation as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 462–63 (1990) (challenging the commonly accepted premise that the spontaneous exclamation exception should be viewed as "firmly rooted").

[73] *See Roberts*, 448 U.S. at 66.

[74] *Crawford*, 541 U.S. at 68–69.

[75] *See* 547 U.S. at 822; Grimm, *supra* note 66, at 157.

[76] *See Giles*, 554 U.S. at 359; *Crawford*, 541 U.S. at 68–69.

[77] *See* Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 559 (2008) (explaining that although "all of the courts to explicitly consider the issue of co-conspiratorial forfeiture by wrongdoing have decided that a co-conspirator can indeed forfeit another co-conspirator's confrontation and hearsay rights," uncertainty about the constitutional limits of forfeiture by wrongdoing remains).

[78] *See Pinkerton*, 328 U.S. at 647–48; Katyal, *supra* note 11, at 1369 (discussing conspiracy law).

[79] *See* 328 U.S. at 647–48.

agreement.[80] Since its inception, *Pinkerton* liability has proven to be an extremely effective and powerful prosecutorial tool to combat group criminality.[81]

In *Pinkerton*, two brothers, Daniel and Walter Pinkerton, were arrested and charged with conspiracy to transport and deal whisky in violation of the Internal Revenue Code.[82] At trial, the jury found both men guilty of conspiracy, and also found Daniel guilty of six substantive counts despite clear evidence that Daniel had no direct involvement in the conduct underlying those charges.[83] The Supreme Court, in considering Daniel Pinkerton's claim, acknowledged that although the government produced significant evidence regarding Walter's involvement in the substantive offenses, they had absolutely no evidence suggesting that Daniel was even aware of Walter's actions.[84] In fact, Daniel was in jail while Walter committed a number of the substantive acts.[85] Nonetheless, the Court upheld the convictions.[86] In doing so, the Court held that the motive or intent of one conspirator could be imputed to other co-conspirators to support liability for substantive crimes because the criminal intent to commit those crimes is established by the formation of the original conspiracy.[87]

Since the *Pinkerton* decision, courts have used this doctrine expansively to impute both the actions and intentions of conspirators on other members of the conspiracy.[88] Moreover, lack of actual knowledge of the underlying sub-

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[80] *Id.* at 647 (noting that "the overt act of one partner in crime is attributable to all," because if a wrongdoing "can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense"); *see* Alex Kreit, *Vicarious Liability and the Constitutional Dimensions of the* Pinkerton *Doctrine*, 57 AM. U. L. REV. 585, 598, 605 (2008) (explaining that the test for *Pinkerton* liability "had gained nearly universal acceptance among the courts" by the early 1990s); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 6 (1992) (explaining that *Pinkerton* concepts are accepted "[i]n virtually every jurisdiction in the United States").

[81] *See* Christian Davis & Eric Waters, *Federal Criminal Conspiracy*, 44 AM. CRIM. L. REV. 523, 525 (2007) (stating that conspiracy "is one of the most commonly charged federal crimes" and that it "is construed broadly by courts and, consequently, is applied by prosecutors to a variety of situations").

[82] 328 U.S at 641.

[83] *Id.* at 641, 645.

[84] *Id.* at 641; *id.* at 648 (Rutledge, J., dissenting) (highlighting that "there was [no evidence] to establish that Daniel participated in [the substantive offenses], aided and abetted Walter in committing them, or knew that he had done so").

[85] *Id.* at 648.

[86] *Id.* at 647–48 (majority opinion).

[87] *Id*.

[88] Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 150 (2000) ("[Courts] have found ways to impute both an 'act' and 'intention' to the defendant sufficient to hold him liable for the substantive crimes of co-conspirators.").

stantive crimes does not obviate *Pinkerton* liability.[89] Even if specific offenses were not contemplated at the time that the conspiracy was formed, all members can be held liable so long as the aforementioned requirements are met.[90] Once individuals join a conspiracy, they are not indefinitely subject to imputed liability for all future acts of their cohorts: they may remove themselves from a conspiracy—and thus avoid conspiratorial liability—through an affirmative act of disengagement.[91]

In short, *Pinkerton* unequivocally established that liability might be imputed to co-conspirators when certain requirements are met, but the decision left open the question of whether forfeiture of confrontation rights may also be imputed in such circumstances.[92]

C. *The* Cherry *Doctrine*

Courts have extended the principles of *Pinkerton* liability to provide for forfeiture of defendants' Confrontation Clause rights through the wrongdoing of their co-conspirators.[93] In *Cherry*, the Tenth Circuit ruled that a defendant forfeited his right to confront a particular witness when his co-conspirator made that witness unavailable.[94] In the case, the government charged five defendants—including Michelle Cherry and Joshua Price—with involvement in a drug conspiracy.[95] Much of the government's evidence of the drug conspiracy came from a government witness named Ebon Lurks.[96] Shortly after Price learned of Lurks's cooperation—but before Price's trial—Price found Lurks and killed him.[97]

At a pretrial suppression hearing, the U.S. District Court for the Eastern District of Oklahoma determined that although Lurks's prior statements could

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[89] James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 516 (2003) ("Coconspirators may be liable for crimes in which they did not directly participate or were unaware were being planned and had no ability to influence, provided there is evidence that the murder was an object of the conspiracy.").

[90] *See id*.

[91] Davis & Waters, *supra* note 81, at 539–40 (stating that in order for a conspirator to withdraw from a conspiracy, the conspirator "must do more than merely cease participation; the conspirator must commit '[a]ffirmative acts inconsistent with the object of the conspiracy and [communicate them] in a manner reasonably calculated to reach co-conspirators.'" (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 464 (1978))).

[92] *See* 328 U.S. at 647.

[93] *See, e.g.*, *Thompson*, 286 F.3d at 955; *Cherry*, 217 F.3d at 820.

[94] 217 F.3d at 820.

[95] *Id.* at 813.

