FORFEITURE OF CONFRONTATION RIGHTS POST-GILES: WHETHER A CO-CONSPIRATOR’S MISCONDUCT CAN FORFEIT A DEFENDANT’S RIGHT TO CONFRONT WITNESSES

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INTRODUCTION

Witness intimidation is a serious problem that allows defendants to manipulate the legal system, thereby weakening the capabilities of law enforcement and perpetuating criminal activity. Historically, witness intimidation was frequently associated with organized crime and domestic violence, but more recently, it has become closely connected to prosecutions for gang- and drug-related criminal activity.1 Studies have indicated that the problem is pervasive and growing.2 A number of strategies have been successfully utilized to minimize the effects of witness intimidation,3 but far more must be done by law enforcement and the judicial system to reduce the impact on the criminal justice

1. See Kelly Delde, Witness Intimidation 2 (U.S. Dep’t. of Justice Office of Comm. Policing Servs. 2006). See also Laura Perry, What’s in a Name, 46 AM. CRIM. L. REV. 1563, 1580 (2009) (“In Suffolk County, Massachusetts, prosecutors noted that from 2003 to 2005, witnesses were intimidated in over 90% of their criminal cases involving ‘gangs, guns, or serious violence.’”) (quoting Fox Butterfield, Guns and Jeers Used by Gangs to Buy Silence, N.Y. TIMES, Jan. 16, 2005, at A1).

2. Delde, supra note 1, at 5 (citing small-scale studies and surveys of police and prosecutors, including a study of witnesses in criminal courts in Bronx County, New York, and a survey of witnesses in the United Kingdom).

3. Gang-Related Witness Intimidation, NAT’L GANG CTR. BULL., Feb. 2007, at 4–6 (discussing comprehensive witness-security strategies including requesting high bail, vigorously prosecuting witness-intimidation, conscientiously managing witnesses, utilizing victim- and witness-assistance programs, limiting and redacting discovery for defense, implementing safeguards to prevent courtroom intimidation, and maintaining protective custody to reduce jailhouse intimidation). In 2004, Baltimore gang members appeared in “Stop Snitching,” a DVD in which the gang members threatened to harm witnesses that cooperate with the police. Delde, supra note 1, at 4.
system and society at large. However, before devising an evidentiary doctrine that may affect constitutional rights in an attempt to respond to the problem of witness intimidation, courts must analyze the greater implications of any such doctrine. This Note evaluates the Cherry doctrine and assesses whether it can withstand a series of recent Supreme Court decisions that address the constitutional right of defendants to confront witnesses against them. This Note addresses cases involving conspiracies in which a defendant is not aware that his co-conspirator may engage in misconduct to make a witness unavailable. It argues that in such cases, based on the Supreme Court’s recent decision in Giles, the Cherry doctrine’s application of hearsay rules to admissibility under the Confrontation Clause violates the Sixth Amendment.

In United States v. Cherry, the Tenth Circuit imputed a waiver of both a criminal defendant’s Sixth Amendment right to confront witnesses against himself, as well as a defendant’s right to make a hearsay objection based on a showing that the defendant’s co-conspirator engaged in misconduct that procured the witness’s unavailability at trial. Under the Cherry doctrine, a waiver required only that the co-conspirator’s misconduct be in the scope of, and a reasonably foreseeable consequence of, the conspiracy. In arriving at this conclusion, the Cherry court relied on the language of the “forfeiture by wrongdoing” doctrine, set out in Rule 804(b)(6) of the Federal Rules of Evidence. However, the Cherry doctrine extended the principle to waive not only hearsay objections, but also confrontation rights under the Sixth Amendment. In the decade since Cherry was decided, nu-

4. United States v. Cherry, 217 F.3d 811, 821 (10th Cir. 2000).
5. Id.
7. U.S. CONST. amend. VI.
8. Cherry, 217 F.3d at 821.
9. Id. (“[T]oday we hold that participation in an ongoing drug conspiracy may constitute a waiver of constitutional confrontation rights if the following additional circumstances are present: the wrongdoing leading to the unavailability of the witness was in furtherance of and within the scope of the drug conspiracy, and such wrongdoing was reasonably foreseeable as a ‘necessary or natural’ consequence of the conspiracy.”).
10. Id. at 815 (noting that “the recently-promulgated Rule 804(b)(6) of the Federal Rules of Evidence represents the codification, in the context of the federal hearsay rules, of this long-standing doctrine of waiver by misconduct”). Federal Rule of Evidence 804(b)(6) permits forfeiture of a defendant’s hearsay objection based on a showing that the defendant’s misconduct made the witness unavailable to testify. FED. R. EVID. 804(b)(6) (“Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”).
merous circuits\textsuperscript{11} and states\textsuperscript{12} have applied the \textit{Cherry} doctrine in their own courts, admitting testimonial and other hearsay statements by witnesses against defendants when the witness was made unavailable by the defendant’s co-conspirator’s misconduct.

In 2004, four years after \textit{Cherry} was decided, the Supreme Court in \textit{Crawford v. Washington}\textsuperscript{13} reformulated the requirements for ensuring that the Confrontation Clause is satisfied when a witness is unavailable to testify at trial. The \textit{Crawford} test requires cross-examination by the defendant in order to admit prior testimonial statements of unavailable witnesses. The Court recognized equitable exceptions to the confrontation requirement, which were based upon exceptions established at common law, and included an exception for the principle of forfeiture by wrongdoing.\textsuperscript{14} In 2008, in \textit{Giles v. Cali-}

\begin{itemize}
\item\textsuperscript{11} See, e.g., United States v. Johnson, 495 F.3d 951, 971 (8th Cir. 2007) (permitting testimonial statements by a witness that was made unavailable based on the “defendant’s role as an aider and abettor,” citing \textit{Cherry} for the proposition that forfeiture of a defendant’s trial rights should be permitted); United States v. Carson, 455 F.3d 336, 364 & n.24 (D.C. Cir. 2006) (citing \textit{Cherry} and \textit{Thompson} in forfeiting the defendants’ confrontation rights, noting “the reasons why a defendant forfeits his confrontation rights apply with equal force to a defendant whose co-conspirators render the witness unavailable, so long as their misconduct was within the scope of the conspiracy and reasonably foreseeable to the defendant”); United States v. Rivera, 412 F.3d 562, 567 (4th Cir. 2005) (admitting testimonial statements against the defendant based on forfeiture-by-wrongdoing, citing \textit{Cherry} and \textit{Thompson} for the proposition that “a defendant need only acquiesce in wrongdoing”); United States v. Rodriguez-Marrero, 390 F.3d 1, 17 & n.8 (1st Cir. 2004) (noting that “[w]hile \textit{Cherry} may represent a sensible rule of law,” not applying it because the government failed to argue it and the district court failed to “make any factual findings on the applicability of conspiratorial liability”); United States v. Thompson, 286 F.3d 950, 955 (7th Cir. 2002) (“We also . . . adopt the Tenth Circuit’s view of waiver [citing \textit{Cherry}] and approve the admission of the testimony of a murdered co-conspirator when the murder was reasonably foreseeable to other conspirators.”).

\item\textsuperscript{12} See, e.g., State v. Poole, 232 P.3d 519, 527 (Utah 2010) (citing \textit{Cherry}, finding that a witness’s testimonial statements may be admissible at trial, in a case where the defendant’s wife pressured their daughter, the witness, into refusing to testify, but declining to admit the statements because the witness’s refusal to testify occurred five months prior to trial and the trial court must wait until the witness is definitively unavailable at the time of trial); Commonwealth v. Edwards, 830 N.E.2d 158, 175 (Mass. 2005) (citing \textit{Cherry} and \textit{Thompson} in admitting testimonial statements noting that the defendants “forfeited their rights because [their co-conspirator’s] conduct in procuring [the witness’s] unavailability was ‘a continuation of’ and ‘in furtherance’ of a joint effort or conspiracy by all three defendants to cover up their participation in the crime and avoid conviction, and it was ‘reasonably foreseeable’ as a consequence of the ongoing conspiracy”); State v. Lewis, 619 S.E.2d 830, 847 (N.C. 2005) (noting that “a defendant may even be determined to waive his right of confrontation merely by acquiescing in the wrongdoing that procured the unavailability of the witness, even without his direct participation, citing \textit{Cherry}, but declining to admit to the witness’s testimonial statements because the “defendant was not responsible for her death”).

\item\textsuperscript{13} 541 U.S. 36, 55–56 (2004).

\item\textsuperscript{14} \textit{Id.} at 62.
\end{itemize}
FORFEITURE OF CONFRONTATION RIGHTS POST-GILES

Forfeiture of confrontation rights post-Giles, the Court clarified the scope of the forfeiture exception based on an analysis of which misconduct would have forfeited the defendant’s right of confrontation at the time of the Sixth Amendment. The Giles Court required that, for forfeiture by wrongdoing to apply, the defendant’s intent must have been to procure the witness’s unavailability.

This Note analyzes the Cherry doctrine and evaluates whether it can withstand the Giles decision. Through an examination of the process under Cherry for waiving a defendant’s Sixth Amendment rights based on his co-conspirator’s misconduct and consideration of the requirements set out by Giles, based on the Court’s understanding of the forfeiture-by-wrongdoing doctrine at common law, this Note finds that the Giles decision effectively overrules the Cherry doctrine. Part I of this Note describes the Sixth Amendment’s Confrontation Clause and the public policy objectives that are met by ensuring a defendant’s confrontation rights. Part II considers the rule of forfeiture by wrongdoing and the underlying legal principles for this equitable doctrine. Part II also analyzes the nature of the right to confrontation and argues that such a right can only be forfeited by the defendant himself. Part III addresses the Cherry doctrine and its extension of the forfeiture-by-wrongdoing doctrine from a defendant’s misconduct to the acts of his co-conspirator. Part III considers the doctrine of Pinkerton liability as the basis for this extension and the Cherry court’s application of Pinkerton liability to both waivers of hearsay objections and confrontation rights. Part IV examines the Supreme Court’s decisions in Crawford and Giles and their impact on the Confrontation Clause guarantees. Part IV also discusses the common law basis for the rule of forfeiture by wrongdoing. Part V argues that the Cherry doctrine is effectively overruled by the Giles requirement that the defendant have the intent to procure a witness’s unavailability in order to apply the forfeiture-by-wrongdoing exception to confrontation. This Note concludes with an analysis of the practical implications of eliminating the Cherry doctrine. It recognizes that one such repercussion may be law enforcement’s inability to admit statements by cooperating witnesses who have been made unavailable by a defendant’s co-conspirators. Yet this Note finds that such an outcome is an inevitable consequence of the Sixth Amendment.

