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Christopher Petroni

Constitutional Limits on Evidentiary Forfeiture by Wrongdoing Among Conspirators

CHRISTOPHER PETRONI*

Four recent decisions in the federal courts of appeals have combined the evidentiary doctrine of forfeiture by wrongdoing with imputed substantive criminal liability among conspirators under Pinkerton v. United States. *According to this augmented rule—called the "*Cherry *rule" after the Tenth Circuit opinion that first enunciated it—a witness's out-of-court statement is admissible against a defendant if a co-conspirator wrongfully silenced the witness in a manner that was within the scope and in furtherance of the conspiracy, and was reasonably foreseeable. This expansion of the forfeiture by wrongdoing doctrine is inconsistent with the Sixth Amendment's Confrontation Clause for two reasons: it was not contemplated at early common law and it leads to forfeiture of the confrontation right based only on a pretrial determination of guilt. In addition, even if the* Cherry *rule were compatible with the Confrontation Clause, due process constrains its application short of* Pinkerton*'s logical extent. Courts should reject or limit the* Cherry *rule accordingly.*

* B.S., 2005, Montana State University; J.D., 2013, University of California Hastings College of the Law. Thanks to Professor Rory Little for the edits and encouragement.

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INTRODUCTION

Efforts to prosecute criminal conspiracies encounter a persistent obstacle: the objects of prosecution will coerce, threaten, and even kill witnesses to keep them away from court. The doctrine of forfeiture by wrongdoing evolved to combat this practice. In the federal system, when a criminal defendant (or any party to any federal litigation, civil or criminal) acts wrongfully to silence a witness, the witness's out-of-court statements will be admissible against the defendant.[1] Federal courts have adapted the doctrine to the frequent situations where a conspiracy defendant was complicit in witness tampering behind the scenes, but not directly responsible for the wrongful conduct itself.[2]

In 2000, the Tenth Circuit expanded the scope of the federal forfeiture-by-wrongdoing doctrine by incorporating the theory of co-conspirator liability set out in *Pinkerton v. United States* into the doctrine.[3] The Fourth, Seventh, and D.C. Circuits later followed suit.[4] Under this approach—commonly referred to as the *Cherry* rule after the case in which it was first adopted—a witness's statement is admissible against a defendant if a co-conspirator wrongfully and intentionally made the witness unavailable, that wrongful act was within the scope and in furtherance of the conspiracy, and the act was reasonably foreseeable.[5]

The federal forfeiture-by-wrongdoing provision, codified as Federal Rule of Evidence 804(b)(6), acts as an exception not only to the exclusion of hearsay, but also to the right to confront witnesses.[6] The *Cherry* rule is also an exception to the confrontation right.[7] *Cherry*, however, is inconsistent with the modern understanding of the Confrontation Clause. First, the Supreme Court has restricted the scope of any exceptions to the Clause to how common law courts understood them at the time the Sixth Amendment was ratified. As far as the common law courts' application of the forfeiture doctrine can be measured from a remote, modern vantage point, they do not appear to

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1. FED. R. EVID. 804(b)(6).

2. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (holding that a defendant forfeits the right to object to admission of a witness's statement if he was involved in the witness's murder "through knowledge, complicity, planning or in any other way"); Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982) (concluding that a defendant or "someone acting on his behalf" may forfeit the defendant's objections to a witness's out-of-court statements by making the witness unavailable).

3. *See* United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000) ("We therefore hold that a co-conspirator may be deemed to have 'acquiesced in' the wrongful procurement of a witness's unavailability for purposes of Rule 804(b)(6) and the waiver by misconduct doctrine when the government can satisfy the requirements of *Pinkerton* [*v. United States*], 328 U.S. [640, 647–48 (1946)].").

4. United States v. Dinkins, 691 F.3d 358, 385 (4th Cir. 2012); United States v. Carson, 455 F.3d 336, 364 & n.24 (D.C. Cir. 2006); United States v. Thompson, 286 F.3d 950, 963–64 (7th Cir. 2002).

5. *Cherry*, 217 F.3d at 820.

6. *See* Davis v. Washington, 547 U.S. 813, 833 (2006); *see also* Giles v. California, 554 U.S. 353, 360 (2008).

7. *Cherry*, 217 F.3d at 820.

have imputed forfeiture by wrongdoing among co-conspirators.[8] Second, as the Court observed of a California forfeiture statute in *Giles v. California*, admitting statements against defendants under the *Cherry* rule amounts to stripping them of the confrontation right based on a pretrial determination of guilt.[9]

Further, the *Cherry* rule fuses Rule 804(b)(6) with the *Pinkerton* doctrine, which has been criticized as overbroad since its adoption in 1946. Several circuit courts have restricted the breadth of *Pinkerton*'s application under the Fifth Amendment's Due Process Clause. As the *Cherry* rule incorporates the *Pinkerton* doctrine wholesale, any and all due process limits on *Pinkerton* should apply to *Cherry* as well.

Part I of this Article summarizes the relevant law. Part II explains why the *Cherry* rule is inconsistent with the Confrontation Clause, both because an analog apparently did not exist at common law and because *Cherry* premises forfeiture of the confrontation right on a pretrial determination of guilt. Part III surveys criticism of *Pinkerton* more generally in order to measure the permissible scope of its application, and therefore, of its incorporation into the *Cherry* rule. Part III also examines courts of appeals decisions concluding that due process restrains the scope of vicarious liability under *Pinkerton*. Finally, Part III applies those due process restraints to the *Cherry* rule.

In short, the *Cherry* rule violates the Confrontation Clause, and even if it does not, due process requires that its application be restricted. Courts should abandon or limit it accordingly.

I. THE RELEVANT LAW

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .
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> —U.S. CONST. amend. VI.