[96] *Id.*

[97] *Id.* at 814.

be introduced against Price, Lurks's statements could not be introduced against the other co-conspirators—including Cherry.[98] The court reasoned that excluding Lurks's statements against the co-conspirators was necessary because the government did not show that Price's co-conspirators had participated directly in Lurks's murder or that they had sufficient knowledge thereof.[99] In response, the government filed an interlocutory appeal challenging the district court's suppression of these statements.[100]

On appeal, the Tenth Circuit reversed the district court and expanded *Pinkerton*'s imputed liability concept to the context of forfeiture of Confrontation Clause rights.[101] The court held that a defendant forfeits his or her Confrontation Clause rights if a preponderance of the evidence establishes either that the defendant directly participated in making the witness unavailable through wrongdoing, or that the conditions of *Pinkerton* liability were met.[102] Thus, where co-conspirators render a witness unavailable through wrongdoing, their actions may be imputed to the defendant and thereby cause that defendant to forfeit his or her Confrontation Clause rights.[103]

The *Cherry* court made explicit that defendants do not need actual knowledge of their co-conspirators' misconduct to forfeit their Confrontation Clause rights.[104] Because *Pinkerton* concepts serve to impute the requisite intent, defendants' involvement in the broader conspiracy justifies forfeiture of their Confrontation Clause rights.[105] Further, the court clarified that the scope of a conspiracy is not necessarily limited to its primary goal, but also may include "secondary goals relevant to the evasion of apprehension and prosecution."[106] The killing of witnesses, the court explained, was within the scope of the conspiracy in *Cherry* because it furthered these secondary goals.[107] Thus, Price's intent to prevent Lurks's testimony was imputed to Cherry, and Cherry therefore forfeited her confrontation right as a natural consequence of her involvement in

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 821 ("Actual knowledge is not required for conspiratorial waiver by misconduct if the elements of *Pinkerton*—scope, furtherance, and reasonable foreseeability as a necessary or natural consequence—are satisfied.").

[102] *Id.* at 820.

[103] *Id.*

[104] *Id.* at 821.

[105] *Id.*

[106] *Id.* That the scope of a conspiracy encompasses the pursuit of secondary goals is accepted in modern conspiracy law as well. *See, e.g.*, United States v. Willis, 102 F.3d 1078, 1083 (10th Cir. 1996) (holding that an escape effort following a bank robbery was a secondary goal that was part of the primary effort to successfully commit the bank robbery).

[107] *See* 217 F.3d at 821.

the underlying conspiracy.[108] Effectively, the *Cherry* decision extended the forfeiture by wrongdoing doctrine to its logical consequence, rendering forfeiture as entirely coextensive with the limits of *Pinkerton* liability.[109]

In the wake of the Tenth Circuit's decision in *Cherry*, various courts have accepted the logic of the decision and found the *Cherry* doctrine to be persuasive.[110] Although some Courts of Appeals are less explicit in their acceptance of the doctrine, and others have yet to embrace or reject it, on the whole the *Cherry* scheme is widely accepted among the courts.[111]

II. AFTER *GILES*: IS THE *CHERRY* DOCTRINE STILL ON TOP?

Nearly a decade after the Tenth Circuit's promulgation of the *Cherry* doctrine, the Supreme Court drastically refined its understanding and articulation of the doctrine of forfeiture by wrongdoing in its 2008 decision in *Giles v. California*.[112] Prior to *Giles*, the Courts of Appeals widely adopted the *Cherry* scheme.[113] As such, courts considered only the *result* of a defendant's miscon-

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[108] *See id.*

[109] *See infra* notes 139–207 and accompanying text (justifying the continued vitality of the *Cherry* doctrine).

[110] *See, e.g.*, United States v. Dinkins, 691 F.3d 358, 384–85 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1278 (2013); United States v. Bakersfield, 448 F. App'x 243, 250 (3d Cir. 2011); United States v. Johnson, 495 F.3d 951, 971 (8th Cir. 2007); United States v. Stewart, 485 F.3d 666, 671 (2d Cir. 2007); United States v. Carson, 455 F.3d 336, 363 (D.C. Cir. 2006); United States v. Rodriguez-Marrero, 390 F.3d 1, 17 n.8 (1st Cir. 2004); *Thompson*, 286 F.3d at 955.

[111] *Compare Stewart*, 485 F.3d at 671 (effectively recognizing the *Cherry* doctrine by embracing proof of knowledge and intent by circumstantial evidence), *with Thompson*, 286 F.3d at 955 (explicitly accepting the *Cherry* doctrine). To date, the Fourth, Seventh, and D.C. Circuits have explicitly adopted the *Cherry* doctrine; the First, Second, and Third Circuits have indicated support for the doctrine, albeit indirectly; and the Fifth, Sixth, Ninth, and Eleventh Circuits have yet to comment. *See infra* note 113 and accompanying text (discussing the approach to *Cherry* taken by the various circuit courts). The Eighth Circuit is the only one to have expressed disapproval of the *Cherry* doctrine, but has since appeared to have accepted its underlying logic. *Compare Johnson*, 495 F.3d at 971 (citing *Cherry* for the proposition that the forfeiture concept is coextensive with criminal liability), *with* Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982) (upholding a defendant's right to confront a witness who did not appear in court after the defendant's co-conspirator threatened her).

[112] *See* Giles v. California, 554 U.S. 353, 359 (2008) (requiring that the defendant act with the design to make the witness unavailable); United States v. Cherry, 217 F.3d 811, 821 (10th Cir. 2000).

[113] *See* United States v. Bakersfield, 448 F. App'x 243, 250 (3d Cir. 2011) (effectively accepting the *Cherry* doctrine by applying forfeiture despite a defendant's lack of direct involvement in a witness's murder); United States v. Johnson, 495 F.3d 951, 971 (8th Cir. 2007) (effectively accepting the *Cherry* doctrine by applying forfeiture despite a defendant's lack of major involvement in a witness's murder); United States v. Stewart, 485 F.3d 666, 671 (2d Cir. 2007) (effectively accepting the *Cherry* doctrine by allowing knowledge and intent to be demonstrated by circumstantial evidence); United States v. Carson, 455 F.3d 336, 363 (D.C. Cir. 2006) (explicitly adopting the *Cherry* doctrine); United States v. Rodriguez-Marrero, 390 F.3d 1, 17 n.8 (1st Cir. 2004) (suggesting in dicta the court's ac-

duct—whether he or she made the witness unavailable—in determining whether to apply the forfeiture by wrongdoing doctrine.[114] In *Giles*, however, the Supreme Court held that in order for a defendant to forfeit his or her Confrontation Clause rights, it is not enough that the witness was made unavailable as a *result* of the defendant's conduct.[115] Under *Giles*, a defendant forfeits Confrontation Clause rights only if, in making the witness unavailable, he or she acted with the *design* to make the witness unavailable.[116]

The *Giles* Court held that the forfeiture by wrongdoing doctrine does not apply without an additional finding of fact indicating that the defendant's *design* was to make the witness unavailable to testify.[117] The Court reasoned that the doctrine of forfeiture by wrongdoing was a Founding-era exception to the Confrontation Clause that requires more than just the overt act of making a witness unavailable.[118] This original understanding, the Court explained, recognized forfeiture by wrongdoing only when a defendant acted with the *design* to prevent a witness from testifying.[119] The Court held that if the government

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ceptance of the *Cherry* doctrine); United States v. Thompson, 286 F.3d 950, 955 (7th Cir. 2002) (explicitly adopting the *Cherry* doctrine).