16. Id. at 2693.
I.
THE SIXTH AMENDMENT’S CONFRONTATION CLAUSE:
BALANCING PUBLIC POLICY WITH
THE DEFENDANT’S RIGHTS

The Sixth Amendment’s Confrontation Clause establishes that in criminal prosecutions, a defendant has a right “to be confronted with the witnesses against him.”\(^\text{17}\) The provision’s primary objective was to prevent \textit{ex parte} affidavits from being used against a defendant without an opportunity to cross-examine the witness.\(^\text{18}\) An early Supreme Court decision noted that the Confrontation Clause set out a method “not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”\(^\text{19}\)

In the century since that decision, the Supreme Court has issued, and revised and reissued, tests to determine which evidence is inadmissible at trial due to protections for the defendant under the Confrontation Clause.\(^\text{20}\) The Court has emphasized the constitutional principles that underlie a defendant’s Sixth Amendment protections. As Justice Cardozo stated in \textit{Snyder v. Massachusetts}:

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof.\(^\text{21}\)

\(^{17}\) U.S. CONST. amend. VI.
\(^{19}\) \textit{Id.} at 242–43.
\(^{20}\) See, e.g., Giles, 128 S. Ct. at 2693 (holding that criminal defendants do not forfeit their Confrontation Clause rights by actions that merely make a witness unavailable, but that forfeiture requires a showing that the defendant’s purpose was to make the witness unavailable); Davis v. Washington, 547 U.S. 813, 829 (2006) (holding that statements made in a 911 call are not testimonial and thereby do not require cross-examination because they are not intended to be used in a future criminal prosecution); Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (holding that cross-examination is required to admit prior testimonial statements by an unavailable witness); Ohio v. Roberts, 448 U.S. 56, 57 (1980) (holding that testimony by an unavailable witness is admissible if it bears adequate indicia of reliability and that reliability can be inferred when the statement falls within a firmly rooted hearsay exception).
\(^{21}\) Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).
However, despite this commitment to ensuring defendants’ rights in the trial process, the Court also notes that those protections may at times yield to public policy considerations based on the facts in a case: “[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

For over a century, the Court has maintained that the public’s rights can supersede the defendant’s protections under the Sixth Amendment: “The rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” The Court is thus faced with a difficult task in weighing the appropriate balance between the defendant’s rights and public policy. Throughout its history, it has issued decisions reformulating its standards to better meet this challenge.

The Court has balanced these essential public policy considerations using both the requirements of the Confrontation Clause as well as the evidentiary rules for hearsay. However, it is important to understand that “[w]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete.” The hearsay rules are promulgated under Article VIII of the Federal Rules of Evidence. While the Supreme Court has the power to prescribe evidentiary rules, the rules are subject to Congressional disapproval before they become legally binding. The Confrontation Clause, on the other hand, is a constitutional guarantee under the Sixth Amendment. The requirements and scope of the Confrontation Clause have been reinterpreted throughout the Court’s history, and at times, the Court has held that the requirements of the Confrontation Clause were met by certain hearsay exceptions. Despite that, the hearsay rule and the Confrontation Clause have fundamentally different sources of authority and, consequently, different requirements. As this Note discusses, an out-of-court statement can meet the requirements of the hearsay rules while being prohibited by the Confrontation

22. Id.
23. Mattox, 156 U.S. at 243.
29. Roberts, 448 U.S. at 66 (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”).
Clause; similarly, numerous statements can violate hearsay rules yet not be prohibited by the Sixth Amendment.\(^{30}\)

II.

**FORFEITURE BY WRONGDOING OF THE RIGHT TO CONFRONT WITNESSES**

The equitable principle of forfeiture by wrongdoing is based on the premise that a defendant should not profit from his wrongful actions. Relying on this doctrine, courts have held that a defendant’s misconduct can forfeit his right to confront witnesses against him. However, given that many constitutional rights are personal to the defendant, only the defendant’s own conduct should be able to waive or forfeit the defendant’s constitutional rights—not the conduct of another party. While other statutes, as well as the evidentiary hearsay rules, may permit another party’s misconduct to constitute a waiver of the defendant’s hearsay objection, this should not similarly waive a constitutional right.

A. **Public Policy Rationale Underlying the Forfeiture Principle**

Courts have recognized a wide array of actions by a defendant that waive his Sixth Amendment right to confrontation, ranging from consent to forfeiture. Defendants have generally been permitted to consent to refrain from cross-examination of witnesses,\(^{31}\) stipulate to the admission of evidence,\(^{32}\) and forego confrontation altogether by entering a guilty plea.\(^{33}\) The Supreme Court has also identified that confrontation rights “may be waived not only by consent, but ‘at times even by misconduct.’”\(^{34}\) The defendant’s misconduct can range from his disruptive conduct in a courtroom\(^{35}\) to his actions making the witness unavailable for trial.\(^{36}\)

This latter exception to the Confrontation Clause’s protections—the defendant’s misconduct in procuring the witness’s unavailability

\(^{30}\) See infra Part III.B.

\(^{31}\) Brookhart v. Janis, 384 U.S. 1, 3 (1966) (noting the denial of cross-examination without waiver creates constitutional issues, implicitly allowing the defendant to waive such rights).

\(^{32}\) United States v. Martin, 489 F.2d 674, 678 (9th Cir. 1973).

\(^{33}\) See Boykin v. Alabama, 395 U.S. 238, 243 (1969) (“Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial, [including] . . . the right to confront one's accusers.”).

\(^{34}\) United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976) (quoting Snyder v. Massachusetts, 291 U.S. 97, 106 (1934)).


\(^{36}\) Reynolds v. United States, 98 U.S. 145, 159 (1878).
to testify—has its roots in the common law preceding the Sixth Amendment’s drafting.\footnote{See Giles v. California, 128 S.Ct. 2678, 2683 (2008); see also Ralph Ruebner & Eugene Goryunov, Giles v. California: Sixth Amendment Confrontation Right, Forfeiture by Wrongdoing, and a Misguided Departure from the Common Law and the Constitution, 40 U. Tol. L. Rev. 577, 579–82 (2009).} Forfeiture by wrongdoing, articulated by the Supreme Court as early as 1878, recognizes that a defendant’s wrongful actions can forfeit his right to confront witnesses against him:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.\footnote{Reynolds, 98 U.S. at 158.}

This early analysis of the forfeiture doctrine recognizes that certain public policy values trump a defendant’s confrontation rights. These values include the integrity of the trial process and witness protection. The Court recognized that “[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.”\footnote{Reynolds, 98 U.S. at 158.}

The evidentiary rules for hearsay, set out in Rule 804(b)(6) of the Federal Rules of Evidence, also establish an exception to hearsay rules based on forfeiture by wrongdoing. The Rule relies on similar principles, discussed by the Court when establishing the Confrontation Clause exception based on forfeiture by wrongdoing.\footnote{FED. R. EVID. 804(b)(6) advisory committee’s note (“Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.”).} The Advisory Committee on Evidence Rules (Advisory Committee) notes emphasize “the need for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’”\footnote{Id. (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).} However, the Advisory Committee never defined “abhorrent behavior,” leaving the task to later judicial decisions.

The principle of forfeiture by wrongdoing is inherently an equitable principle. It ensures that the Confrontation Clause is not used as a shield to protect a defendant from his own misconduct.\footnote{United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976).} Confrontation is a guaranteed right based on the premise that the defendant must
have the “right to face his accuser and challenge the truth of the accusation,” but any “unfairness [in denying that right] disappears when the accused deliberately brings about that denial in furtherance of his own interests.” The forfeiture-by-wrongdoing doctrine is designed to incentivize and disincentivize certain behavior by defendants, including misconduct intended to make a witness unavailable to testify. The defendant “cannot . . . be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial.”

Although courts often use the words “forfeit” and “waive” interchangeably, these terms have different connotations and, consequently, refer to different conduct. While forfeiture often requires less action—or, at times, no action—by the defendant than that required for waiver, under those circumstances, the consequences of such a method of forfeiture may also be less severe than that of waiver. While this Note focuses on forfeiture of confrontation rights based on misconduct, at times, the term “waiver” is used, in order to

43. United States v. Mayes, 512 F.2d 637, 650 (6th Cir. 1975) (citations omitted).
44. Id.
45. United States v. Carson, 455 F.3d 336, 363 (D.C. Cir. 2006) (citing United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997)) (noting the rule is premised on “‘the need for fit’ incentives”).
46. Mayes, 512 F.2d at 651.
47. Freytag v. Comm’r, 501 U.S. 868, 894 n.2 (1991) (“The Court uses the term ‘waive’ instead of ‘forfeit.’ The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision.”).
48. Forfeiture involves the failure to make a timely assertion of a right, whereas waiver is a particular method of forfeiture. United States v. Olano, 507 U.S. 725, 733 (1993). Waiver requires “an intentional relinquishment or abandonment of a known right or privilege.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938), overruled in part on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981). On the other hand, rights can be forfeited by means short of waiver, such as a mere failure to object. See United States v. Whitten as an example of forfeiture of the right of confrontation by failure of timely objection. 706 F.2d 1000, 1018, n.7 (9th Cir. 1983) (“Appellant also charged that the admission of [hearsay statements] violated the Confrontation Clause of the federal constitution. That issue was not preserved by a proper objection at trial and we do not consider it here.”).
49. For example, plain error, which is an error that affects a defendant’s substantial rights, is extinguished by waiver. Fed. R. Crim. P. 52(b) (“Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”). Yet forfeiture of that substantial right by failing to object does not extinguish the error. Olano, 507 U.S. at 733–34 (“If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an ‘error’ within the meaning of Rule 52(b) despite the absence of a timely objection.”).
remain consistent with the terminology used by courts applying the Cherry doctrine.50

B. Confrontation Rights Are a Personal Right of the Defendant Which Should Only be Waived or Forfeited by the Defendant

The Sixth Amendment’s guarantee to a defendant of the right “to be confronted with the witnesses against him”51 is a personal and individual right of the defendant, and only the defendant himself should be able to waive or forfeit that right. The confrontation right is “by its language and historical underpinnings, a personal right of the accused and is intended for his benefit.”52 The Supreme Court recognizes that the right is “given directly to the accused[,] for it is he who suffers the consequences if the defense fails.”53 Given that confrontation rights are personal to the defendant, only the defendant should be able to waive or forfeit that right. In several cases, in the Sixth Amendment context as well as others, the Supreme Court has noted that personal rights can only be waived by the holder of that right.54 Consequently,

50. See infra Part III.B. See also United States v. Cherry, 217 F.3d 811, 821 (10th Cir. 2000) (interchanging waiver and forfeiture when stating, “even if the district court finds the standard for waiver by acquiescence to be met for some or all appel-l-ees, and thereby their Confrontation Clause and hearsay objections to be forfeited, the district court is still free to consider concerns . . . .”) (emphasis added). The New Mexico Court of Appeals provides an explanation for the Cherry court’s failure to distinguish between waiver and forfeiture, noting that prior to Crawford, there was no forfeiture-by-wrongdoing doctrine. State v. Romero, 133 P.3d 842, 853 (N.M. Ct. App. 2006) (“we note that while our Court . . . consistently used the term ‘forfeiture,’ Cherry, the Tenth Circuit case relied on by our [c]ourt, consistently uses the term ‘waiver.’ We also note that the Cherry [c]ourt may not have considered the waiver/forfeiture distinction, because Cherry was decided before Crawford, and Crawford appears to be the first case in which the United States Supreme Court referred to the doctrine as a ‘forfeiture.’”) (citation omitted). See also Commonwealth v. Edwards, 830 N.E.2d 158, 162 & n.3, 168 & n.16 (Mass. 2005) (“Some jurisdictions have used the term ‘waiver’ or phrase ‘waiver by misconduct’ to describe essentially the same doctrine. The parties here have utilized ‘waiver’ and ‘forfeiture,’ sometimes interchangeably, when describing the doctrine. We use the phrase ‘forfeiture by wrongdoing’ to refer to the doctrine . . . . We adopt the doctrine as one involving ‘forfeiture’ rather than ‘waiver’ because the phrase ‘forfeiture by wrongdoing’ better reflects the legal principles that underpin the doctrine.”) (citations omitted).
51. U.S. CONST. amend. VI.
52. United States v. Carlson, 547 F.2d 1346, 1357 (citing Faretta v. California, 422 U.S. 806, 819 (1975)).
54. See, e.g., Peretz v. United States, 501 U.S. 923, 936 (1991) (“[L]itigants may waive their personal right to have an Article III judge preside over a civil trial.”) (emphasis added); Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 848–49 (1986) (“Moreover, as a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal
courts must determine “whether the defendant forfeited his right to confront his accusers personally.”