This Part first examines how *Crawford v. Washington* defined the modern contours of the Confrontation Clause. Second, it addresses *Giles*, in which the Supreme Court applied *Crawford*'s lens to the forfeiture-by-wrongdoing doctrine. Third, it summarizes the Tenth Circuit's opinion in *United States v. Cherry*. Finally, it examines the

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8. Commentators have sharply criticized the Supreme Court's historical analysis of the forfeiture-by-wrongdoing doctrine. *See Giles*, 554 U.S. at 380 (Souter, J., concurring in part) (observing that "the early cases on the exception were not calibrated finely enough to answer the narrow question here"); *id.* at 390–98 (Breyer, J., dissenting) (finding that "no case limits forfeiture" as Justice Scalia's opinion for the Court suggested); Adrienne Rose, Note, *Forfeiture of Confrontation Rights Post-*Giles*: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 312–13 & nn.171–72 (2011) (summarizing academic criticism of the Court's analysis). Questions of reliability aside, the Court's historical approach to the Confrontation Clause is the law, and the historical reasoning that the Court followed in *Giles* also calls for rejecting the *Cherry* rule.

9. *Giles*, 554 U.S. at 365.

opinions of other circuits that have adopted the *Cherry* rule after *Giles* and in particular, the Fourth Circuit's attempt to reconcile *Cherry* with the *Giles* court's interpretation of the forfeiture doctrine.

A. *Crawford v. Washington* Tied the Scope of the Confrontation Clause to Its Historical Application

Until 2004, the Confrontation Clause permitted admission of an out-of-court statement against a criminal defendant only if it was sufficiently reliable, an inquiry that centered on whether the statement fell within a "'firmly rooted hearsay exception' or b[ore] 'particularized guarantees of trustworthiness.'"[10] In *Crawford*, the Supreme Court concluded that determining an out-of-court statement's admissibility based on its reliability was inconsistent with the Confrontation Clause's original meaning.[11] Noting that the "principal evil" against which the Clause was directed was the use of ex parte witness examinations against defendants, the Court adopted a categorical approach: statements that are "testimonial" are strictly inadmissible unless the declarant was unavailable and was subject to cross-examination on a prior occasion, while nontestimonial statements do not implicate the Confrontation Clause at all.[12] The Court allowed for exceptions to the categorical exclusion of testimonial statements, but only those that were "established at the time of the founding."[13] Forfeiture by wrongdoing is such an exception.[14]

B. *Giles v. California* Limited the Forfeiture-by-Wrongdoing Exception to Its Historical Understanding

In *Giles*, the Supreme Court held that a California statute setting out a hearsay exception for forfeiture by wrongdoing was inconsistent with the Confrontation Clause.[15] The California exception provided for admitting a declarant's out-of-court statements against a defendant who

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10. Crawford v. Washington, 541 U.S. 36, 60 (2004) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

11. *Id.*

12. *Id.* at 50–54.

13. *Id.* at 54.

14. Giles v. California, 554 U.S. 353, 360 (2008); Davis v. Washington, 547 U.S. 813, 832 (2006); *Crawford*, 541 U.S. at 62. As the forfeiture-by-wrongdoing doctrine (and Rule 804(b)(6), which codifies it, *Giles*, 554 U.S. at 367; *Davis*, 547 U.S. at 833) is an exception to the confrontation right, *Crawford*'s distinction between testimonial and nontestimonial statements is irrelevant to the scope of the doctrine's application. Testimonial statements by intentionally silenced witnesses are admissible under the doctrine, and nontestimonial statements are similarly admissible under the hearsay exception in Rule 804(b)(6). On the other hand, the restriction of the scope of the Clause to its historical application is highly relevant, because it ties the modern interpretation of the forfeiture-by-wrongdoing doctrine to its application in 1791. *See Giles*, 554 U.S. at 358 ("We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right.").

15. *Giles*, 554 U.S. at 353, 377.

harmed or threatened to harm the declarant, without any requirement that the defendant intended to make the declarant unavailable.[16] Justice Scalia's opinion for a plurality of the Court first noted that forfeiture by wrongdoing was recognized as an exception to the confrontation right when the Sixth Amendment was ratified, as *Crawford* requires.[17] Justice Scalia examined early common law cases applying the forfeiture-by-wrongdoing exception and concluded that the language the decisions used implied that the purpose of the defendant's wrongful conduct must have been to make the witness unavailable.[18] He buttressed this interpretation with several English and early American murder cases in which the victims' statements were offered against the defendant.[19] In each of these cases, the statements were admitted only if the defendant had a previous opportunity to confront the victim or if they qualified as dying declarations.[20] Justice Scalia reasoned that if, as the modern California statute provided, proof of intent to silence the witness was not required to show forfeiture by wrongdoing, the prosecutors would have sought to introduce the statements on that basis.[21] Recalling from *Crawford* that only those exceptions to the confrontation right that were "established at the time of the founding" may limit the scope of the right today, the Court held that this inferred common law requirement of a design "to prevent a witness from testifying" applies today as well.[22]

This historical reasoning won over only a plurality of the Court, perhaps because the murder cases on which the plurality relied are too slender a reed to support its sweeping conclusion. The two concurring justices concluded that the early cases cited by the plurality "were not calibrated finely enough to answer the narrow question" of whether specific intent to silence the witness was required to invoke the forfeiture doctrine.[23] The three dissenting justices were puzzled at how the plurality inferred the existence of a common law principle from the absence of examples to the contrary, rather than affirmative evidence that early courts recognized it.[24] They developed a different explanation for the prosecutors' failure to introduce the victim's statements in early murder cases: whether or not the defendant's purpose was to prevent the victim's testimony, the statements would be admissible only if the defendant had had a prior opportunity for cross-examination.[25] In those cases where the