[114] *See, e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005) ("There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying.").

[115] 554 U.S. at 359.

[116] *Id.* In *Giles*, the Court considered the plight of Dwayne Giles, who shot and killed his ex-girlfriend Brenda Avie and claimed self-defense at trial. *Id.* at 356. To defeat this claim, the government sought to introduce statements that Avie had made to a police officer following a domestic violence incident roughly three weeks prior to her murder. *Id.* Avie told the police officer that Giles accused her of cheating on him, grabbed her by the shirt, choked her, punched her in the face, and threatened to kill her. *Id.* at 356–57. The trial court admitted her statements into evidence, and the jury convicted Giles of first-degree murder. *Id.* at 357. On appeal, the California Court of Appeals upheld the conviction, holding that Avie's prior statements were admissible against Giles under the forfeiture by wrongdoing exception to the Confrontation Clause. *Id.* The California Supreme Court later affirmed that decision. *Id.*

[117] *Id.* at 365.

[118] *Id*. at 359, 368 (describing the forfeiture by wrongdoing doctrine as a product of common law with "roots" dating back to the practices of the seventeenth century).

[119] *Id.*To support its imposition of the design requirement, the court cited a number of historical sources. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 148, 158 (1875) holding that the defendant was "in no condition to assert that his constitutional rights ha[d] been violated" when the witness's absence was due to his "wrongful procurement"); Lord Morley's Case, 6 How. St. Tr. 769, 771–77 (H.L. 1666) (asserting an early version of the doctrine of forfeiture by wrongdoing in holding that the sworn statements taken by a coroner of three witnesses could be admitted against a defendant despite the witnesses' unavailability because the witnesses were either "dead" or "withdrawn by the procurement of the prisoner"); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 429 (London, E. Nutt & R. Gosling 1721) (asserting that it was "settled" law that prior statements taken at a coroner's inquest "may be given in Evidence at the Trial . . . [if the witness] is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner"); EDMUND POWELL, PRACTICE OF THE

could not demonstrate that Giles acted with the requisite intent (i.e., the *design* to make the witness unavailable), then the witness's prior statements could not be introduced against him.[120]

As noted by some commenters, this newfound focus on design could potentially limit the scope of the *Cherry* doctrine.[121] Conceivably, the design requirement introduced in *Giles* is stricter than the traditional limits of co-conspirator liability set by the Supreme Court in 1946 in *Pinkerton v. United States*.[122] By emphasizing the design or intent of the defendant, the *Giles* decision arguably confined the forfeiture by wrongdoing doctrine to situations in which a defendant personally and specifically intended to make a witness unavailable.[123] If the notion of design is so narrowly construed, then instances in which a co-conspirator's misconduct results in forfeiture may be limited.[124]

Despite *Giles*'s introduction of this intent element into the forfeiture analysis, the effect of this wrinkle on the scope of the forfeiture doctrine in the co-conspirator context remains unclear.[125] Importantly, the *Giles* decision did not explicitly state whether this design element could continue to be imputed to the

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LAW OF EVIDENCE 166 (1858) (stating that the forfeiture rule applied when a witness "had been kept out of the way by the prisoner, or by some one on the prisoner's behalf, in order to prevent him from giving evidence against him"). *But see* Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of* Giles*'s Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding*,*"* 13 LEWIS & CLARK L. REV. 605, 670–72 (2009) (arguing that Justice Scalia's review of history in the Supreme Court's 2004 decision in *Crawford v. Washington* was inaccurate, noting that "originalism is merely a rhetorical pretense under which justices justify their personal predilections by falsely claiming fidelity to historical meaning, while actually ignoring or altering the historical meaning").

[120] *Giles*, 554 U.S. at 377. The California courts determined that a retrial was necessary. *See* People v. Giles, No. B224629, 2012 WL 130659, at *9 (Cal. Ct. App. Jan. 18, 2012), *reh'g denied* (Feb. 17, 2012), *review denied* (Apr. 11, 2012). At retrial, Giles was again convicted, and this time the prosecution chose to not introduce Avie's prior statement in its case in chief. *Id.*

[121] *See* Rose, *supra* note 14, at 285, 315–18 (arguing that the design requirement imposed by *Giles* limits the applicability of forfeiture by wrongdoing doctrine in the co-conspirator context); *see also* Lininger, *supra* note 17, at 908 (arguing that hearsay rules are not consistent with the newfound *Giles* design requirement).

[122] *See* Pinkerton v. United States, 328 U.S 640, 647 (1946); Rose, *supra* note 14, at 285, 315–18. Under the *Cherry* doctrine, whether a defendant forfeit his or her Confrontation Clause rights depends on the traditional limits of conspiratorial liability as established in *Pinkerton*—i.e., whether the wrongful procurement of the witness's absence was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of the conspiracy. *See Cherry*, 217 F.3d at 821 (citing *Pinkerton*, 328 U.S. at 647).

[123] *See* Rose, *supra* note 14, at 285, 315–18.