Given that waiver, unlike forfeiture, requires conduct as opposed to mere omission, the action must be the defendant’s own action. The Supreme Court recognized in Johnson v. Zerbst that waiver requires an “intentional relinquishment,” which implies that the known right can only be waived by the defendant’s actions, not by the misconduct of another individual. Further, the Court notes, “courts indulge in every reasonable presumption against waiver” and will “not presume acquiescence in the loss of fundamental rights.” However, the Zerbst Court set out factors to consider when determining whether to presume a waiver, which include “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” The inclusion of the defendant’s conduct reinforces the principle that a waiver is personal to the defendant and based on the defendant’s conduct, not the actions of another party. Twenty-five years after Zerbst, the Supreme Court in Schneckloth v. Bustamonte clarified the requirements for waiver, noting that a “knowing and intelligent waiver” with regard to the rights of defendants is required in order to preserve a fair trial. This knowledge-and-intelligence requirement further establishes that the waiver must be due to conduct of the defendant himself, as opposed to based on another party’s conduct. For example, if a court permitted another party’s conduct to meet the requirements to demonstrate the defendant’s waiver, there would be no showing of the defendant’s knowledge or intelligence in providing that waiver.

classical rights that dictate the procedures by which civil and criminal matters must be tried. . . . [The defendant] indisputably waived any right he may have possessed . . . .”) (emphasis added).

55. Carlson, 547 F.2d at 1358 n.11 (emphasis added).
57. Brewer v. Williams, 430 U.S. 387, 404 (1977); see also Brookhart v. Janis, 384 U.S. 1, 4 (1966) (“[F]or a waiver to be effective it must be clearly established that there was ‘an intentional relinquishment or abandonment of a known right or privilege.’”) (citing Zerbst, 304 U.S. at 464).
59. Zerbst, 304 U.S. at 464 (emphasis added).
60. 412 U.S. 218, 237 (1973) (“Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.”).
C. Defendant’s Conduct that May Forfeit Confrontation Rights

The Second Circuit in United States v. Mastrangelo61 set out a series of wrongful actions by a defendant that procure a witness’s unavailability and thereby forfeit that defendant’s right of confrontation:

[I]f a witness’[s] silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him. Any other result would mock the very system of justice the confrontation clause was designed to protect.62

Further, the defendant’s conduct to procure the witness’s unavailability need not be criminal conduct for it to constitute forfeiture by wrongdoing. For example, in Reynolds, the Supreme Court found that the defendant forfeited his confrontation rights based on his refusal to allow his alleged second wife to meet an officer to receive a subpoena to appear at the defendant’s trial for bigamy.63

Despite the Court’s requirement in Johnson v. Zerbst that a waiver result only from the defendant’s intentional relinquishment of a right,64 when the defendant engages in conduct that procures a witness’s unavailability, courts have imputed a waiver of his confrontation rights. In United States v. Carlson,65 the Eighth Circuit admitted the grand jury testimony of an unavailable witness after the defendant engaged in witness intimidation. The court noted that the defendant “did not explicitly manifest his consent to a waiver of his confrontation rights,” but that the defendant’s actions “intimidated [the witness] into not testifying . . . [which ] waive[s] his right of confrontation by pursuing this course of conduct, which is itself inimical to the administration of justice.”66 Despite absence of an explicit waiver by the defendant, the court found that the defendant’s own conduct consti-

61. United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982).
62. Id. at 272–73 (citations omitted). Further, it should be noted that while Mastrangelo sets out the defendant’s relevant misconduct, the scope of the forfeiture is more limited than that waived under the Cherry doctrine. The Cherry doctrine waives the right of confrontation for all hearsay statements. Mastrangelo limits forfeiture to that of grand jury testimony, which contrary to other testimonial hearsay, is inherently more reliable because it is under oath.
63. Reynolds v. United States, 98 U.S. 145, 158–60 (1878); see also Epstein, supra note 38, 442–44.
65. 547 F.2d 1346 (8th Cir. 1976).
66. Id. at 1358.
tuted an “intentional relinquishment” amounting to a waiver of his right to confront witnesses against him.67

D. Conduct of Another that May Forfeit the Defendant’s Confrontation Rights

While it is clear that the defendant’s own actions to procure a witness’s unavailability can forfeit his confrontation rights, this raises the question of whether another individual’s actions would forfeit the defendant’s right to confront his witnesses. While this Note only addresses the issues of the Confrontation Clause and the probative link between the misconduct and the defendant necessary to satisfy the Sixth Amendment, it is important to understand the parallel analysis under the hearsay rules. With regard to the rules for forfeiture of a hearsay objection, discussed supra Part II.A, Federal Rule of Evidence 804(b)(6) sets out a principle of forfeiture by wrongdoing based on the defendant’s misconduct that procured a witness’s unavailability at trial. The Rule permits admission of statements by that witness, although these statements would otherwise be inadmissible as hearsay. As a basis for forfeiture, the rule includes not only the defendant’s own wrongdoing, but also conduct whereby the defendant “acquiesced in wrongdoing that was intended to, and did, procure the unavailability” of the witness.68 While the Advisory Committee’s Note is silent on the use of the term “acquiesced,” it seems clear that the word was used to clarify that direct participation is not a necessary condition of the defendant’s forfeiture by wrongdoing.69

The Advisory Committee defined neither what conduct would be sufficient to constitute acquiescence nor what level of the defendant’s involvement is necessary to link him to the misconduct, so as to forfeit his right to object on hearsay grounds. However, the Advisory Committee’s Note quotes the public policy arguments of Mastrangelo as justification for the Rule,70 and the Mastrangelo court relied on the term “acquiescence” in determining whether to admit statements of an unavailable witness:

As the court below stated at argument,. . . I was warranted in finding that this defendant, Mastrangelo, either directly arranged for the

67. Id. at 1360.
68. Fed. R. Evid. 804(b)(6) (emphasis added). See also Fed. R. Evid. 840(b)(6) advisory committee’s note.
70. Fed. R. Evid. 804(b)(6) advisory committee’s note.
killing of the witness or was advised of the possible killing of the witness and acquiesced. He was the only person that could gain from it . . . . It just is inconceivable. . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness, would have been taken without his knowledge, acquiescence, or orders. 71

Even with the insight of the Mastrangelo court as to the meaning of “acquiescence,” the term is still “sufficiently ambiguous such that it is capable of broad interpretation.” 72

Scholars have analyzed the Advisory Committee’s language and concluded that the ambiguity of the word “acquiesce” attenuates the probative link between the defendant and the conduct that procured the witness’s unavailability. 73 For instance, focusing on the limited conduct required for “acquiescence,” Professor Flanagan has noted:

Acquiesce is defined as follows: “to accept or comply tacitly or passively, without implying assent or agreement; to accept as inevitable or indisputable.” A tacit or passive agreement suggests that it can be inferred from silence or perhaps from the gestalt of the surrounding circumstances. Acquiescence has the advantage of not excluding any evidence that might show agreement. A definition that permits the agreement to be inferred from silence or from some unspecified gestalt of the situation implies that a weak probative link between predicate facts and ultimate conclusion is sufficient. Furthermore, acquiesce also has the connotation of submission to another’s wishes. Ballentine’s Law Dictionary, for example, has defined “acquiescence” as “[a] tacit approval or at least an indication of lack of disapproval. Acceptance, perhaps without approval, as acquiescence in a decision.” This connotation and reliance on a “lack of disapproval” further weaken the required probative link between a defendant and the violence directed at the witness. 74

Courts have imported the analysis for admissibility under hearsay rules into admissibility under the Confrontation Clause, thereby extending the consequences of misconduct that would fall under hearsay’s “acquiescence” exception, even though the Confrontation Clause and the hearsay rule of evidence are based on different procedural requirements. This Note does not address whether such a tenuous connection between the defendant and the misconduct would be sufficient

72. Flanagan, supra note 69, at 499 (citing Telephone Interview with Professor Neil P. Cohen, member of the Advisory Committee (Dec. 5, 2002)).
73. Flanagan, supra note 69, at 499–500.
74. Id. (citations omitted).
to forfeit a defendant’s hearsay objection, which is guaranteed only by statute. However, this Note does argue that, in order to forfeit confrontation rights, there must be a showing of the probative nexus between the misconduct and the defendant. Mere acquiescence or acceptance without approval should not be sufficient to waive a defendant’s constitutional right. In fact, some courts have been unwilling to hold that a defendant has waived his confrontation rights based only on conduct to which he is tenuously connected.75

### III. CONSPIRATORIAL LIABILITY AND WAIVER—THE *PINKERTON AND CHERRY* DOCTRINES

In Cherry, the Tenth Circuit extended the principle of the Pinkerton doctrine from conspiratorial liability for a substantive offense to encapsulate a waiver of confrontation rights based on co-conspirator’s misconduct. Courts applying the Cherry doctrine have relied on the murky hearsay rule’s use of “acquiescence” to expand the notion of forfeiture of hearsay objections as well as confrontation rights. The effect has been to lower the minimum showing for the defendant’s misconduct, while expanding the range of defendants to whom the waiver can be imputed.

#### A. Conspiratorial Liability for Substantive Offenses of a Conspiracy under the Pinkerton Doctrine

The doctrine of Pinkerton liability sets out that a defendant can be liable for the substantive offenses committed by his co-conspirator when the acts are within the scope of the conspiracy and are reasonably foreseeable as a necessary and natural consequence of the conspiracy.76 The Supreme Court in *Pinkerton v. United States* relied on principles of partnership to justify this conclusion, finding that “so long as the partnership in crime continues, the partners act for each other in carrying it forward.”77 The Court reasoned that, by joining a conspiracy, a defendant had the criminal intent to do all of the acts

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75. See, e.g., Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982) (holding that the defendant “did not waive his confrontation right” despite evidence of the defendant’s co-conspirator’s threats against a witness. “[V]irtually no evidence ties [the defendant] to these threats . . . . The right to confront witnesses is a constitutional right personal to the accused. Only [the defendant] or someone acting on his behalf may waive or forfeit that right.”) (citations omitted).