16. *Id.* at 357.
17. *Id.* at 359 (citing, e.g., Lord Morley's Case, (1666) 6 How. St. Tr. 769 (H.L.) 771 (Eng.)).
18. *Id.* at 359–61.
19. *Id.* at 362–64.
20. *Id.*
21. *Id.* at 367.
22. *Id.* at 358, 368 (quoting Crawford v. Washington, 541 U.S. 36, 54 (2004)).
23. *Id.* at 379–80 (Souter, J., concurring in part).
24. *Id.* at 393 (Breyer, J., dissenting).
25. *Id.* at 394–95.

prosecutor did not offer the statements, the defendant had not had this opportunity, and therefore, any attempt to introduce them would have been pointless.[26] Regardless of the persuasiveness of the plurality's historical reasoning, however, the dissent did not dispute that, under *Crawford*, the scope of the confrontation right remains tethered to its "metes and bounds" in 1791.[27]

C. *Giles* Also Held That Forfeiture May Not Be Premised Merely on a Pretrial Determination of Probable Guilt

A majority of the Court identified another reason for invalidating the California forfeiture statute: it premised a finding of forfeiture on nothing more than a pretrial determination that the defendant was probably guilty of the wrongful act that silenced the witness.[28] The Court reasoned that "[t]he notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury."[29] Similarly, Justice Souter reasoned that "[i]f the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence."[30] In other words, a finding that the defendant forfeited her right to confront the witness would rest on a pretrial determination that the defendant was probably guilty of the wrongful act that silenced the witness.[31] "Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying."[32]

D. The Tenth Circuit in *Cherry* Extended *Pinkerton* Liability to Evidentiary Forfeiture by Wrongdoing Under Rule 804(b)(6), Before *Crawford* and *Giles*

In *Pinkerton*, the Supreme Court held that a defendant is liable for a substantive crime of a co-conspirator if the crime is (1) within the scope and in furtherance of the conspiracy and (2) reasonably foreseeable.[33] In

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26. *Id.*

27. *Id.* at 383. For more critical analysis of the *Giles* plurality's historical reasoning, *see* Rose, *supra* note 8, at 313 nn.171–72.

28. *Giles*, 554 U.S. at 365 (majority opinion); *id.* at 379 (Souter, J., concurring in part).

29. *Id.* at 365 (majority opinion) (emphasis in original).

30. *Id.* at 379 (Souter, J., concurring in part).

31. *Id.*

32. *Id.*

33. 328 U.S. 640, 647–48 (1946). Justice Douglas's opinion for the majority stated these elements not in the conjunctive, but in the disjunctive:

2000, the Tenth Circuit applied the *Pinkerton* co-conspirator liability principle in a context that *Pinkerton* itself did not anticipate: forfeiture by wrongdoing under Federal Rule of Evidence 804(b)(6).[34] Rule 804(b)(6) provides that an out-of-court statement is admissible "against a party who wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result."[35] Under the Tenth Circuit's rule (the "*Cherry* rule"), a defendant is deemed to have forfeited her right to confront a witness if a co-conspirator procured the witness's unavailability and "the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of [the] conspiracy."[36]

In *Cherry*, five defendants were charged with involvement in a drug conspiracy.[37] The district court found that one of the defendants had murdered a government informant, and held that the informant's out-of-court statements[38] were admissible against the killer, but not her co-conspirators, under Rule 804(b)(6).[39] The district court found that the co-conspirators had not forfeited their hearsay and confrontation objections to the informant's statements because no evidence suggested that they were responsible for killing the informant.[40] On interlocutory appeal, the

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> A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

Id. However, if liability will not be imputed among co-conspirators if any one of the elements is not present, this necessarily implies that all elements must be present in order for imputed liability to attach. Lower courts have since applied the *Pinkerton* rule to require that the substantive criminal act is within the scope and in furtherance of the conspiracy and reasonably foreseeable. *E.g.*, United States v. Min, 704 F.3d 314, 324 n.9 (4th Cir. 2013); United States v. Coplan, 703 F.3d 46, 71 (2d Cir. 2012); United States v. Madrid, 495 F. App'x 427, 430 (5th Cir. 2012); United States v. Lopez-Zamoran, 494 F. App'x 802, 804 (9th Cir. 2012); United States v. Smith, 697 F.3d 625, 635 (7th Cir. 2012); United States v. Burwell, 690 F.3d 500, 514 (D.C. Cir. 2012); United States v. Irvin, 682 F.3d 1254, 1274 (10th Cir. 2012); United States v. Norman, 465 F. App'x 110, 117 n.10 (3d Cir. 2012); United States v. Elder, 682 F.3d 1065, 1073 (8th Cir. 2012); United States v. Diaz, 670 F.3d 332, 342 (1st Cir. 2012); United States v. Lopez, 403 F. App'x 362, 377–78 (11th Cir. 2010); United States v. Adkins, 372 F. App'x 647, 650–51 (6th Cir. 2010).

34. United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000).

35. FED. R. EVID. 804(b)(6).

36. *Cherry*, 217 F.3d at 820.

37. *Id.* at 813.

38. The Tenth Circuit did not describe the statements that the government sought to introduce, saying no more than that it "moved to admit out-of-court statements by [the informant]." *Id.* at 813. The nature or scope of the statements is irrelevant under Rule 804(b)(6), however, because misconduct intended to silence a witness amounts to total forfeiture of the right to object to introduction of the witness's statements on hearsay and confrontation grounds. FED. R. EVID. 804(b)(6) advisory committee's note (1997); Giles v. California, 554 U.S. 353, 367 (2008); Davis v. Washington, 547 U.S. 813, 833 (2006); *Cherry*, 217 F.3d at 815.

39. *Cherry*, 217 F.3d at 814.