[124] *See id.*

[125] *Compare* United States v. Dinkins, 691 F.3d 358, 384–85 (4th Cir. 2012) (applying the *Cherry* doctrine post-*Giles*), *cert. denied*, 133 S. Ct. 1278 (2013), *with* Rose, *supra* note 14, at 285, 315–18 (arguing that the design requirement imposed by *Giles* limits the applicability of forfeiture by wrongdoing doctrine in the co-conspirator context).

defendant by the actions of co-conspirators.[126] If the notion of design is understood to be coextensive with the limits of *Pinkerton* liability—such that a conspiracy is designed to achieve all that it might foreseeably accomplish—then *Giles* will not limit the applicability of the *Cherry* doctrine in the co-conspirator context.[127] If, however, the notion of design is instead understood more narrowly, then the scope of the forfeiture by wrongdoing doctrine may be severely limited.[128]

In 2012 in *United States v. Dinkins*, the U.S. Court of Appeals for the Fourth Circuit explicitly endorsed the *Cherry* doctrine's continued viability.[129] In *Dinkins*, members of a Baltimore narcotics organization known as "Special" were charged in a twelve-count indictment for narcotics trafficking and various acts of violence, including murder.[130] James Dinkins served as an enforcer for the organization, committing murders for hire.[131] After Dinkins had already been arrested in 2005, other members of Special murdered John Dowery—a former Special drug dealer who had been providing detailed information to law enforcement officers about the organization for nearly a year.[132]

In affirming the introduction of Dowery's statements at Dinkins's criminal trial, the Fourth Circuit held that the concepts of *Cherry* remain viable post-*Giles*.[133] The court even cited to *Giles* as support for imputing forfeiture of Dinkins's confrontation right.[134] Although the court confirmed the limitations that *Cherry* and its progeny suggest—that "[m]ere participation in a conspiracy will not trigger the admission of testimonial statements under a forfeiture-by-wrongdoing theory"—the court embraced the thrust of the *Cherry* doctrine.[135]

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[126] *See* 554 U.S. at 377.

[127] *See Dinkins*, 691 F.3d at 384–85 (applying the *Cherry* doctrine post-*Giles*); *see infra* notes 139−207 and accompanying text (arguing why the *Giles* design requirement should not limit the scope of the *Cherry* doctrine).

[128] *See* Rose, *supra* note 14, at 285, 315−18. *But see Dinkins*, 691 F.3d at 384–85 (affirming an application of the *Cherry* doctrine post-*Giles*).

[129] *See* 691 F.3d at 384–85.

[130] *Id.* at 362−63.

[131] *Id.* at 363.

[132] *Id.* at 365. Dowery had earned the reputation of being a "snitch" for his incriminating testimony against another member of Special. *Id.* at 364.

[133] *Id.* at 383−84.

[134] *Id.* at 383, 385 (stating that "[t]he *Giles* decision did not materially alter application of the forfeiture-by-wrongdoing exception" and that "application of principles of conspiratorial liability in the forfeiture-by-wrongdoing context strikes the appropriate balance between the competing interests involved" (citing *Giles*, 554 U.S. at 367−68; *Thompson*, 286 F.3d. at 963−64)).

[135] *Id.* at 385 (holding—consistent with the *Cherry* doctrine—that defendants forfeit their confrontation rights when "(1) [they] participated directly in planning or procuring the declarant's una-

Notably, upon petition for review, the Supreme Court denied certiorari in *Dinkins* in February 2013.[136] Although nothing dispositive can typically be gleaned from a denial of certiorari, it appears the Supreme Court has tacitly endorsed the continued vitality of the *Cherry* doctrine in the post-*Giles* era.[137] Further, the lack of any counter-instructive case law on this issue suggests that the lower courts agree that the *Giles* decision has not had any effect on the continued viability of the *Cherry* doctrine.[138]

III. The Continued Viability of the *Cherry* Doctrine

In 2008 in *Giles v. California*, the Supreme Court held that for defendants to forfeit their right to confront a particular witness, they must act with the requisite intent—i.e., design—to make that witness unavailable.[139] Before *Giles*, the *Cherry* doctrine supported the forfeiture of confrontation rights by enabling courts to impute the misconduct of co-conspirators.[140] After *Giles*, however, imputing misconduct is not enough to sustain forfeiture; courts now must also impute the *intent* of co-conspirators to make witnesses unavailable.[141]

This Part argues that the *Cherry* doctrine survives the *Giles* Court's newfound emphasis on a defendant's specific intent to procure a witness's unavailability.[142] Section A considers the text of the Supreme Court's decision in *Giles* and suggests that the Court's reference to context indicates that a gang's violent reputation may support the inference that the defendant shared his or her co-conspirators' design to make a witness unavailable.[143] Section B seeks guidance from other areas of law in which intent is similarly at issue and finds that the *Cherry* doctrine's continued vitality is supported by analogy.[144] Finally, Section C considers the policy implications that result from a failure to extend the vitality of the *Cherry* doctrine and concludes that the doctrine is both normatively desirable and logically compelled.[145]

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vailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy").

[136] *See* Dinkins v. United States, 133 S. Ct. 1278 (2013).

[137] *See id*.

[138] *See Dinkins*, 691 F.3d at 384–85 (affirming an application of the *Cherry* doctrine post-*Giles*).

[139] Giles v. California, 554 U.S. 353, 359, 365 (2008).

[140] *See id.*; United States v. Cherry, 217 F.3d 811, 821 (10th Cir. 2000).

[141] *See* 554 U.S. at 359, 365.

[142] *See infra* notes 146−407 and accompanying text.

[143] *See infra* notes 146−154 and accompanying text.

[144] *See infra* notes 155−176 and accompanying text.

[145] *See infra* notes 177−207 and accompanying text.

A. *Jiving with* Giles*: Textual Support for the* Cherry *Doctrine*

The *Giles* decision provides supports for the continued viability of the *Cherry* doctrine.[146] Justice Scalia, concerned that courts would misapply the newfound intent requirement to severely limit the forfeiture by wrongdoing doctrine, made a point to assert the doctrine's continued vitality in the domestic violence setting.[147] Anticipating the dissents' arguments, Justice Scalia emphasized that context is "highly relevant" to the assessment of whether the defendant's intent should be inferred so to justify forfeiture.[148] Acknowledging the difficulties that this newfound intent requirement might present in cases in which previously abusive relationships culminated in murder, Justice Scalia explicitly instructed that courts should be willing to infer defendants' intent to make would-be witnesses unavailable from the context of the abusive relationship, particularly by paying special attention to defendants' prior threats of abuse.[149]

This logic from the domestic violence context suggests that in the context of a violent drug conspiracy, a gang's reputation of silencing witnesses could be similarly relevant.[150] Modern criminal enterprises often seek to foster violent reputations because their continued operations depend on unbroken codes of silence.[151] The *Cherry* doctrine has proven especially useful to prosecutors

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[146] *See* 554 U.S. at 377.