77. Id. at 646.
committed by his co-conspirators within the scope of and in furtherance of the conspiracy. 78

For a defendant to be liable under Pinkerton because of his co-conspirator’s acts, the fact finder must find, beyond a reasonable doubt, that: (1) the substantive offense was committed, (2) the person who actually committed the crime was a member of the conspiracy found to have existed, (3) the substantive crime was committed pursuant to the common plan and understanding found to exist among the conspirators, (4) the defendant was a member of the conspiracy at the time the substantive crime was committed, and (5) the defendant could have reasonably foreseen that the substantive crime might be committed by his co-conspirators. 79

The Pinkerton doctrine has been expansively applied and can easily sweep in co-conspirators for offenses in which they did not participate and of which they had no knowledge, once it is determined that the offenses were within the scope and reasonably foreseeable consequences of a conspiracy. 80 Pinkerton liability also encapsulates substantive offenses that were neither contemplated at the time of the formation of the conspiracy nor consistent with its original goals. 81 Critics have raised concerns about the Pinkerton doctrine when liability has been imposed in “large sprawling conspiracies to reach lower-level members,” based on the arguments that “lower-level members are unaware of the activities of other conspirators and have no ability to influence them, nor are they directly responsible for the acts.” 82 Based on these criticisms, some jurisdictions have rejected Pinkerton liability in favor of a standard that imposes individual liability based on the individual’s responsibility. 83 The Model Penal Code, for exam-

78. Id. at 647–48.
79. 1 MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL VOLUMES) § 19.03 (LEXIS-NEXIS 2010).
81. Id. at 516 (citing United States v. Feola, 420 U.S. 671, 696 (1975) (holding defendants guilty of conspiracy for assaulting federal agents, though at the time the defendants were unaware they were federal officers)).
82. Id. at 517 (citing United States v. Etheridge, 424 F.2d 951, 963–65 (6th Cir. 1970) (finding that the murder of an informant during a burglary conspiracy reaches two conspirators without any knowledge of the intended murder of the informant because “the murder actually committed must be viewed as within the reasonable contemplation of those who formulated and participated in the bank robbery [sic] scheme and was in furtherance of the plan”)).
83. Id. at 517. See Professor Kreit’s history of Pinkerton scholarship for a discussion of the falling and rising influence of the Pinkerton doctrine. Alex Kreit, Vicarious Liability and the Constitutional Dimensions of Pinkerton, 57 AM. U. L. REV. 585, 597–98 (2008) (“In the years following Pinkerton, the decision was ‘almost universally condemned by the academic community.’ And, although no statistics exist, Pin-
ple, permits liability for another’s conduct only when the defendant, “with the purpose of promoting or facilitating the commission of the offense,” solicits the other person to commit it or aids the other person in planning or committing the offense.\(^8^4\) This is a far step from liability based on the reasonable foreseeability of \textit{Pinkerton}. The Code’s drafters set out these requirements to ensure proportionality, such that lower-level members of a conspiracy would not be liable for offenses for which they were neither responsible nor able to influence.\(^8^5\)

One senior prosecutor noted the ambiguity of the \textit{Pinkerton} doctrine and suggested reforms that maintain the \textit{Pinkerton} doctrine while ensuring that a defendant is only liable for a co-conspirator’s conduct that the defendant intended:

The \textit{Pinkerton} instruction is based on a legal fiction: That conspirators are agents of one another. . . . Short of the abolition of \textit{Pinkerton} liability, it is hard to draw the \textit{Pinkerton} line. . . . Requiring the jury to make such a finding would require the jury to focus on each defendant separately and each crime as to which the government seeks to apply the \textit{Pinkerton} theory, and to ask “did this defendant intend that this crime be committed in furtherance of the agreement that he entered?” Such precision stands in contrast to the open-ended inquiry currently called for by the \textit{Pinkerton} instruction.\(^8^6\)

However, despite concerns raised by the breadth of the \textit{Pinkerton} doctrine, the Supreme Court has never overruled it; to the contrary, the Court has upheld it in numerous cases over the past two decades.\(^8^7\)

\(^8^4\) MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962).

\(^8^5\) Flanagan, \textit{supra} note 69, at 517 (citing MODEL PENAL CODE § 2.04(3), at 20, 26 (Tentative Draft No. 1, 1956)); see also MODEL PENAL CODE § 2.04(3), at 21 (Tentative Draft No. 1, 1956) (“Law would lose all sense of just proportion if in virtue of that crime, each were held accountable for thousands of offenses that he did not influence at all.”).


\(^8^7\) See, e.g., Salinas v. United States, 522 U.S. 52, 63–64 (1997) (“A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every
B. The Cherry Doctrine and Conspiratorial Waiver of Confrontation Rights and Hearsay Objections

In United States v. Cherry, the Tenth Circuit extended the Pinkerton doctrine to create a theory of “conspiratorial waiver by misconduct.”\(^88\) Cherry involved five defendants who were part of a drug conspiracy. Most of the evidence came from a cooperating witness who was murdered prior to trial. While there was sufficient evidence that one of the defendants procured the witness’s unavailability, the lower court found there was “absolutely no evidence [that Cherry] had actual knowledge of, agreed to or participated in the murder of [the witness].”\(^89\) However, the Cherry court found that actual knowledge was not necessary for conspiratorial waiver by misconduct if the Pinkerton elements are satisfied.\(^90\)

Relying on the principles of Pinkerton liability in the context of the waiver of confrontation rights, the Cherry court holds that a defendant waives his confrontation rights and hearsay objections when it is reasonably foreseeable to the defendant that his co-conspirator would engage in misconduct to procure a witness’s unavailability and when the misconduct is within the scope of the conspiracy.\(^91\) The court stated:

A defendant may be deemed to have waived his or her Confrontation Clause rights (and, a fortiori, hearsay objections) if a preponderance of the evidence establishes one of the following circumstances: (1) he or she participated directly in planning or procuring the declarant’s unavailability 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.\(^92\)

\(^88\) United States v. Cherry, 217 F.3d 811, 821 (10th Cir. 2000).

\(^89\) Id. at 814 (quoting United States v. Price, No. CR-98-10-S, order at 17 (E.D. Okla. Jan. 14, 1999)).

\(^90\) Cherry, 217 F.3d at 821.

\(^91\) Id.

\(^92\) Id. at 820 (citation omitted). The court clarified the requirements to impute a waiver of the defendant’s confrontation rights based on a showing by preponderance of the evidence, holding that finding a waiver was proper when the wrongdoing was (1) in furtherance of the conspiracy, (2) within the scope of the conspiracy, and (3) “reasonably foreseeable as a necessary or natural consequence of the conspiracy.” Id.
The Cherry court expanded the waiver by broadening the extent of the conspiracy, noting, "the 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." 93

The Cherry doctrine is aimed at “recognizing the applicability of agency concepts and permitting admission of the testimony of an unavailable witness against a co-conspirator involved in, but not necessarily immediately responsible for, procuring that witness’s unavailability.” 94 Neither actual knowledge of, nor agreement to, nor participation in the conduct that made the witness unavailable is necessary to impute conspiratorial waiver by misconduct. 95 The theory is that when the government can satisfy the requirements of the Pinkerton doctrine, a co-conspirator may be deemed to have “acquiesced in” the wrongful procurement of a witness’s unavailability. 96 Yet while prosecutors can rely on the Cherry doctrine to admit a witness’s testimony, they may choose not to charge the defendant using Pinkerton liability for the substantive offense that made the witness unavailable. After all, as the Cherry court noted, the Pinkerton elements must only be proven by preponderance of the evidence, 97 whereas a conviction on the underlying offense requires satisfaction by the fact finder that the Pinkerton elements were met by the more stringent standard of beyond a reasonable doubt.

Two years after the Cherry holding, the Seventh Circuit followed the Cherry doctrine in United States v. Thompson. 98 After explaining why it found the Cherry decision persuasive, the Thompson Court noted:

[A] defendant who joins a conspiracy risks many things—e.g. the admission of his coconspirator’s statements at trial under Federal Rule of Evidence 801(d)(2)(E), the potential conviction for substantive offenses committed in furtherance of the conspiracy, and the inclusion of his coconspirator’s [sic] acts in the computation of his relevant conduct at sentencing. We see no reason why imputed waiver should not be one of these risks, particularly when the waiver results from misconduct designed to benefit the conspir-
acy’s members . . . . The waiver-by-misconduct of one conspirator may be imputed to another conspirator if the misconduct was within the scope and in furtherance of the conspiracy, and was reasonably foreseeable to him.99

The Thompson Court relied on the requirement of reasonable foreseeability, because “[b]y limiting coconspirator waiver-by-misconduct to those acts that were reasonably foreseeable to each individual defendant, the rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct.”100 However, because reasonable foreseeability is an objective standard, the rule in fact sometimes captures co-conspirators who not only did not implicitly acquiesce to the conduct but also had no conception that it might occur.101

The Cherry and Thompson decisions both relied on the term “acquiesce,” which was used in Rule 804(b)(6), discussed supra Part II.D. However, acquiescence is applicable only to the admissibility of hearsay and not to the constitutional requirements under the Confrontation Clause. While under Ohio v. Roberts, satisfying a firmly rooted hearsay exception without more could meet the reliability requirement of the Confrontation Clause,102 the Crawford Court established that

99. Id. at 965.
100. Id.
101. See, e.g., New Jersey v. Bridges, 628 A.2d 270, 274 (1993) (“The Appellate Division thus interpreted Pinkerton to prescribe a requirement of subjective foreseeability of the criminal consequences as a basis for vicarious co-conspirator liability. That understanding of Pinkerton is not supported . . . . Although the determination, uttered as dictum, in Pinkerton has been subject to criticism, it has not been disputed that it purported to impose vicarious liability on each conspirator for the acts of others based on an objective standard of reasonable foreseeability . . . . [I]t was understood that the liability of a co-conspirator under the objective standard of reasonable foreseeability would be broader than that of an accomplice, where the defendant must actually foresee and intend the result of his or her acts.”) (citations omitted); State v. Stein, 360 A.2d 347 (1976) (finding defendant conspiratorially liable for reasonably foreseeable consequences of conspiracy even though they were not in contemplation of conspirators at time of agreement). Numerous scholars have criticized the objective standard in Pinkerton, noting that it extends liability to individuals with remote or nonexistent involvement in the underlying offense. See, e.g., Flanagan, supra note 69, at 516–17; Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Reinterpretation of Doctrine, 73 CAL. L. REV. 323, 363–64 (1985) (“These cases seem excessive because they hold a secondary party liable for the acts of a principal in circumstances where the possibility that the secondary’s actions mattered at all is remote . . . . If it is a fault to impose liability at all for a highly attenuated contribution, it belongs to complicity, not conspiracy.”).
102. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (“[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”).
hearsay and the Confrontation Clause demanded two different tests. Yet the Cherry and Thompson courts equated the requirements for hearsay with the requirements for waiver of Confrontation Clause rights, and as a result, the courts found that the term “acquiescence” in the hearsay rule allowed for a broad range of misconduct to result in forfeiture. The Thompson court set out that acquiescence to another’s misconduct was sufficient to constitute a waiver, noting “acquiescence itself is an act . . . [and] when that act is done intentionally and voluntarily it is no less valid as a means of waiver than the decision to more directly procure the unavailability of a witness by, for example, murdering a witness oneself.”