40. *Id.*

government urged the Tenth Circuit to hold the statements admissible and rule that *Pinkerton* co-conspirator liability applies to the evidentiary forfeiture-by-wrongdoing rule.[41] The court of appeals held that forfeiture under Rule 804(b)(6) may be imputed among co-conspirators, reasoning that *Pinkerton* liability strikes an "appropriate balance" between the defendant's interest in confronting adverse witnesses and the justice system's need to prevent witness tampering.[42] The court therefore reversed the district court's order and remanded with instructions to determine whether the informant's murder was within the scope and in furtherance of the conspiracy and reasonably foreseeable.[43]

Two years later, the Seventh Circuit followed the Tenth Circuit's example and applied *Pinkerton* co-conspirator liability to the forfeiture-by-wrongdoing exception in Rule 804(b)(6).[44]

E. Subsequent Decisions by Circuit Courts Adopted the *Cherry* Rule, Sometimes with Modification, After *Crawford* and *Giles*

Two circuit courts, the D.C. Circuit in *United States v. Carson* and the Fourth Circuit in *United States v. Dinkins*, adopted the *Cherry* rule after *Crawford*.[45] The D.C. Circuit's opinion in *Carson* did not address whether the Supreme Court's reinterpretation of the Confrontation Clause in *Crawford* had any effect on the scope or validity of the *Cherry* rule, devoting its reasoning on the question to a single footnote.[46] The Fourth Circuit's opinion in *Dinkins*, on the other hand, followed both *Crawford* and *Giles* and acknowledged that both required reexamination of the constitutional reach of the forfeiture-by-wrongdoing doctrine.[47] Accordingly, it set out to square the *Cherry* rule with *Giles*'s intent requirement.

Like the Tenth Circuit, the Fourth Circuit in *Dinkins* reasoned that importing co-conspirator liability under *Pinkerton* into the forfeiture-by-wrongdoing doctrine would strike an "appropriate balance between" a defendant's confrontation right and the public interest in preventing witness tampering.[48] The court, therefore, adopted the *Cherry* rule in nearly the same terms as the Tenth Circuit: a witness's statement is admissible against a defendant when her co-conspirator wrongfully

41. *Id.* at 813–16.

42. *Id.* at 820.

43. *Id.* at 821.

44. United States v. Thompson, 286 F.3d 950, 963–64 (7th Cir. 2002).

45. United States v. Dinkins, 691 F.3d 358, 385 (4th Cir. 2012); United States v. Carson, 455 F.3d 336, 364 & n.24 (D.C. Cir. 2006).

46. *Carson*, 455 F.3d at 364 n.24. The D.C. Circuit noted that the murdered witness's statements were likely testimonial, but found the distinction to be "of no moment" because the forfeiture-by-wrongdoing exception applies to testimonial statements as well as nontestimonial statements. *Id.* at 363 n.22.

47. *Dinkins*, 691 F.3d at 382–84.

48. *Id.* at 384–85.

procured the witness's unavailability, and "the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy."[49] The court went on to observe, however, that the Supreme Court in *Giles* had "clarified that the forfeiture-by-wrongdoing exception applies 'only when the defendant engaged in conduct *designed* to prevent the witness from testifying.'"[50] The Fourth Circuit reconciled *Giles*'s intent requirement with *Cherry*'s allowance of forfeiture based only on reasonable foreseeability by holding that a co-conspirator's intentional misconduct that silences a witness will lead to forfeiture of a defendant's right to confront that witness's statements only if the government presents "evidence that the defendant 'engaged in conduct designed to prevent the witness from testifying.'"[51]

The *Dinkins* court went on to find that the facts of the case before it satisfied this modified *Cherry* rule.[52] The defendant in *Dinkins* was incarcerated when his co-conspirators murdered an informant.[53] He had, however, attempted to kill the same informant in the past, and announced an intent to "go to the hospital and finish him off."[54] The Fourth Circuit found that the defendant's prior attempt on the informant's life made his successful murder by co-conspirators reasonably foreseeable as required by *Cherry*.[55] Similarly, the court reasoned, the prior attempt showed evidence, on the defendant's part, of a "design" to make the informant unable to testify, as required by *Giles*.[56]

Contrary to the observations of some commentators, *Dinkins*'s attempt to square *Cherry* and *Giles* must be regarded a failure.[57] If the defendant must have personally intended to silence a witness, merely that she should reasonably have foreseen a co-conspirator's wrongful attempt to do so is insufficient by definition. The Fourth Circuit's application of its refined *Cherry* rule illustrates the problem. The defendant in *Dinkins* attempted to kill the informant with the purpose of making him unavailable, and when the attempt failed, announced to his co-conspirators the necessity of "finish[ing] the job."[58] The defendant's

49. *Id.* at 385.
50. *Id.* at 383 (quoting Giles v. California, 554 U.S. 353, 359 (2008) (emphasis in original)).
51. *Id.* at 385 (quoting *Giles*, 554 U.S. at 359) (emphasis omitted).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 386.
56. *Id.*
57. *See, e.g.*, Ruth A. Moyer, Comment, *Setting Critical Limits on the* Cherry *Doctrine: The Fourth Circuit Decision in* United States v. Dinkins, 64 S.C. L. REV. 1117, 1127 (2013) ("[T]he *Dinkins* court adeptly reconciled the *Cherry* doctrine with the fundamental intent requirement of *Giles*.").
58. *Dinkins*, 691 F.3d at 385.

prior attempt on the witness's life showed that he personally intended to prevent the informant from testifying against him and his co-conspirators. That the killing he personally set in motion was reasonably foreseeable to him played no practical role in the court's analysis. In other words, inserting an intent requirement into the *Cherry* rule rendered the foreseeability of the co-conspirators' actions superfluous.

Put another way, the *Dinkins* court's version of the *Cherry* rule is akin to a criminal statute that simultaneously requires both intent and negligence with regard to the proscribed result. The criminal law generally recognizes that intent is a more culpable mental state than that required for negligence, where reasonable foreseeability is key.[59] The *Dinkins* rule requires that the defendant, against whom the witness's statement is offered, harbor both intent and negligence with regard to the act that procured the witness's unavailability. A defendant who should reasonably have foreseen that her co-conspirator would silence a witness, that is, who harbored the less culpable mental state of negligence, will not fall under the *Dinkins* rule unless she also harbored the more culpable mental state of intent that the witness be silenced. Inclusion of the more culpable mental state renders the less culpable one purposeless.