[147] *See id.*

[148] *See id.* ("Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.").

[149] *See id.* ("Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."). Despite Justice Scalia's instruction that courts should freely infer a defendant's intent to make would-be witnesses unavailable in the domestic violence context, the scope of a defendant's design remains hotly disputed. *Compare* Marc McAllister, *Down but Not Out: Why* Giles *Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393, 409 (2009) (arguing that although *Giles* added an intent requirement to the forfeiture analysis, "the majority arguably retreated from its freshly-minted rule by declaring that the rule's requisite intent may be inferred in domestic abuse cases"), *with* G. Kristian Miccio, Commentary, Giles v. California*: Is Justice Scalia Hostile to Battered Women?*, 87 TEX. L. REV. SEE ALSO 93, 103 (2009), http://www.texaslrev.com/wp-content/uploads/Miccio-87-TLRSA-93.pdf, *archived at* http://perma.cc/7V8U-XZ7T (arguing that the new *Giles* intent requirement will severely limit the scope of the forfeiture by wrongdoing doctrine in the domestic violence context).

[150] *See* Flanagan, *supra* note 89, at 516–17 ("[M]embers of a criminal organization, with a reputation for violent discipline, are responsible for those murders and the consequent loss of constitutional and evidentiary rights.").

[151] *See, e.g.*, United States v. Carson, 455 F.3d 336, 364 (D.C. Cir. 2006) (holding that forfeiture was supported despite "no direct evidence of an explicit agreement to kill adverse witnesses" because such an agreement could be inferred from the gang's prior acts of violence); LETIZIA PAOLI, MAFIA

who deal with modern-day drug conspiracies because these gangs' implicit enforcement policies are often successful in discouraging witnesses from testifying against members at trial.[152] As gang reputations have traditionally been used to support the inference of *Pinkerton* liability, these reputations similarly support the inference of forfeiture under the *Cherry* regime.[153] Accordingly, despite the Court's newfound intent requirement to permit forfeiture, the text of the *Giles* decision suggests that this intent may be inferable from a gang's violent reputation.[154]

B. *Imputation of Intent: Guidance by Analogy*

Analyzing other areas of law in which intent is similarly at issue can guide the assessment of the *Cherry* doctrine's vitality following the *Giles* Court's newfound focus on design.[155] A review of three legal principles—transferred intent, the felony-murder doctrine, and the accepted use of *Pinkerton* concepts to impute specific intent for the purposes of liability—all suggest that *Pinkerton* concepts also operate to impute the intent necessary for forfeiture by wrongdoing.[156] Accordingly, it appears that the *Cherry* doctrine survives the *Giles* decision unscathed.[157]

Courts have created various doctrines that satisfy the mens rea elements of crimes, even where the specific intent of an individual defendant appears to

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BROTHERHOODS: ORGANIZED CRIME, ITALIAN STYLE 109 (2003) (discussing the Italian Mafia's codification of this sort of bond in a word: *omertà*). Under these unwritten—but actively enforced—codes of silence, individuals are expected to absolutely avoid speaking to authorities regarding criminal activity, and breaking this silence is punishable by death. PAOLI, *supra*; *see also* THE GAME, STOP SNITCHIN, STOP LYIN (Black Wall Street Records 2005) (an example of omertà in hip-hop culture).

[152] *See* Flanagan, *supra* note 89, at 516−17 ("Conspiracies often have explicit or implicit enforcement policies which [provide evidence that murder was reasonably foreseeable].").

[153] *Compare* United States v. Thompson, 286 F.3d 950, 966 (7th Cir. 2002) (holding that the witness's murder was not reasonably foreseeable to the defendant because "there [was] no evidence that this conspiracy had previously engaged in murder or attempted murder"), *with* United States v. Miller, 116 F.3d 641, 669 (2d Cir. 1997) (concluding that the murder of a witness was reasonably foreseeable where "there was an abundance of evidence that the [gang] made it a practice to murder members whose cooperation with authorities was suspected or who posed a threats to the gang's operations").

[154] *See* 554 U.S. at 377; Flanagan, *supra* note 89, 516−17.

[155] *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 934, 963−66 (1996) (analyzing the utility of analogy in constructing legal argument).

[156] *See infra* notes 158−176 and accompanying text (analyzing the doctrines of transferred intent, felony murder, and *Pinkerton* liability).

[157] *See infra* notes 158−176 and accompanying text (concluding that the doctrines of transferred intent, felony murder, and *Pinkerton* liability all support the continued vitality of the *Cherry* doctrine post-*Giles*).

be lacking.[158] One such doctrine, transferred intent, is common to both tort and criminal law.[159] Essentially, the doctrine of transferred intent allows an actor to be guilty of a crime that requires specific intent—for example, murder—even if the actual victim of the crime was not the actor's intended target.[160] Consider this hypothetical: Madman shoots a gun at Alfred but hits and kills Brutus by mistake.[161] The doctrine of transferred intent allows for Madman to be found guilty of murder even though he did not have the specific intent to harm the ultimate victim, Brutus.[162] Although a required element of first-degree murder—the intent to kill Brutus—is lacking, this element is satisfied through the doctrine of transferred intent.[163]

In addition to transferred intent, the doctrine of felony murder also provides for liability despite the absence of specific intent.[164] Effectively, this doctrine fictitiously transforms an individual's intent to commit a dangerous felony into the intent to commit murder.[165] According to this doctrine, when a victim dies as a result of an offender committing a dangerous felony, the offender is guilty of murder even if the killing was an accident and the offender lacked the specific intent to kill.[166] This principle is essentially an extended application of the doc-

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[158] *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 285–96 (1978) (discussing the doctrine of felony murder); Douglas Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 66–67 (1996) (discussing the concept of transferred intent); Colin Miller, *The Purpose-Driven Rule: Drew Peterson,* Giles v. California*, and the Transferred Intent Doctrine of Forfeiture by Wrongdoing*, 112 COLUM. L. REV. SIDEBAR 228, 230 (2012), http://columbialawreview.org/wp-content/uploads/2012/12/228_Miller.pdf, *archived at* http://perma.cc/R39A-KPMT (arguing that the *Giles* court endorsed a transferred-intent doctrine of forfeiture by wrongdoing). Mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY, *supra* note 36, at 1075.