Ultimately, the Thompson court distinguished the facts of that case from those of Cherry and found that the actions of defendants’ conspirators were not reasonably foreseeable to the defendants who participated neither in the murder of a witness nor its cover-up. The Thompson court applied a strict construction of “reasonable foreseeability,” finding that the witness’s murder was not reasonably foreseeable. Relying on the Cherry and Thompson decisions, later courts have nonetheless applied a more lax interpretation of reasonable foreseeability. The application of this diluted “reasonable foreseeabil-

103. Crawford v. Washington, 541 U.S. 36, 68 (2004) (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”). Forfeiture by wrongdoing of a hearsay objection applies to “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” FED. R. EVID. 804(b)(6). Forfeiture by wrongdoing of confrontation rights under Giles requires “a showing that the defendant intended to prevent a witness from testifying.” Giles v. California, 128 S.Ct. 2678, 2684 (2008).

104. Thompson, 286 F.3d at 964 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 18 (1986) (defining acquiesce as “to accept or comply tacitly or passively”)).

105. Id. at 956–66.

106. See, e.g., United States v. Martinez, 476 F.3d 961, 964–67 (D.C. Cir. 2007) (testimonial statements by a murdered cooperating witness were admissible based on court’s finding that defendant “was aware that his co-conspirators were willing to engage in murder to protect the conspiracy”; finding was based on prior threat by the defendant to a lower-level worker in a drug operation that he and his family could be killed if he told anyone about the drug operation; the court found that the threat was evidence that the defendant “and his co-conspirators considered murder to be a possible sanction to protect the privacy of the conspiracy”); United States v. Carson, 455 F.3d 336, 360–65 (D.C. Cir. 2006) (testimonial statements by a murdered witness were admissible at defendant’s trial over objections from defendant Sweeney who was incarcerated at the time of the witness killing; while incarcerated, defendant Sweeney
ity” standard ultimately imputes conspiratorial waiver based on facts indicating weaker probative links to the misconduct than those for which the Thompson court refused to impute waiver.

In the decade since the Cherry decision, numerous circuit and state courts have cited the Cherry doctrine when imputing a conspiratorial waiver by misconduct of a defendant’s confrontation right or hearsay objection. In United States v. Carson, the D.C. Circuit relied on the logic of Cherry and Thompson in finding that the reasons for a defendant to forfeit his confrontation rights apply equally when the defendant’s co-conspirators made the witness unavailable, “so long as their misconduct was within the scope of the conspiracy and reasonably foreseeable to the defendant.” The Carson court found no direct evidence of an explicit agreement to kill adverse witnesses but nonetheless determined that there was sufficient evidence to “infer the existence of such an agreement and to conclude that [the misconduct] was in furtherance of the conspiracy and reasonably foreseeable.” Consequently, relying on the arguments in Cherry and Thompson, the D.C. Circuit permitted an exception to the Confrontation Clause and hearsay rules and admitted testimonial statements by an unavailable witness.

Similarly, the Eighth Circuit in United States v. Johnson relied on Cherry and Carson in applying the forfeiture doctrine against a defendant for having “aided and abetted the procurement of the witnesses’ unavailability.” The Court found that forfeiture of her hearsay rights would apply, even though the defendant’s misconduct was directed at a witness appearing at her co-conspirator’s trial, rather than her own trial:

We also observe that in conspiracy cases, witnesses’ cooperation with the government threatens not only the liberty of the particular

had told his co-conspirator defendant Carson that he had previously told the witness about prior offenses; the court admitted the witness’s testimonial statements, finding based on Cherry and Thompson, that the witness killing was within the scope and in furtherance of the conspiracy, as well as reasonably foreseeable to conspirators that the defendant’s co-conspirator would act to make a witness unavailable).

107. See cases cited supra note 11.
108. See cases cited supra note 12.
109. Carson, 455 F.3d at 364.
110. Id. (finding that the defendant’s co-conspirator “told several people, while he was in jail, that [the witness] was ‘snitching’ and that ‘family or not, he has got to get dealt with.’ . . . [The defendant] stated that without [the witness] the government would have no case . . . . And the government adduced considerable evidence that members of the conspiracy . . . regularly murdered or attempted to kill witnesses or informants who could testify against them”).
111. United States v. Johnson, 495 F.3d 951, 971 (8th Cir. 2007).
conspirators against whom the witness may testify, but the viability of the conspiracy as a whole; and an investigation or prosecution that might start with one conspirator may result in charges being levied against other conspirators as well.112

In *United States v. Rivera* the Fourth Circuit also adopted the *Cherry* doctrine in a case involving testimonial statements by a witness who was later killed by a member of the defendant’s gang, MS-13.113 The court admitted the statements, finding that the defendant “need only have acquiesced in [the witness’s] death to trigger the Rule’s applicability.”114 Numerous other circuit courts115 and state courts116 have also relied on *Cherry* and imputed conspiratorial waiver by misconduct, admitting both out-of-court hearsay and testimonial statements against the defendant, “subject to the Government’s proving at trial, by a preponderance of the evidence, that the wrongful procurement of [the witness’s] unavailability was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy in which [the defendant] was involved.”117

C. Challenges in Extending Conspiratorial Waiver of Hearsay Objections to Waiver of Confrontation Rights

While the *Cherry* doctrine may be sensible with regard to waiving a hearsay objection under the language of Rule 804(b)(6), such a principle should not be extended to impute a waiver of constitutional confrontation rights. The *Cherry* court’s extension to both confrontation rights and hearsay objections of the forfeiture-by-wrongdoing doctrine based on a co-conspirator’s conduct impermissibly joined two separate concepts with distinct requirements. Yet this linking of confrontation rights and hearsay objections was no accident. On the contrary, the *Cherry* court recognized that the two overarching principles that courts consider when determining when to impute a waiver

112. *Id.* at 972. In *Johnson*, the conspiracy to kill the witness was far clearer than under the facts of *Cherry*. After a witness spoke with the grand jury, the defendant’s co-conspirator later killed the witness, allegedly with the defendant’s assistance. *Id.* at 958–59. The Eighth Circuit relied on *Cherry* and *Carson*, finding that it made little sense to limit forfeiture of the defendant’s trial rights to narrower facts than would be sufficient for a conviction. *Id.* at 971.


114. *Id.* at 567 (emphasis added).

115. See cases cited *supra* note 11.

116. See cases cited *supra* note 12.

are, at times, in conflict: (1) “the right to confrontation is ‘a fundamental right essential to a fair trial in a criminal prosecution,’”\textsuperscript{118} and (2) “courts will not suffer a party to profit by his own wrongdoing.”\textsuperscript{119} While the Cherry and Thompson courts extended their holdings to a waiver of confrontation rights, the courts’ analyses relied on the language of the forfeiture-by-wrongdoing hearsay exception in Rule 804(b)(6)\textsuperscript{120}. As will be discussed infra Part IV.A, under the Roberts standard for admissibility of out-of-court statements under the Confrontation Clause, it is understandable that the Cherry and Thompson courts equated the exceptions to hearsay and the Confrontation Clause. Yet given the Crawford decision, which overruled Roberts, and the subsequent Giles decision, application of the Cherry doctrine to confrontation rights is no longer viable.

Imputing a waiver of a constitutional right is far more severe than merely denying an evidentiary objection. Consequently the standard for waiver of the constitutional protection should be that much greater than that for a waiver of the evidentiary rule. Courts have noted the predominance of constitutional waivers, finding that a “waiver of the constitutional right is \textit{a fortiori} a valid waiver of an objection under the rules of evidence.”\textsuperscript{121} Thus, forfeiture of Sixth Amendment confrontation rights should require a stronger set of facts than waiver of a hearsay objection. The Cherry doctrine finds a waiver of a hearsay objection based on a showing of both a conspiracy and the reasonable foreseeability of the witness’s unavailability, but that standard should not be adequate to forfeit the defendant’s confrontation rights. Instead, forfeiture of confrontation rights should require a more direct nexus between the defendant and the wrongful conduct that procured the witness’s unavailability. “[T]o say a defendant has waived [his rights under the Confrontation Clause] merely because of his participation in a drug conspiracy is too expansive and goes against the rule of fundamental fairness.”\textsuperscript{122}

\textsuperscript{118.} United States v. Cherry, 217 F.3d 811, 816 (10th Cir. 2000) (citing Pointer v. Texas, 380 U.S. 400, 404 (1965)).

\textsuperscript{119.} Id. (citing United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)).

\textsuperscript{120.} Fed. R. Evid. 804(b)(6) (“Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”).

\textsuperscript{121.} E.g., United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979).

\textsuperscript{122.} Cherry, 217 F.3d at 823 (Holloway, J., dissenting) (quoting the district court opinion) (alteration in original) (citations omitted).
The Supreme Court’s “presumption against the waiver of constitutional rights”\textsuperscript{123} is specifically intended “[t]o preserve the protection of the Bill of Rights for hardpressed defendants.”\textsuperscript{124} Individuals who are merely part of a conspiracy but lacked any direct connection to the wrongdoing that procured a witness’s unavailability are the very hard-pressed defendants that the Supreme Court intended to be protected by the Bill of Rights. Because the Cherry doctrine—like the Pinkerton doctrine—relies on an objective standard of foreseeability, these defendants have often had little or no knowledge of or complicity in the misconduct that made the witness unavailable.\textsuperscript{125} Consequently, it is improper for courts to extend the Cherry doctrine to the forfeiture of confrontation rights as opposed to a mere hearsay objection.

IV. THE CONFRONTATION CLAUSE REQUIREMENTS AFTER CRAWFORD AND GILES

The Supreme Court’s framework to guarantee Sixth Amendment rights for criminal defendants has undergone an evolution over the past three decades. In 1980, the Court held in Ohio v. Roberts that hearsay statements were admissible without confrontation if they bore an “adequate ‘indicia of reliability.’”\textsuperscript{126} However, in 2004, the Crawford Court required that all out-of-court testimonial statements be subject to cross-examination.\textsuperscript{127} Four years later, in Giles, the Court set out an exception to the Confrontation Clause requirements, based upon forfeiture by wrongdoing, according to which the Court required a showing that the defendant had the intent to procure the witness’s unavailability when engaging in his misconduct.\textsuperscript{128} The Giles Court analyzed the common law understanding of the forfeiture-by-wrongdoing,\textsuperscript{129} which is relevant to understanding how courts at common law would have viewed misconduct by a defendant’s co-conspirator who procured a witness’s unavailability, and whether at common law such misconduct would constitute a forfeiture by the defendant himself.

\begin{itemize}
\item \textsuperscript{123} Brookhart v. Janis, 384 U.S. 1, 4 (1966) (holding that unless the defendant “did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied . . . ”).
\item \textsuperscript{124} Glasser v. United States, 315 U.S. 60, 70 (1942) (citations omitted).
\item \textsuperscript{125} See Kadish, supra note 101.
\item \textsuperscript{126} Ohio v. Roberts, 448 U.S. 56, 66 (1980).
\item \textsuperscript{127} Crawford v. Washington, 541 U.S. 36, 68 (2004).
\item \textsuperscript{128} Giles v. California, 128 S. Ct. 2678, 2693 (2008).
\item \textsuperscript{129} Id. at 2683–86.
\end{itemize}
A. The Crawford Doctrine and its Reformulated Standard for Guaranteeing Confrontation Clause Protections