To say that the *Dinkins* court failed to reconcile the *Cherry* rule with *Giles*'s intent requirement is not to say that the two are necessarily incompatible. As will be taken up in the next Part, recent commentators have reached opposing conclusions on this question. This Article does not propose a solution to the controversy, but concludes that the *Cherry* rule is inconsistent with the Confrontation Clause for other reasons.

II. THE *CHERRY* RULE IS INCONSISTENT WITH THE CONFRONTATION CLAUSE UNDER *CRAWFORD* AND *GILES*

Since the Supreme Court's decision in *Giles* was announced, commentators have asked whether its requirement that the defendant acted with the intent to make the witness unavailable can be reconciled with the *Cherry* rule. One commentator argues that the Court's decision in *Giles* precludes imputed forfeiture under *Cherry* because a "design to prevent the witness from testifying" cannot be imputed from one conspirator to another.[60] This conclusion is based on the *Giles* Court's

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59. For example, of the Model Penal Code's four mental states, purpose (equivalent to intent) is the most culpable and negligence the least. MODEL PENAL CODE §§ 1.13(12), 2.02(2), 2.02(5), 2.02 cmt. (2001). Under the Model Penal Code, a defendant was negligent if her failure to perceive a risk that the proscribed result would occur was "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *ID.* § 2.02(2)(d).

60. *See* Rose, *supra* note 8, at 318. In a similar vein, the Fourth Circuit apparently assumed that *Giles* did not allow for imputation among conspirators of a "design[] to prevent the witness from testifying." *Dinkins*, 691 F.3d at 385.

historical analysis and its reliance on the common law maxim that "no one shall be permitted to take advantage of his own wrong."[61]

Another author reaches the opposite conclusion: *Giles* and the *Cherry* rule can coexist in harmony because one conspirator's intent to prevent a witness's testimony may be imputed to her co-conspirators.[62] The *Giles* Court itself did not direct lower courts not to impute one conspirator's "design to prevent a witness from testifying" to another.[63] The majority did, according to the author, explain that the factual context will affect whether a court may infer that a defendant intended to render a witness unavailable.[64] In particular, the Court addressed cases of domestic violence, in which trial courts might infer from patterns of past abuse that the abuser intended to isolate the victim from potential avenues for relief.[65] Similarly, a court may permissibly infer from the collective efforts of a criminal conspiracy to foster a reputation for violent retaliation against "snitches" that one conspirator's intent to silence a particular witness should be imputed to her fellows.[66] Other criminal doctrines, in which intent is imputed by operation of law, such as transferred intent, felony murder, and even substantive liability under *Pinkerton* where intent is an element of the crime, further suggest that intent may be imputed for forfeiture purposes.[67] Finally, the author asserts that the *Cherry* rule is perfectly consistent with the forfeiture doctrine's aims of stripping defendants of the benefits of their wrongdoing and of deterring future witness tampering.[68]

This Article does not attempt to resolve the controversy that these commentators raise. Whether *Giles*'s central holding permits courts to impute intent to prevent a witness's testimony among conspirators, the *Cherry* rule is inconsistent with the Confrontation Clause for two unrelated reasons: (1) imputation of forfeiture by wrongdoing among conspirators was unknown to the common law when the Sixth Amendment was ratified; and (2) the *Cherry* rule premises forfeiture on a pretrial determination of the defendant's guilt.

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61. Rose, *supra* note 8, at 314 (quoting Reynolds v. United States, 98 U.S. 145, 159 (1878)).

62. Nathaniel Koslof, Note, Cherry *Still on Top: How* Pinkerton *Concepts Continue to Govern Co-Conspirator Forfeiture of Confrontation Rights Post-*Giles, 55 B.C. L. REV. 301, 327–28 (2014).

63. *Id.* at 317–18 (citing Giles v. California, 554 U.S. 353, 377 (2008)).

64. *Id.* at 320.

65. *Giles*, 554 U.S. at 377.

66. Koslof, *supra* note 62, at 320–21.

67. *Id.* at 321–23.

68. *Id.* at 324–26. The Seventh Circuit also relied, in part, on this deterrence rationale when it adopted the *Cherry* rule. United States v. Thompson, 286 F.3d 950, 965 (7th Cir. 2002). It went on to reject the argument that the *Cherry* rule permits one conspirator to be stripped of the confrontation right involuntarily based on the wrongful conduct of another. *Id.* (citing *Cherry*, 217 F.3d at 823 (Holloway, J., dissenting)). The Court reasoned that the *Cherry* rule is tied to the defendant's intentional, wrongful conduct in participating in an illegal conspiracy, where wrongful action against a witness is reasonably foreseeable. *Id.*

A. Imputed Forfeiture Among Conspirators Did Not Exist at the Time the Sixth Amendment Was Ratified

The crime of conspiracy was first enacted in England in the fourteenth century, and was well established in the United States by the end of the eighteenth.[69] When conspiracy was charged against a defendant, acts of co-conspirators taken in pursuit of the conspiracy were imputed to the defendant for the purpose of establishing the conspiracy's existence.[70] However, the Author has been unable to uncover a case prior to the twentieth century in which a conspirator was deemed criminally liable for her co-conspirator's actions, apart from her liability for the crime of conspiracy. It appears that American courts did not begin imputing substantive criminal liability among conspirators until the twentieth century, and the Supreme Court did not adopt the principle until *Pinkerton* in 1946.[71]