[159] *See* Husak, *supra* note 158, at 66−67 (explaining the basis and limitations of transferred intent); Elizabeth F. Harris, Recent Decisions, 56 MD. L. REV. 744, 747−48 (1997) (same).

[160] *See, e.g.*, Bradshaw v. Richey, 546 U.S. 74, 75 (2005) (stating that "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim" (quoting State v. Richey, 595 N.E.2d 915, 925 (Ohio 1992), *abrogated by* State v. McGuire, 686 N.E.2d 1112 (Ohio 1997)) (internal quotation marks omitted)); State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936) ("The intention follows the bullet" (citations omitted) (internal quotation marks omitted)).

[161] *See* Harris, *supra* note 159, at 747–48 (relying on a similar hypothetical).

[162] *See id.*

[163] *See id.*

[164] *See* FLETCHER, *supra* note 158, at 285–96 (explaining the operation of the doctrine of felony murder).

[165] *See id.*

[166] *See* Erwin S. Barbre, Annotation, *What Felonies Are Inherently or Foreseeably Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R. 3d 397 (1973). Note that in most jurisdictions, not all felonies qualify for felony-murder status. *Id*. Generally, the underlying felony must present a foreseeable danger to life, and the link between the felony and the death must not be too remote. *Id.*

trine of transferred intent: the culpability associated with an individual's wrongful intended action is constructively transferred to account for certain wrongful but unintended results.[167] Although the doctrine of felony murder is not without its own critics,[168] it nonetheless remains the law in the majority of American jurisdictions.[169]

In addition to these legal maneuvers, the concept of *Pinkerton* liability is routinely used to support convictions even where the actor's intent is an element of the crime.[170] For example, in 1985 in *United States v. Alvarez*, the U.S. Court of Appeals for the Eleventh Circuit utilized *Pinkerton* concepts to impose vicarious liability on the defendant for certain "unintended" consequences of the drug conspiracy in which he was involved.[171] In affirming the defendants' convictions for second-degree murder, the Eleventh Circuit recognized that *Pinkerton* liability extended even to substantive crimes that were not within the originally intended scope of the conspiracy so long as they were reasonably foreseeable.[172] Strictly speaking, the conspiracy members convicted of murder did not possess the requisite intent to kill.[173] Nonetheless, because murder was a reasonably foreseeable consequence of their involvement in such a dangerous drug conspiracy, the Eleventh Circuit concluded that the intent requirement of the defendant's murder charge was satisfied.[174]

The doctrines of transferred intent, felony murder, and *Pinkerton* liability all excuse situations in which a mens rea element is lacking in order to justify the imposition of criminal liability.[175] Looking to these legal doctrines for

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[167] *See* People v. Washington, 402 P.2d 130, 133 (Cal. 1965) (en banc) (stating that "inadvertent or accidental killings are first degree murders when committed by felons in the perpetration of robbery"). For a detailed discussion of the purpose and limits of the felony-murder doctrine, see Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 971–72 (2008).

[168] *See e.g.*, MODEL PENAL CODE § 210.2 cmt. 6 (1985); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06(A), at 557 (4th ed. 2006) (arguing that unintended and unforeseen deaths cannot be deterred); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 680, 695–96 (1994) (labeling the felony-murder doctrine as a "rationally indefensible doctrine" due to its incongruence with the general goals of deterrence and punishing according to culpability).

[169] Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 551 (2011).

[170] *See e.g.*, United States v. Bingham, 653 F.3d 983, 998 (9th Cir. 2011) (holding that there was sufficient evidence to support a conviction for murder in aid of racketeering on a *Pinkerton* theory of liability); United States v. Lloyd, 947 F. Supp. 2d 259, 266 (E.D.N.Y. 2013) (finding that the evidence was sufficient to support a conviction for armed robbery on a *Pinkerton* theory of liability).

[171] 755 F.2d 830, 848–49 (11th Cir. 1985). In *Alvarez*, an undercover agent was killed as the result of a drug deal gone awry, and three members of the ongoing conspiracy who were not present at the shootout were tried and convicted for second-degree murder. *Id.*

[172] *Id.* at 851.

[173] *See id.*

[174] *Id*.

[175] *See supra* notes 158−174 and accompanying text.

guidance, courts should use the *Cherry* doctrine to similarly satisfy the newfound intent requirement imposed by *Giles*.[176]

C. *Policy—Discouraging Potentially Dangerous Conspiracies*

In addition to text and analogy, strong policy considerations further support the continued vitality of the *Cherry* doctrine.[177] Witness intimidation is a significant problem throughout the United States, and violence toward potential cooperating witnesses has become an integral part of normal gang behavior.[178] Although various strategies exist to offset the impact of gang-related witness intimidation, the violence persists and continues to occur at an alarmingly high rate.[179]

One legal solution to this devastating problem is *Cherry*'s extension of the forfeiture by wrongdoing doctrine to encompass certain misconduct of coconspirators.[180] The doctrine of forfeiture by wrongdoing is premised on the proposition that defendants should not be able to benefit from their own misconduct.[181] In order to protect the integrity of the criminal justice system, any incentives that criminals have to engage in witness tampering should be negated.[182] By disrupting the free functioning nature of the adversary process, pervasive witness tampering has the potential to undermine the legitimacy of the entire criminal justice system.[183]

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[176] *See supra* notes 155−174 and accompanying text.

[177] *See infra* notes 178−207 and accompanying text (arguing that the continued vitality of the *Cherry* doctrine advances the policy goals of fighting witness intimidation and deterring crime).

[178] PETER FINN & KERRY MURPHY HEALEY, NAT'L INST. OF JUSTICE, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION 2 (1996).

[179] John Anderson, *Gang-Related Witness Intimidation*, NAT'L GANG CTR. BULL., Feb. 2007, at 1, 1, *available at* http://www.nationalgangcenter.gov/content/documents/gang-related-witness-intimidation.pdf, *archived at* http://perma.cc/9A8J-S6J5 ("Traditionally used strategies include intensive witness management, immediate apprehension and aggressive prosecution of intimidators, setting high bail in cases of gang violence (especially gang-related witness intimidation), creation and use of influential victim/witness assistance programs, and occasional relocation of threatened witnesses.").