Prior to 2004, courts relied on the Ohio v. Roberts standard for determining the admissibility of evidence under the Confrontation Clause when a witness was unavailable.\textsuperscript{130} Roberts held that when a witness was unavailable, the Confrontation Clause permits admission of the witness’s prior statements if the statement “bears adequate ‘indicia of reliability,’ [which] can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”\textsuperscript{131} The Roberts Court noted that the Confrontation Clause operated in two ways to limit the range of admissible hearsay: first, by producing the declarant of the hearsay statement for cross-examination, or else demonstrating the declarant’s unavailability, and second, by only admitting hearsay marked with sufficient trustworthiness, for statements of unavailable declarants.\textsuperscript{132} The Roberts Court held that certain hearsay exceptions met the “indicia of reliability” test by “rest[ing] upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection.”\textsuperscript{133} For such “firmly rooted hearsay exception[s],” reliability could be inferred without more.\textsuperscript{134} The Court emphasized its understanding that the Confrontation Clause was intended to protect the same values as hearsay rules. This language sheds light on later courts’ equation of forfeiture under Rule 804(b)(6) with a waiver of confrontation rights.\textsuperscript{135}

However, in 2004, in Crawford v. Washington, the Supreme Court overruled the Roberts standard. The Court also reformulated the requirements that must be met to ensure that the Confrontation Clause is satisfied when a witness is unavailable to testify to his out-of-court testimonial statements.\textsuperscript{136} The Court set out that, while the purpose of the Confrontation Clause “is to ensure reliability of evidence . . . it is a procedural rather than a substantive guarantee. It commands, not that

\textsuperscript{130} See, e.g., Bourjaily v. United States, 483 U.S. 171, 183 (1987) (admitting co-conspirator’s statements because “the co-conspirator exception to the hearsay rule is firmly enough rooted”); Horton v. Allen, 370 F.3d 75, 85 (1st Cir. 2004) (finding the state-of-mind hearsay exception to be a firmly rooted hearsay exception, thereby satisfying Roberts); Latine v. Mann, 25 F.3d 1162, 1166 (2d Cir. 1994) (noting that a statement against penal interest is firmly rooted and bears adequate indicia of reliability).

\textsuperscript{131} Roberts, 448 U.S. at 66.

\textsuperscript{132} Id. at 65.

\textsuperscript{133} Id. at 66 (citation omitted) (internal quotations omitted).

\textsuperscript{134} Id.

\textsuperscript{135} See discussion infra Part IV.B.

evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."\textsuperscript{137} The Court drew a distinction, which it elaborated on in later cases,\textsuperscript{138} between testimonial statements and non-testimonial statements. Testimonial statements, which include police interrogations,\textsuperscript{139} are not admissible when the witness is unavailable and his statement was not subject to cross-examination.\textsuperscript{140} "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."\textsuperscript{141}

The \textit{Crawford} Court recognized a clear distinction between the protections that evidentiary rules provide for hearsay statements and the constitutional guarantees under the Sixth Amendment that the \textit{Crawford} standard would cover, stating, "the Framers [did not] leave the Sixth Amendment’s protection to the vagaries of the rules of evidence."\textsuperscript{142} Despite the \textit{Crawford} standard’s reliance on confrontation, the Court recognized equitable exceptions to confrontation rights, including the principle of forfeiture by wrongdoing.\textsuperscript{143} The \textit{Crawford} Court also noted other exceptions, finding that the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."\textsuperscript{144} While the \textit{Crawford} Court referred to a permissible exception based on the principle of forfeiture by wrongdoing, until the \textit{Giles} decision four years later, the scope of the forfeiture exception was unclear.\textsuperscript{145} A First Circuit opinion, issued shortly after \textit{Crawford}, noted with approval the \textit{Cherry} doctrine’s imputation of a waiver of a defendant’s confrontation rights based on the misconduct of the defendant’s co-conspirator and implied that the \textit{Cherry} doctrine would withstand \textit{Crawford}.\textsuperscript{146} However, the Supreme Court’s 2008

\begin{footnotes}
\item 137. \textit{Id.} at 61.
\item 139. \textit{Crawford}, 541 U.S. at 68.
\item 140. \textit{Id.} at 59.
\item 141. \textit{Id.} at 68–69.
\item 142. \textit{Id.} at 61.
\item 143. \textit{Id.} at 62 ("For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.") (citation omitted).
\item 144. \textit{Id.} at 36 (citation omitted).
\item 146. United States v. Rodriguez-Marrero, 390 F.3d 1, 17 & n.8 (1st Cir. 2004) (*"Under appropriate circumstances, the forfeiture by wrongdoing doctrine can provide an exception to the Confrontation Clause . . . . [T]he glancing reference to the doctrine of forfeiture by wrongdoing in the government’s brief does not give us any assistance
\end{footnotes}
FORFEITURE OF CONFRONTATION RIGHTS POST-GILES

Giles decision clarified what forfeiture by wrongdoing entails and which misconduct would forfeit the defendant’s rights under the Crawford doctrine.\footnote{See infra Part IV.B.} Based on the Crawford limitation to exceptions established at the time of the Sixth Amendment and the Giles analysis of forfeiture by wrongdoing, Cherry’s conspiratorial waiver of confrontation rights should not be upheld.

B. Giles v. California—Application of the Rule of Forfeiture by Wrongdoing after the Crawford Decision

In Giles v. California, the defendant was charged with murdering his ex-girlfriend.\footnote{Id.} The defendant testified that he acted in self-defense. In response, prosecutors sought to introduce statements that the victim had made to a police officer responding to a domestic violence report weeks prior to the shooting.\footnote{Id. at 2682 (citing CAL. EVID. CODE § 1370(a) (West 2008)) (“Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. (2) The declarant is unavailable as a witness . . . . (3) The statement was made at or near the time of the infliction or threat of physical injury . . . . (4) The statement was made under circumstances that would indicate its trustworthiness. (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.”). Based on subsection (5), the statute contemplates that the out-of-court statements will include testimonial statements made to a law enforcement officer, which would otherwise be prohibited under Crawford and Davis.} The trial court admitted the statements pursuant to a California law that permits admission of hearsay statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify and the prior statements are deemed trustworthy.\footnote{Id.} The defendant was convicted, and while his appeal was pending, Crawford was decided. The California Court of Appeals, affirmed by the California Supreme Court, held that the admitted statements did not violate the defendant’s confrontation rights, based on the principle of forfeiture by wrongdoing in addressing this difficult waiver issue . . . . The Seventh and Tenth Circuits have held that the scope of imputed responsibility for procuring the unavailability of a witness, under both Rule 804(b)(6) and the Confrontation Clause, is coextensive with conspiratorial liability under Pinkerton v. United States . . . . Here, the district court did not make any factual findings on the applicability of conspiratorial liability, let alone conduct a separate hearing outside the presence of the jury. While Cherry may represent a sensible rule of law, the government’s failure to argue it means that we lack the benefit of arguments on whether to apply Cherry to this case, either in its substantive (scope of liability) or procedural (determination of liability by separate hearing) aspects.” (citations omitted).}
The California Supreme Court found that because the defendant had committed the murder for which he was on trial, and because that intentional criminal act made the victim unavailable to testify as a witness, the defendant had forfeited his right to confront the witness. The California Supreme Court’s interpretation of the rule of forfeiture by wrongdoing only required that the judge find “that the defendant committed a wrongful act that rendered the witness unavailable to testify at trial.” This standard did not require that the defendant’s intent be to procure the witness’s unavailability at trial.

The U.S. Supreme Court, on the other hand, took a contrary view as to whether California’s theory of forfeiture by wrongdoing is, as required by Crawford, “a founding-era exception to the confrontation right.” The Court analyzed the common law doctrine, as will be discussed infra Part IV.C, and determined that forfeiture requires a showing of intent on the part of the defendant. The Court noted that at common law, “unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying.” Accordingly, unconfronted testimony is inadmissible when the witness’s unavailability is the result—but not the intent—of the defendant’s conduct. The Court identifies “the typical murder case involving accusatorial statements by the victim” as such a case in which, under the common law, “the testimony was excluded unless it was confronted.” Consequently, the Court in Giles overruled the California Supreme Court’s theory of forfeiture, holding that the lower court’s admission of the victim’s testimonial statements violated the defendant’s confrontation rights because they were not subject to a Sixth Amendment exception that was established at common law.

153. Giles, 128 S. Ct. at 2682.
154. Id.
155. Id. at 2684.
156. Id. The Court considers the example of King v. Woodcock from 1789. The defendant was accused of killing his wife. Between the wife’s assault and death, a magistrate took the wife’s testimony under oath. At the defendant’s trial, the judge found that the wife’s testimony could not be admitted because it was unconfronted and did not meet the alternative dying declaration exception. Id. Similarly, the Court noted that at common law, in the 1791 case King v. Dingler, the judge excluded unconfronted statements given under oath by a murder victim while she was in the hospital because “they were not taken in the presence of the prisoner, with the result that the defendant did not have, as he is entitled to have, the benefit of cross-examination.” Id. at 2685 (internal quotations omitted).
C. Common Law Application of Forfeiture by Wrongdoing Principle

The Crawford Court’s requirement, that exceptions to the Confrontation Clause must have been established at common law, necessitated the analysis in Giles of the common law basis for the rule of forfeiture by wrongdoing. The doctrine was first applied in Lord Morley’s 1666 murder trial before the House of Lords.\(^\text{157}\) The court found that the witness had disappeared in advance of Lord Morley’s upcoming trial, but the court did not admit the witness’s prior testimony, because “the evidence was not sufficient to show that the accused procured [the witness’s] absence.”\(^\text{158}\) This case first introduced the theory of forfeiture, according to which “judges concluded that a witness’s having been ‘detained by the means or procurement of the prisoner,’ provided a basis to read testimony previously given at a coroner’s inquest.”\(^\text{159}\) The House of Lords relied on the Lord Morley’s Case precedent in 1692 in Harrison’s Case, admitting a witness’s statement at trial “if the evidence’s proponent sufficiently proved that the accused procured the witness’s absence.”\(^\text{160}\) In 1696, the House of Commons expanded the Lord Morley’s forfeiture doctrine to admit testimony from an earlier trial in Sir John Fenwick’s trial for treason.\(^\text{161}\)

In Giles, the Supreme Court recognized that the terminology used in defining the forfeiture-by-wrongdoing doctrine implied that the “exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying.”\(^\text{162}\) The Court’s view of the forfeiture doctrine as it applied at the time of the Sixth Amendment’s drafting is important for determining its scope today. If the Court’s analysis requires intent or purpose to procure the witness’s unavailability, then that should mean that the Cherry doctrine’s application to co-conspirators with reasonable foreseeability would not fall under forfeiture by wrongdoing.

The Giles Court reached its purpose-based test by parsing the language of Lord Morley’s Case, noting that “[t]he rule required the

\(^{157}\) Ruebner & Goryunov, supra note 37, at 579 (citing King v. Morley (Lord Morley’s Case), 6 How. St. Tr. 769 (H. L. 1666) (Lord Morley was indicted for running his sword through the head of his victim in an argument over a half-crown outside the Fleece-Taverne)).

\(^{158}\) Id. at 579–80.

\(^{159}\) Giles, 128 S. Ct. at 2683 (quoting Lord Morley’s Case, 6 How. St. Tr. at 770–71).

\(^{160}\) Ruebner & Goryunov, supra note 37, at 580 (citing Harrison’s Case, 12 State Trials 833, 853 (Eng. 1692)).