Early common law treatises discuss the forfeiture rule without mentioning forfeiture based on a co-conspirator's conduct. For example, Phillips & Amos wrote that a witness's deposition was deemed admissible against a defendant at trial if the witness was "kept away by the practices" of the defendant.[72] The treatise did not mention that a defendant could be deemed to have forfeited any objection to admitting the deposition if a co-conspirator kept the witness away.[73] Similarly, an 1801 edition of Gilbert's *Law of Evidence* provided that a coroner's examination of a witness would be admissible at trial if "the witness [was]

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69. *See* 4 William Blackstone, Commentaries *136 (describing the statutory crime of conspiracy to falsely indict); Francis B. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 395–96 (1922); *see also* Case of Fries, 9 F. Cas. 924, 931 (C.C.D. Pa. 1800) (No. 5127); Gardner v. Preston, 2 Day 205, 209–10 (Conn. 1805); People v. Barrett, 1 Johns. 66, 75–76 (N.Y. Sup. Ct. 1806); Lambert v. People, 9 Cow. 578, 624 (N.Y. 1827); Cornwell v. State, 8 Tenn. (Mart. & Yer.) 147, 147 (Tenn. 1827).

70. *Cornwell*, 8 Tenn. (Mart. & Yer.) at 147; *Gardner*, 2 Day at 210 (citing 1 Edward H. East, A Treatise of the Pleas of the Crown § 38 (1803)).

71. *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 922, 993–94 (1959) [hereinafter *Developments*]; Note, *Vicarious Liability for Criminal Offenses of Co-Conspirators*, 56 Yale L.J. 371, 376 (1947) [hereinafter *Vicarious Liability*]. California courts held defendants liable for the substantive crimes of co-conspirators "committed as a part of the conspiracy" before *Pinkerton*. *See* Anderson v. Superior Court, 177 P.2d 315, 317 (Cal. Dist. Ct. App. 1947). *Anderson* in turn cited a number of pre-*Pinkerton* cases for that proposition. *See* People v. Kauffman, 92 P. 861, 862 (Cal. 1907) (noting that all parties who "conspire or combine together to commit any unlawful act" are criminally liable for all acts by co-conspirators which are "probable and natural consequences" of the conspiracy); People v. Welch, 264 P. 324, 327 (Cal. Dist. Ct. App. 1928) (describing as "well-settled" the principle that criminal liability for acts committed "during the life of the conspiracy and in the furtherance of [its] accomplishment" is imputed among all conspirators); People v. Murphy, 200 P. 484, 488 (Cal. Dist. Ct. App. 1921) ("The established rule is that when a conspiracy to commit an offense of a certain class is shown each conspirator is deemed guilty of every such crime committed in furtherance of the conspiracy by any of the conspirators.").

72. Samuel March Phillipps & Andrew Amos, A Treatise on the Law of Evidence 576 (8th ed. 1838) (citation omitted).

73. *Id.* at 576–77.

detained and kept back from appearing by the means and procurement of the prisoner."[74] No mention is made of whether the witness's examination would be similarly admissible against the defendant's co-conspirators. Neither treatise, however, addresses the question specifically.

In contrast, at least one English case discusses whether a witness's out-of-court statement would be admissible against the co-conspirators of the defendant who wrongfully silenced the witness.[75] In *R v. Scaife*, the Crown sought to introduce a witness's statements against three defendants charged with robbery.[76] The evidence showed that only one defendant was responsible for procuring the witness's unavailability.[77] The trial court allowed the statements to be read before the jury.[78] On appeal, the Court of Queen's Bench considered the argument that the deposition was properly admitted against all defendants because they acted in combination in the charged felony.[79] However, the Court held that the statements were not admissible against all of the defendants because only one was shown to have been responsible for preventing the witness from testifying.[80]

Scaife cautions modern courts against imputing forfeiture of the confrontation right among co-conspirators in the same manner as the murder cases that Justice Scalia examined in *Giles*, and it supports the conclusion more strongly than those cases. Justice Scalia reasoned that if the early common law provided that a defendant forfeited any objection to a witness's statement merely by causing the witness's unavailability, prosecutors would have sought to introduce a murder victim's statement against the defendant on that theory.[81] That prosecutors did not do so demonstrates that a defendant was not deemed to forfeit the confrontation right absent intent to make the witness unavailable.[82] Unlike the cases that Justice Scalia examined in *Giles*, in *Scaife* the Crown attempted to invoke the theory of forfeiture in question: it attempted to introduce the statement of the silenced witness against all of the codefendants, not merely the defendant responsible for keeping

74. GEOFFREY GILBERT, THE LAW OF EVIDENCE 125 (James Sedgwick ed., 6th ed. 1801). Justice Scalia cited similar language appearing in a 1756 edition of Gilbert on Evidence in *Giles*. Giles v. California, 554 U.S. 353, 365 (2008) (citing GEOFFREY GILBERT, LAW OF EVIDENCE 140–41 (1756)).

75. R v. Scaife, (1851) 117 Eng. Rep. 1271 (Q.B.). *Scaife* is among the cases that the majority and dissent in *Giles* cited in their respective discussions of the historical scope of the confrontation right. *Giles*, 554 U.S. at 359, 366–67 (majority opinion); *id.* at 382–83 (Breyer, J., dissenting).

76. *Scaife*, 117 Eng. Rep. at 1271.

77. *Id.*

78. *Id.*

79. *Id.* at 1273.

80. *Id.*

81. Giles v. California, 554 U.S. 353, 362–64 (2008).

82. *Id.*

the witness away. The Court of Queen's Bench expressly rejected that argument. The court's affirmative rejection of the Crown's invitation to impute one co-venturer's forfeiture of the right to confront a witness to her co-conspirators demonstrates that the common law did not recognize imputed forfeiture.