[180] *See id.* ("Promising new approaches include . . . amending the rules of evidence in some states to allow the admission of a prior sworn statement or grand-jury testimony if the defendant causes the witness to be unavailable.").

[181] *See* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–33 (1959) (stating that the principle that "no man may take advantage of his own wrong" is "[d]eeply rooted in our jurisprudence"); Reynolds v. United States, 98 U.S. 145, 159 (1878) ("The [doctrine of forfeiture by wrongdoing] has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.").

[182] *See* Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982) (suggesting that courts should "[protect] the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness").

[183] *See id.*; Anderson, *supra* note 179, at 1.

Accordingly—from a normative perspective—any policy that will potentially reduce the incidence of witness intimidation should be strongly considered.[184] Aligning forfeiture doctrine with the limits of conspiracy liability is consistent with deterrence theory—a consequentialist approach to shaping conduct that appears throughout the legal system.[185] Although some scholars tend to resist consequentialist theory when it is taken to the extreme, it is undeniable that laws are partly designed to shape individual conduct.[186]

A forfeiture doctrine that is coextensive with the limits of *Pinkerton* liability will deter crime in two ways.[187] First, as a consequence of a broader forfeiture doctrine, individuals will be deterred from ever joining dangerous conspiracies in the first place.[188] Aware of the severe consequences that a defendant's involvement in the conspiracy will bring, a would-be conspirator may opt out entirely to avoid the risk of incurring their own criminal liability.[189] Naturally, the greater the consequences that individuals face for their criminal behavior, the greater deterrent effect that the law should have on those individuals.[190]

More pointedly, individuals who are already members of a conspiracy will be deterred from engaging in witness intimidation if the law is able to strip away the benefit that would follow from procuring their witnesses' absenc-

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[184] *See* Katyal, *supra* note 11, at 1340, 1372–75 (highlighting the harms spared and benefits gained from expansive conspiracy liability as established in *Pinkerton*).

[185] *See id.* Deterrence theory underlies the notion of *Pinkerton* liability—i.e., deterring bad behavior and incentivizing good behavior. *See* Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 954–55 (2000) ("Under consequentialist ethics, punishment is justified by the deterrence of harm or, more broadly, by the promotion of social welfare."); *see, e.g.*, United States v. Dinkins, 691 F.3d 358, 383, 385 (4th Cir. 2012) (embracing the *Cherry* doctrine post-*Giles* because it strikes the "appropriate balance between the competing interests involved"), *cert. denied*, 133 S. Ct. 1278 (2013).

[186] *See* Huigens, *supra* note 185, at 1035 (exposing the shortcomings of pure consequentialist deterrence theory). *But see* Katyal, *supra* note 11, at 1372–75 (discussing how deterrence is a primary justification for *Pinkerton* liability); Harris, *supra* note 159, at 761 n.123 (explaining that the doctrine of transferred intent is one of the legal system's "tools of result-oriented jurisprudence").

[187] *See* Pinkerton v. United States, 328 U.S 640, 647–48 (1946); *infra* notes 188−194 and accompanying text (discussing the deterrence benefit of an unencumbered *Cherry* doctrine).

[188] *See* JAMES Q. WILSON & RICHARD HERRNSTEIN, CRIME AND HUMAN NATURE 494 (1985) (explaining that the greatest deterrent effect of expansive liability for conspiracy members will be felt by individuals other than the particular defendant); Katyal, *supra* note 11, at 1372–75 (explaining how expansive conspiracy liability deters group criminality).

[189] *See* Katyal, *supra* note 11, at 1374. Admittedly, deterrence theory assumes an awareness of the law that might not actually exists; nonetheless, deterrence theory posits that individuals will learn to avoid crimes that are punished most severely. *See* WILSON & HERRNSTEIN, *supra* note 188, at 494; Katyal, *supra* note 11, at 1374.

[190] *See* Katyal, *supra* note 11, at 1315 ("Deterrence is a function of the severity of a criminal sanction discounted by the probability that it will actually be enforced.").

es.[191] If conspiracy members learn that witnesses' statements to police will be used against them regardless of whether they are available for trial, the conspirators will no longer have the same incentive to intimidate or kill them.[192] If, however, forfeiture is denied unless the government is able to produce clear evidence of the defendant's personal intent to procure the witness's absence, then the law creates the "horribly perverse incentive, to 'finish the job' and make the assault a fatal one."[193] Such social motivation, when carefully calibrated, should be embraced to better combat the dangerous threat of witness intimidation in the context of group criminality.[194]

Finally, the counter-arguments raised by skeptics—those who have predicted that *Giles* renders the *Cherry* doctrine dead letter—are ultimately unpersuasive.[195] One counter-argument is that the rights guaranteed by the Confrontation Clause are personal to the defendant, and thus only the defendant should be able to waive or forfeit those rights.[196] This position submits that the Confrontation Clause requires the "intentional relinquishment" of these rights by the particular defendant for forfeiture to ever be justified.[197] Further, this position suggests that courts should be skeptical of forfeiture claims given the Supreme Court's "presumption against the waiver of constitutional rights."[198]

Although superficially appealing, this analysis is fundamentally flawed.[199] First, because the doctrine of forfeiture by wrongdoing is premised

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[191] *See id.* at 1374.

[192] *See Thompson*, 286 F.3d at 962 ("The primary reasoning behind [the forfeiture] rule is obvious—to deter criminals from intimidating or 'taking care of' potential witnesses against them."); Katyal, *supra* note 11, at 1315 (explaining marginal deterrence theory generally); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 808 (2005) (arguing that "[t]he doctrine of forfeiture by wrongdoing would help to prevent abusers from manipulating witnesses" because without the protection the doctrine provides, abusers would have greater incentive to resort to such violence).

[193] Brief for Richard D. Friedman as Amicus Curiae Supporting Respondent at 8 n.5, Giles v. California, 554 U.S. 353 (2008) (No. 07-6053), 2008 WL 859395, at *6 n.5; *see* George J. Stigler, *The Optimum Enforcement of Laws*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 55, 57 (Gary S. Becker & William M. Landes eds., 1974) ("If the thief has his hand cut off for taking five dollars, he had just as well take $5,000.").

[194] *See* WILSON & HERRNSTEIN, *supra* note 188, at 494; Katyal, *supra* note 11, at 1374–75.