\(^{161}\) Id. at 580.

\(^{162}\) Giles, 128 S. Ct. at 2683.
witness to have been ‘kept back’ or ‘detained’ by ‘means or procurement’ of the defendant.”\footnote{Id. (citations omitted).} The Court then analyzed definitions of "procure" and “procurement” and found that, while some definitions “would merely require that a defendant have caused the witness’s absence, other definitions would limit the causality to one that was designed to bring about the result ‘procured.’”\footnote{Id. (citations omitted).} The Court resolved the ambiguity in favor of a purpose-based definition, relying on cases and treatises from that time period.\footnote{Id. at 2683–84.} An 1816 treatise allowed a forfeiture exception when a witness was “kept away by the means and contrivance of the prisoner.”\footnote{Id. at 2684 (citing Drayton v. Wells, 10 S.C.L. 409, 411 (S.C. 1819) (“kept away by the contrivance of the opposite party”); 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 81 (1816); S. PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE 165 (1814) (“kept out of the way by the means and contrivance of the prisoner”)).} An analysis of the term “contrivance”\footnote{Giles, 128 S. Ct. at 2684 (“Contrivance is commonly defined as the act of ‘inventing, devising or planning,’ ‘ingeniously endeavoring the accomplishment of anything,’ ‘the bringing to pass by planning, scheming, or stratagem,’ or ‘[a]daption of means to an end; design, intention.’”) (citations omitted).} revealed that the phrase required “that the defendant have schemed to bring about the absence from trial.”\footnote{Id.} The Court further relied on an 1858 treatise that “made the purpose requirement more explicit still, stating that the forfeiture rule applied when a witness ‘had been kept out of the way by the prisoner, or by someone on the prisoner’s behalf, in order to prevent him from giving evidence against him.’”\footnote{Id. (quoting E. POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (1st ed. 1858)) (emphasis added).} While the language explicitly permits the possibility of forfeiture based on wrongful conduct by another individual on the defendant’s behalf, the Court noted that the defendant’s intent is a requirement: “The manner in which the rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying.”\footnote{Id. at 2684.} Critics have disputed the\footnote{Id. (quoting E. POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (1st ed. 1858)) (emphasis added).} Giles Court’s analysis of the common law understanding of the forfeiture rule, both as to the scope of what it admits and what it prohibits by its intent requirement. Some scholars have argued that the common law foundation for the forfeiture rule only permitted admission of prior testimony subject to cross-examina-
tion.171 Others argue that there is an insufficient number of authorities to demonstrate “a clearly developed doctrine rather than either an aberration, a mistake, or a reflection of changing historical understanding.”172 Further, critics emphasize that the Court’s analysis in Giles recognizes that “the case law is sparse,”173 and that the common law did not “clearly establish a strong forfeiture doctrine” outside of previously confronted statements.174 Other scholars have challenged the Giles Court’s parsing of the early cases’ language on forfeiture and found that there was no intent requirement at common law, such that the defendant must have himself intended to procure the witness’s unavailability.175 The critics argue that the cases “focused exclusively on the accused’s voluntary wrongful conduct in causing the unavailability of the out-of-court declarant’s live in-court testimony.”176 These arguments emphasize that the common law forfeiture rule “did not require a showing that the accused acted with intent to prevent the witness from testifying, and it steadfastly preserved the right of confrontation

171. Robert Kry, Forfeiture and Cross-Examination, 13 Lewis & Clark L. Rev. 577, 600–01 (2009) (“[T]he most natural reading of the [Reynolds] Court’s logic is that forfeiture justifies admitting ‘competent’ evidence, and that prior testimony is ‘competent’ only if the defendant had an opportunity to cross-examine.”); see also Robert P. Mosteller, Giles v. California: Avoiding Serious Damage to Crawford’s Limited Revolution, 13 Lewis & Clark L. Rev. 675, 688 & n.58 (2009) (noting that at the time of the cases cited in Giles, the hearsay doctrine emphasized whether the declarant had been under oath or if the defendant had been present).

172. Mosteller, supra note 171, at 688; see also Marc McAllister, Down But Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing, 59 Case W. Res. L. Rev. 393, 422 (2009) (“While much of the majority opinion is devoted to proving the existence of its rule at common law, a majority of Justices concluded that the historical record simply did not resolve the issue. Justices Souter and Ginsburg, who joined the majority opinion but wrote a separate concurrence, were admittedly unpersuaded, concluding that ‘the early cases on the exception were not calibrated finely enough to answer the narrow question here.’”) (quoting Giles, 128 S. Ct. at 2694 (Souter, J., concurring)); Adam Kyle Mansfield, Giles v. California and Forfeiture by Wrongdoing: Timing is Everything, 38 Calif. U. L. Rev. 673, 675 (2010) (“A closer examination of the English common law cases and early American cases upon which the plurality heavily relied evidences the failure in interpretation. This examination shows that these cases provide only minimal support for the Court’s decision, due to a complete lack of attention given to the time limitations inherent to the exception, and any support built thereon is completely misplaced.”) (citations omitted).

173. Mosteller, supra note 171, at 688 (quoting Giles, 128 S. Ct. at 2691).

174. Id.

175. See McAllister, supra note 172, at 398 (“Despite its ruling, the Giles Court was severely divided. Although the Court’s primary aim was to apply the forfeiture exception as it existed at the time of our nation’s founding, five of the nine Justices ultimately deemed the historical record unable to resolve the particular intent issue, and four expressed concern with the overall case outcome.”).

176. Ruebner & Goryunov, supra note 37, at 582.
where there was no causal link between the accused and the witness’s failure to appear at the proceedings.”

However, the Giles analysis is in line with Reynolds, decided in 1878. The Reynolds Court also analyzed Lord Morley’s Case and Harrison’s Case, and similar to the Giles Court, it relied on the terminology of wrongful “procurement” when holding that “if a witness is absent by [the defendant’s] wrongful procurement, [the defendant] cannot complain if competent evidence is admitted to supply the place of that which he has kept away.” Reynolds is the earliest known Supreme Court decision setting out principles underlying the rule of forfeiture:

The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

The Reynolds analysis recognizes that the early Supreme Court was committed to pursuing the common law understanding of the forfeiture doctrine. However, some have argued that the Reynolds decision has been misinterpreted, emphasizing that the Reynolds Court only admitted prior trial testimony during which the defendant had an opportunity to cross-examine the witness. Given the Giles Court’s analysis of the common law interpretation of forfeiture by wrongdoing and its finding that forfeiture requires the defendant’s intent to procure the witness’s unavailability, the Cherry doctrine, which permits a waiver of a defendant’s confrontation rights without a showing of the defendant’s intent, is effectively overruled.

177. Id.
179. Id. at 158.
180. Id. at 159.
181. Andrew A. Hitt, Unveiling Confrontation Forfeiture: A Return to Lord Morley, 33 Hamline L. Rev. 39, 56–58 (2010). Hitt further discusses the significance of the Reynolds decision, noting, “Reynolds is the most significant forfeiture case in American jurisprudence for two reasons. First, it represents America’s revision of the original forfeiture doctrine and a response to concerns about awarding special admissibility status to statements from a coroner’s inquest . . . . Second, many courts have misinterpreted Reynolds and relied upon the broad statements that Reynolds used to justify its rule rather than relying on the rule itself.” Id. at 57.
V.

CONSPIRATORIAL WAIVER OF CONFRONTATION RIGHTS
AFTER GILES: THE GILES REQUIREMENT OF INTENT UNDER THE
FORFEITURE DOCTRINE EFFECTIVELY OVERRULES
THE CHERRY DOCTRINE

The Cherry doctrine relied on Pinkerton principles to impute a waiver of confrontation rights of a defendant based on the misconduct of a co-conspirator that procured a witness’s unavailability. This Note does not address cases that involve a conspiracy in which there may be actual knowledge or even an explicit agreement among members of the conspiracy that, in the event of future prosecution, co-conspirators would act on one another’s behalf to make witnesses unavailable to testify at the defendant’s trial. Such conspiracies are common in cases involving organized crime, gangs, and narcotics trafficking. Indeed, scholars and courts have recognized that “[c]onspiracies often have explicit or implicit enforcement policies.”182 The Fourth Circuit in United States v. Ayala described the enforcement policy of MS-13, one of the largest street gangs in the United States: “The gang maintains internal discipline through the use of violence as well. Members who do not follow the rules are routinely beaten, and those who cooperate with the police face penalty of death. . . . The gang also discusses ongoing police investigations and devises ways to prevent others from cooperating with the police.”183 In large-scale conspiracies that contain implicit or explicit policies to kill witnesses, such as the Ayala court described with regard to MS-13, it may be reasonable to find that the defendant met the Giles intent requirement to procure the witness’s unavailability, despite a limited showing of the defendant’s involvement in the misconduct that made the witness unavailable. If so, there may be a sufficiently probative link between the defendant and the misconduct to demonstrate intent for the purpose of forfeiture of confrontation rights, without needing to expand the scope of conduct to include “acquiescence.” However, this Note will not address defendants involved in such conspiracies, and it recognizes that under further analysis, such conspiracies may meet the Giles intent requirement for a forfeiture exception.

182. See United States v. Houlihan, 92 F.3d 1271, 1277 (1st Cir. 1996) (noting that defendants “imposed a strict code of silence” and “dealt severely with [those] who . . . talked too freely”)); Flanagan, supra note 69, at 516 (citing United States v. Miller, 116 F.3d 641, 669 (2d Cir. 1997) (finding that it was the gang’s practice to murder individuals suspected of cooperating with authorities).

183. United States v. Ayala, 601 F.3d 256, 261 (4th Cir. 2010).
This Note limits its argument to conspiracies in which defendants did not intend to procure a witness’s unavailability, but that it may have been objectively reasonably foreseeable that a co-conspirator would engage in witness tampering to make the witness unavailable. In such cases, conspiratorial waiver by misconduct under the Cherry doctrine is inconsistent with both Giles and the common law principles that underlie the forfeiture rule set out supra Part III.C. In such conspiracies, without a showing of the defendant’s intent to tamper with witnesses, a court may still find that the conspiracy meets the elements under Cherry necessary to waive confrontation rights and hearsay objections. However, without a showing of the defendant’s intent for such misconduct, and without any showing of a known agreement between co-conspirators to engage in witness tampering, then under Giles, it is inappropriate to impute a conspiratorial waiver by misconduct as to the defendant’s confrontation rights.

The Thompson court disputes the premise of the existence of such conspiracies, finding that such a narrow conspiracy would not meet the reasonable foreseeability requirement: in cases involving “mere membership in a conspiracy,” the Cherry doctrine would not apply because “[b]y limiting coconspirator waiver-by-misconduct to those acts that were reasonably foreseeable to each individual defendant, the rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct.”184 However, as discussed supra Part IV.B, the Thompson court’s vision of “reasonably foreseeable” was narrower than later courts applied. On the contrary, scholars have noted that the requirement of reasonable foreseeability of witness intimidation or murder can be easily satisfied in many cases.185 Under the Pinkerton doctrine, scholars have noted, defendants are often found “responsible for crimes that were not contemplated when the conspiracy was formed, and were in fact inconsistent with the original goal of the conspiracy.”186 Consequently, in many such conspiracies, without an “enforcement policy” or other evidence that the defendant knew of the likelihood of misconduct directed at a witness, the reasonable foreseeability prong could often be satisfied. Ultimately, the trial court, as with other evidentiary matters, would need to determine whether the defendant manifested the requisite intent to make the witness unavailable prior to a decision whether to admit the testimonial hearsay. If the court found that there was actual intent of the defendant to make the witness unavailable to testify, as

184. Thompson, 286 F.3d at 964–65.
186. Id.
could be shown through an enforcement policy among the co-conspirators as in Ayala, then the court could admit the testimonial statements under the forfeiture exception to the Confrontation Clause set out by Giles. If the court did not find the requisite intent to satisfy the Giles exception, then the court would have to exclude the testimonial hearsay.