This argument, like the Court's historical analysis in *Giles*, is not especially persuasive on its own. The absence of any discussion that forfeiture by wrongdoing was imputed among conspirators in the treatises mentioned above is compatible with the contention that the common law did not recognize such imputation, but these authorities are "not calibrated finely enough to answer the narrow question" of whether that contention is true.[83] *R v. Scaife* is stronger evidence of the proposition, because the Court of Queen's Bench affirmatively rejected the Crown's argument that the witness's statement should be admissible against the co-venturers of the defendant responsible for wrongfully silencing the witness. On the other hand, even this example is susceptible to Justice Souter's ambivalence in *Giles*, because there was no accusation of conspiracy in *Scaife*, and therefore, co-conspirator imputation principles in particular were not implicated. The academic commentary, however, suggests that vicarious liability for substantive crimes did not become a feature of conspiracy law until the twentieth century; this also suggests that it did not exist at early common law.[84] If the principle of imputed substantive liability among conspirators did not exist in the eighteenth and nineteenth centuries, then courts in those centuries could not have adopted that principle to impute forfeiture among conspirators as well. In combination, the treatises, case law example, and apparent lack of vicarious substantive liability among conspirators demonstrate that the *Cherry* rule has no analog in early common law.

B. The *Cherry* Rule Allows for Forfeiture of the Confrontation Right Based on a Pretrial Determination of Guilt

In *Giles*, the Supreme Court overturned a California forfeiture-by-wrongdoing statute in part because it allowed a witness's testimonial out-of-court statements to be admitted as evidence that a defendant was guilty of murder based only on a pretrial finding that the defendant was probably guilty of murdering the witness.[85] Six justices held that this provision for forfeiture of the confrontation right based on a pretrial

83. *Giles*, 554 U.S. at 380 (Souter, J., concurring in part).
84. *See supra* note 71 and accompanying text.
85. *Giles*, 554 U.S. at 365; *id.* at 379 (Souter, J., concurring in part).

determination of guilt rendered the statute unconstitutional, while only four signed on to the Court's historical analysis without reservation.[86]

Like the California statute rejected in *Giles*, the *Cherry* rule premises forfeiture of the confrontation right on a pretrial determination of guilt. The *Cherry* rule adopts *Pinkerton* liability wholesale: a statement is admissible against a defendant if the defendant's co-conspirator's wrongful act to silence a witness was within the scope and in furtherance of the conspiracy and reasonably foreseeable.[87] Under the *Cherry* rule, then, if a witness's statement is admissible against a defendant, the defendant would also be liable for any crime committed against the witness under *Pinkerton*. In other words, evidence of guilt would be admissible against the defendant based on a pretrial determination that the defendant is probably guilty of silencing the witness through the actions of her co-conspirator. As Justice Souter concluded in *Giles*, "[e]quity demands something more" than a bare, circular conclusion that the defendant is guilty: the defendant in particular must have acted with the purpose of making the witness unavailable.[88] This "something more" is missing from the *Cherry* rule.

Of course, other pretrial evidentiary questions frequently involve determinations that a defendant participated in a conspiracy, but these do not amount to a pretrial determination of guilt in the manner that the *Cherry* rule does. As a particular example, the Federal Rules of Evidence's exclusion of co-conspirator statements from the hearsay rule requires proof that the statements were made "by a coconspirator of a party during the course and in furtherance of the conspiracy."[89] This Rule, therefore, necessarily requires proof before trial that the defendant participated in a conspiracy. However, the admissibility of co-conspirator statements does not rest on the theory that the wrongful nature of the defendant's conspiring amounts to forfeiture of any rights. Rather, the statements are deemed the statements of the defendant herself, and are therefore admissible as party admissions.[90] "[T]heir admissibility in evidence is the result of the adversary system," not of any finding that the defendant forfeited her confrontation right through criminal wrongdoing.[91]

Rule 804(b)(6), unlike the exemption for co-conspirator statements, is quasi-criminal in nature. At the foundation of Anglo-American

86. *See id.* at 379 (explaining that the Court's exposition of the danger that forfeiture might rest on a pretrial judicial determination of guilt, rather than the Court's historical analysis, persuaded him to join the Court's opinion).

87. United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000).

88. *Giles*, 554 U.S. at 379 (Souter, J., concurring in part).

89. FED. R. EVID. 801(d)(2)(E).

90. FED. R. EVID. 801 advisory committee's note (1972).

91. *Id.*

criminal law is the notion that individuals may be compelled to compensate society for the public wrongs they commit through forfeiture of their liberty and property.[92] Criminal law is also meant to prevent crime through the threefold goals of deterrence, incapacitation, and rehabilitation.[93] Weighty as these interests are, the high liberty costs that attend a conviction require the government to prove its case against a defendant beyond a reasonable doubt.[94] Rule 804(b)(6) functions in the same manner and has many of the same aims as the criminal law. As the criminal punishment, in some sense, repays society for deliberate harms worked against it, forfeiture by wrongdoing compensates somewhat for a defendant's wrongful action against a witness by stripping that defendant of the benefits of her wrongdoing. Though the Rule may not incapacitate or rehabilitate wrongdoers, it aims to deter wrongful conduct.[95] Each of these aims is accomplished by deeming the defendant to have forfeited her constitutionally recognized right to confront witnesses. As the Court recognized in *Giles*, to premise this forfeiture on nothing more than a determination before trial, out of the presence of the jury, and by a mere preponderance of the evidence that the defendant is probably guilty of whatever criminal act rendered the witness unavailable, is a burden that the Confrontation Clause cannot bear.[96] The more stringent requirement set out in *Giles* ensures that forfeiture of the right to confront a witness will rest not on a pretrial determination of guilt, but on a showing that the defendant intended specifically to render the witness unavailable.