[195] *See* Rose, *supra* note 14, at 285 (arguing that *Giles* put an end to the *Cherry* doctrine); *see also* Lininger, *supra* note 17, at 908 (arguing that hearsay rules are not consistent with the newfound *Giles* design requirement).

[196] *See* Rose, *supra* note 14, at 291–92.

[197] *Id.* at 292 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981)).

[198] *Id.* at 306 (quoting Brookhart v. Janis, 384 U.S. 1, 4 (1966)).

[199] *See infra* notes 200−204 and accompanying text.

on a forfeiture principle, the comparison to waiver is inapposite.[200] Waiver requires "an intentional relinquishment or abandonment of a known right or privilege."[201] Forfeiture, on the other hand, generally carries no such intent requirement.[202] Further, even should the forfeiture by wrongdoing doctrine be analyzed through the waiver lens, the *Cherry* doctrine nonetheless survives because the "intention to relinquish a right" can be inferred from a defendant's conduct.[203] Accordingly, any attempt to read additional requirements for forfeiture into the *Giles* decision—beyond what the Court stated—should be rejected.[204]

Finally, to separate the reasonably foreseeable consequences of a conspiracy from its design would be logically inconsistent.[205] As these two concepts are necessarily intertwined, a conspiracy is designed to achieve all that is within the scope of that conspiracy and reasonably foreseeable to its members.[206] When a defendant's co-conspirator procures a witness's unavailability, and

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[200] *See Taylor*, 684 F.2d at 1201 n.8. In its 1982 decision in *Steele v. Taylor*, the U.S. Court of Appeals for the Sixth Circuit explained:

> It should be noted that the "waiver" concept is not applicable, strictly speaking, to procurement, and its use is somewhat confusing. It is a legal fiction to say that a person who interferes with a witness thereby knowingly, intelligently and deliberately relinquishes his right to exclude hearsay. He simply does a wrongful act that has legal consequences that he may or may not foresee.

Id.; *see also* 2 MCCORMICK, TREATISE ON EVIDENCE app. A, at 665 (5th ed. 1999) ("'Forfeiture' should be substituted for 'waiver' because the concept of knowing waiver in this context is a fiction."); Moore, *supra* note 77, at 535 (noting that forfeiture reflects "the uniform position of jurisdictions that have considered the question" and explaining that forfeiture "better reflects the legal principles that underpin the doctrine" (quoting Commonwealth v. Edwards, 830 N.E.2d 158, 168 n.16 (Mass. 2005)) (internal quotation marks omitted)). *But see* James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1231 (2006) (arguing that a forfeiture-based theory produces unacceptable and excessive results because it does not tie the loss of constitutional rights to the intent of the individual actor).

[201] *Zerbst*, 304 U.S. at 464 (explaining that intent is required for waiver).

[202] *See Taylor*, 684 F.2d at 1201 n.8 (explaining that intent is not required for forfeiture).

[203] *See Dinkins*, 691 F.3d at 383, 385 (noting that "[t]he actual knowledge and intention to relinquish a right are inferred from the defendant's actions and the context in which they are taken").

[204] *See id.* (stating that "[t]he *Giles* decision did not materially alter application of the forfeiture-by-wrongdoing exception").

[205] *See infra* notes 139–204 and accompanying text. Importantly, this Note does not propose an argument for expansive conspiratorial liability; instead, it argues that in order to achieve logical consistency, the limits of the forfeiture by wrongdoing doctrine must be made contiguous with the accepted limits of conspiratorial liability. *See Pinkerton*, 328 U.S at 647–48; *Cherry*, 217 F.3d at 821.

[206] *See Cherry*, 217 F.3d at 821 ("[T]he scope of the conspiracy is not necessarily limited to a primary goal—such as bank robbery—but can also include secondary goals relevant to the evasion of apprehension and prosecution for that goal—such as escape, or, by analogy, obstruction of justice.").

such an action is a reasonably foreseeable consequence of the conspiracy, the co-conspirator's intent must be imputable for purposes of forfeiture.[207]

Conclusion

To combat the ever-expanding problem of witness intimidation, courts have employed familiar concepts of conspiracy liability to justify the extension of the forfeiture by wrongdoing doctrine in the context of group criminality. Under the *Cherry* doctrine, whether a co-conspirator's misconduct is imputed to defendants so as to render their confrontation rights forfeited is governed by the traditional limits of conspiracy liability under *Pinkerton*. To impute forfeiture to a defendant, the government must demonstrate that the wrongdoing was: (1) done in furtherance of the conspiracy; (2) within the scope of the unlawful project; and (3) reasonably foreseeable as a necessary or natural consequence of the unlawful agreement.

In *Giles*, the Supreme Court added a wrinkle to the forfeiture by wrongdoing analysis that seemingly put the *Cherry* doctrine in jeopardy. By inserting a new element of intent, the *Giles* decision potentially limited forfeiture to situations where a defendant personally possessed the intent to make a witness unavailable.

Despite what some commenters have suggested, however, the *Cherry* doctrine survives the *Giles* Court's shift in emphasis. Even though *Giles* now requires the *intent* to make a witness unavailable, the scope of the forfeiture by wrongdoing doctrine remains unchanged in the co-conspirator context. Accordingly, so long as a co-conspirator possesses the intent to make a witness unavailable, this intent can be imputed to the defendant, thus allowing the *Cherry* doctrine to live on.

This outcome is supported by the text of the *Giles* decision, comparisons to analogous doctrines, and the policies underlying the forfeiture doctrine. The text of the *Giles* decision acknowledges the importance of context, suggesting that a gang's violent reputation may support forfeiture even without facts that specifically support an individual's intent to make a witness unavailable. Additionally, various other legal constructs are routinely employed to impose criminal liability even when a mens rea element is lacking. Finally, the continued vitality of the *Cherry* doctrine is consistent with the policy goals of deterring witness intimidation and group criminality. Accordingly, even post-*Giles*, the

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[207] *See Pinkerton*, 328 U.S. at 647; *Dinkins*, 691 F.3d at 383; *Cherry*, 217 F.3d at 821; *see also* Moore, *supra* note 77, at 531 (advocating for a forfeiture by wrongdoing doctrine in Florida that would permit intent to be imputed to co-conspirators in a manner consistent with *Cherry*).

Cherry doctrine is still available even when another co-conspirator has made sure that a witness is not.

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