In fact, Cherry is one example of a conspiracy in which the testimonial statements should not be admissible under Giles because the defendant’s requisite intent to procure the witness’s unavailability cannot be demonstrated. As discussed supra Part IV.B, in Cherry, the trial court found “absolutely no evidence [that the defendant Cherry] had actual knowledge of, agreed to or participated in the murder of [the witness].” Nonetheless, the Cherry court found that it may have been reasonably foreseeable that Cherry’s co-conspirator would engage in misconduct to procure the witness’s unavailability, and that if so, the court should impute a waiver of Cherry’s confrontation rights. However, under Crawford and its progeny, the witness’s statements are “testimonial” statements, given that the witness’s statements were made as a cooperating witness to an FBI agent in the course of a drug investigation of the five defendants. As testimonial statements under Giles, Cherry would have the protections of the Confrontation Clause and the right to cross-examine the witness. The lower court found that Cherry had no knowledge of the witness tampering, and consequently, Cherry could not have had the requisite intent under Giles to waive his confrontation rights. If the witness was unavailable, and if Cherry did not have the intent to procure the witness’s unavailability, then the witness’s prior uncrossed testimonial statements ought to have been inadmissible against Cherry. However, the Cherry doctrine would nevertheless waive the defendant’s confrontation rights, despite the contradicting legal authority in Giles.

While Cherry and its progeny find that acquiescence is sufficient to waive hearsay objections and confrontation rights, Crawford re-
quires that testimonial statements meet a burden under the Confrontation Clause higher than that required by hearsay rules. Giles further raised the standard for forfeiture of the Confrontation Clause beyond that required for hearsay, holding that forfeiture of confrontation rights must satisfy the standard that was set out at common law at the time of the Sixth Amendment. This heightened standard of forfeiture by wrongdoing of confrontation rights under Giles is stricter than that which satisfies forfeiture of a hearsay objection under Rule 804(b)(6). While acquiescence may be sufficient to forfeit a hearsay objection under Rule 804(b)(6), under Giles and the common law interpretation of forfeiture by wrongdoing, acquiescence is inadequate to forfeit confrontation rights. Thus Giles effectively overrules the Cherry doctrine by permitting a forfeiture exception only “when the defendant engaged in conduct designed to prevent the witness from testifying.”

Giles would not allow the conspiratorial waiver-by-misconduct doctrine set out in Cherry to be applied to a witness’s testimonial statements, which require confrontation under the Sixth Amendment, if the defendant did not manifest sufficient intent to prevent a witness from testifying.

The Supreme Court reaffirmed its opposition to imputation of a waiver of a defendant’s Sixth Amendment rights in Giles, noting that “[t]he notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial . . . does not sit well with the right to trial by jury. It is akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’” Earlier decisions have found that courts must “indulge every reasonable presumption against waiver,” and the recent decisions in Giles and Crawford demonstrate the endurance of that commitment. This further indicates a rejection of the Cherry doctrine, which imputed a defendant’s waiver of his Sixth Amendment rights based on the lax standard of reasonable foreseeability, as opposed to Giles’ strict standard of intent.

CONCLUSION

The Supreme Court’s decision in Giles effectively overrules the Cherry doctrine in cases involving conspiracies where the defendant did not intend the witness tampering. The Court prohibited any exception to the Confrontation Clause based on forfeiture by wrongdoing.

191. Id. at 2686 (citing Crawford, 541 U.S. 36, 62 (2004)).
without a showing that the defendant intended to procure the witness’s unavailability. The practical implications of this result are significant. In cases involving long-term government investigations with cooperating witnesses, statements by an unavailable cooperating witness to prosecutors, investigators, and grand juries will be considered testimonial and prohibited under the Confrontation Clause if the government is unable to prove that the defendant intended that the witness be unavailable to testify at trial. However, the Cherry doctrine could continue to apply to non-testimonial statements by the cooperating witness under Federal Rule of Evidence 804(b)(6), as the Giles holding only affects testimonial statements and not other hearsay.

While numerous circuits and state courts have relied on the Cherry doctrine to impute a conspiratorial waiver by misconduct, there has been astoundingly little scholarship on the Giles holding’s effect on the Cherry doctrine. There has been a great outcry among scholars about Giles’ impact on victims of domestic violence, who tend to be the unavailable witnesses in domestic violence cases, yet there has been very little discussion of its impact on prosecutions of criminal conspiracies, including organized crime and gang- and drug-related criminal activities. In light of the increasing prevalence of witness tampering, it is critical that scholars focus greater attention on the effect that Giles will have as effectively overruling Cherry. At the same time, given the Supreme Court’s commitment to the protection of a defendant’s right of confrontation, it is equally necessary that lower courts heed the warning in Giles and ensure that confrontation rights are only waived when the defendant’s intended misconduct procured the witness’s unavailability.

Studies indicate that witness intimidation is pervasive and often underreported. However, federal and state witness protection pro-

193. See cases cited supra note 11.
194. See cases cited supra note 12.
196. Perry, supra note 1, at 1579–80 (discussing one study which indicated that in 2004, witness intimidation played a role in an estimated 75% to 100% of crimes that were reported and prosecuted and another study, which noted that in 1996, eight urban jurisdictions reported physical witness intimidation occurring on a daily or weekly basis) (citing Kelly Duddell, U.S. DEP’T OF JUSTICE, WITNESS INTIMIDATION, PROBLEM-ORIENTED GUIDES FOR POLICE, PROBLEM-SPECIFIC GUIDES SERIES No. 42, 4–5, 42 (2006), http://www.cops.usdoj.gov/files/ric/Publications/e07_063407.pdf; Kerry Murphy Healey, Victim and Witness Intimidation: New Developments and Emerging
grams too often fail witnesses, particularly those who are witnesses to modern organized crime—specifically, gang- and drug-related violence.\textsuperscript{197} Witness protection programs currently in existence respond to the witness intimidation tactics used by traditional organized crime groups in the 1960s, and these programs sought to protect informants and co-conspirators that cooperated with the government in exchange for immunity.\textsuperscript{198} However, these programs have been ineffective at protecting witnesses from modern gang crime activity—either witnesses are innocent bystanders and deemed too minor to receive significant protection or witnesses are already well-known to defendants and are intimidated prior to any government intervention.\textsuperscript{199} Additionally, in the case of gang-related crime, key witnesses are often minors, which can create additional challenges for law enforcement. For example, parents may find the relocation and identity change requirements of witness protection programs too intrusive.\textsuperscript{200} Further, when children have parents with dual custody, “[t]he non-relocated parent may have his rights to visitation or custody infringed upon because of the relocation of the custodial parent.”\textsuperscript{201} Despite these inadequacies in traditional witness protection programs, few alternatives have succeeded. Courts have made efforts to conceal witnesses’ identities, yet these attempts have been held unconstitutional, as a violation of a defendant’s confrontation rights.\textsuperscript{202}


\textsuperscript{197} Perry, supra note 1, at 1582–83 (“Although these programs have successfully protected thousands of witnesses, they were developed in response to the intimidation tactics of the mafia and are unable to meet the needs of witnesses targeted by the gangs of today . . . . Witness protection programs are inept at protecting the typical witnesses of inner-city gang violence because of the criteria used to determine whether a witness qualifies for protection. An innocent bystander witness might not be considered sufficiently ‘crucial’ to warrant protection, the witness may live near the defendant and be more susceptible to immediate intimidation before any government agency can offer the witness protection, or the witness may be unwilling to even come forward and admit he saw anything because of the high costs associated with testifying.”) (citations omitted); Lisa M. Rogan, \textit{The Price of Protecting Our Children: The Dilemma of Allowing Children to Testify as Key Witnesses to Gang Violence}, 20 J. Juv. L. 127, 132 (1999) (noting that the Federal Witness Protection Program was designed primarily for those people who were involved in criminal activity and not for non-criminals, explaining that private citizens who come into the program find the program too intrusive and turn down the offer of protection).

\textsuperscript{198} Perry, supra note 1, at 1584.


\textsuperscript{200} Rogan, supra note 197, at 127.

\textsuperscript{201} Id. at 132.

\textsuperscript{202} Smith v. Illinois, 390 U.S. 129, 131 (1968) (“[W]hen the credibility of a witness is in issue, the very starting point in ‘exposing falsehood and bringing out the truth’
FORFEITURE OF CONFRONTATION RIGHTS POST-GILES

Far more must be done by prosecutors and law enforcement to ensure that acts of witness intimidation are reported and vigorously prosecuted. At the same time, courts must not permit the legitimate government interests in protecting witnesses and the integrity of the trial process to outweigh the countervailing interest of defendants in their constitutional confrontation rights. The Cherry doctrine may have previously been an effective tool to aid prosecutors otherwise hampered by the effects of witness intimidation. In light of the Supreme Court’s ruling in Giles, however, absent a defendant’s intent to make the witness unavailable, forfeiture of a defendant’s confrontation rights should no longer be pursued by prosecutors as a strategy to combat witness intimidation. As discussed supra Part V, some conspiracies have an agreement among co-conspirators to prevent witnesses from testifying at a later trial. Conspiracies with such “enforcement policies” may meet the intent requirement set out by Giles, and their members may be found to have waived their confrontation rights based on a co-conspirator’s misconduct in witness tampering. However, there are numerous other conspiracies that do not have such “enforcement policies,” and in cases involving those conspiracies, prosecutors will likely be unsuccessful at admitting testimonial statements. Consequently, the statements to law enforcement by unavailable cooperating witnesses will not often be admitted against the defendant who did not engage in misconduct against that witness. One practical result is that large-scale conspiracies and organized crime networks may avoid making known their willingness to engage in witness tampering to avoid any showing that their members intended the witness tampering. Prosecutors, on the other hand, will have to secure better evidence to demonstrate that the defendant did in fact intend that the witness be made unavailable.

through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness’ name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.”); Alford v. United States, 282 U.S. 687, 692 (1931) (reversing conviction when judge permitted prosecution witness to not reveal where he lived, noting, “It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . . .”).
The effective overruling of the *Cherry* doctrine will undoubtedly limit a prosecutor’s ability to bring evidence in a case in which a defendant’s co-conspirators engaged in reprehensible acts of witness intimidation to the benefit of the defendant. However, that is an inevitable repercussion of the guarantees that the Sixth Amendment grants defendants. As Justice Potter Stewart stated over fifty years ago, quoting Justice Felix Frankfurter, “a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.”

That a defendant may benefit from the exclusion of inculpatory statements of an unavailable witness is an unfortunate but necessary ramification of the protections that the Sixth Amendment guarantees to all defendants.

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