III. EVEN IF THE *CHERRY* RULE DOES NOT OFFEND THE CONFRONTATION CLAUSE, DUE PROCESS CONSTRAINS ITS APPLICATION SHORT OF THE LOGICAL EXTENT OF *PINKERTON* CO-CONSPIRATOR LIABILITY

The *Pinkerton* decision expanded the scope of federal conspiracy law to include liability for the substantive crimes of other conspirators. While some commentators have supported this extension, most have criticized it.[97] In response to the shortcomings of the *Pinkerton* doctrine,

92. 4 WILLIAM BLACKSTONE, COMMENTARIES *6.

93. *Id.* at *10–11.

94. *In re* Winship, 397 U.S. 358, 363–64 (1970).

95. *E.g.*, United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002); United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000).

96. FED. R. EVID. 804 advisory committee's note.

97. *See, e.g.*, *Vicarious Liability*, *supra* note 71, at 375; *Developments*, *supra* note 71, at 996; Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 7 n.28 (1992). The Model Penal Code rejected vicarious liability for reasonably foreseeable crimes by co-conspirators. *See* MODEL PENAL CODE § 2.06(3) (1962) (providing that complicity requires that the defendant have "the purpose of promoting or facilitating the commission of the offense"); MODEL PENAL CODE § 2.04(3) cmt. 2 (Tentative Drafts Nos. 1–4, 1968) (noting that co-conspirator liability based on the probability of the substantive offense "predicate[s] the liability on negligence when, for good reason, more is normally required"). Many state court decisions have rejected *Pinkerton* as well. *See* State v. Stein, 27 P.3d 184, 189 (Wash. 2001)

many circuit courts have intimated that due process constrains the doctrine's reach.[98] Because the *Cherry* rule applies the *Pinkerton* doctrine to Rule 804(b)(6) wholesale, the due process concerns identified in *Pinkerton* apply with equal force to the *Cherry* rule. Accordingly, even if the *Cherry* rule may be applied consistently with the Confrontation Clause (as the Fourth Circuit attempted in *Dinkins*), the due process limitations that circuit courts have applied to constrain *Pinkerton* should constrain *Cherry* as well.

A. *PINKERTON* ALLOWS FOR THE IMPUTATION OF SUBSTANTIVE LIABILITY FOR CO-CONSPIRATORS' CRIMES

The U.S. Code presently defines conspiracy as the act of "two or more persons conspir[ing] either to commit any offense against the United States, or to defraud the United States."[99] This modern formulation and all other versions of the crime of conspiracy in effect in U.S. jurisdictions trace their origins to a statute enacted in England in 1304 by Edward I.[100] Originally, the crime of conspiracy applied only to agreements to bring a false indictment, though it expanded into agreements to commit any crime whatsoever in the seventeenth century.[101] Indeed, in England and the United States, the crime swelled so far as to include agreements to commit any act the courts deemed immoral.[102]

That the act of one conspirator in furtherance of the conspiracy is considered the act of all was well settled at common law by the end of the eighteenth century, though case law did not provide for vicarious liability

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(en banc) (rejecting *Pinkerton* as "incompatible with Washington law" because it allows for complicity in a co-conspirator's act without knowledge of it); State *ex rel.* Woods v. Cohen, 844 P.2d 1147, 1151 (Ariz. 1992) (en banc) (concluding that *Pinkerton* is not within Arizona's "statutory universe"); People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979) ("[I]t is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant, to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate.").

98. *See, e.g.*, United States v. Alvarez, 755 F.2d 830, 850 (11th Cir. 1985); United States v. Castaneda, 9 F.3d 761, 768 (9th Cir. 1993).

99. 18 U.S.C. § 371 (2014).

100. Sayre, *supra* note 69, at 395–96 (citing Third Ordinance of Conspirators, 1304, 33 Edw. 1 (Eng.)).

101. *Id.* at 400.

102. *Id.* at 400–07. More recently, the Supreme Court determined that a state statute criminalizing conspiracies "to commit acts injurious to public morals" was likely unconstitutionally vague and overbroad, but declined to find fault with criminalizing an agreement to commit an act that was not itself criminal. *See* Musser v. Utah, 333 U.S. 95, 97–98 (1948) (remanding to the Utah Supreme Court to determine whether the statute could be construed narrowly). The principle that a conspiracy is criminal even if its purpose is not is expressed in the federal conspiracy statute, which penalizes conspiracies to "defraud the United States." 18 U.S.C. § 371 (2014); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1144–45 (1973).

for substantive crimes.[103] Instead, by the first half of the twentieth century, federal courts had come to use the imputation principle

> (1) to establish as the act of all members of the alleged conspiracy the overt act required by the federal conspiracy statute, (2) to show the extent and duration of the conspiracy in relation to all the conspirators, or (3) as a rule of evidence to connect all the defendants with the crime charged.[104]

Before 1946, federal courts declined to extend the theory of conspiracy to hold one conspirator liable for a substantive offense committed by another conspirator.[105]

1. Pinkerton *Extended Co-Conspirator Liability to Substantive Crimes by Co-Conspirators That Were Not the Object of the Conspiracy*

The potential scope of criminal conspiracy law expanded considerably with the Supreme Court's 1946 opinion in *Pinkerton*.[106] Walter and Daniel Pinkerton appealed from convictions for multiple counts of Internal Revenue Code violations, and one count each of conspiracy.[107] Daniel argued that no evidence connected him to the substantive crimes in the indictment.[108] In fact, he showed that he was serving time in a penitentiary when Walter committed some of the

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103. EAST, *supra* note 70, at 97. The principle is stated in a chapter explaining the crime of high treason, but the text makes clear that it applied to all conspiracies. *Id.* at 96; *see* United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469 (1827) ("Each [conspirator] is deemed to consent to, or command, what is done by any other in furtherance of the common object."); Gardner v. Preston, 2 Day 205, 210 (Conn. 1805) (one conspirator's act in pursuit of the objective of the conspiracy is deemed the act of all conspirators).

104. *Vicarious Liability*, *supra* note 71, at 375; *see id.* at 375 nn.36–38 (collecting cases). Of course, at present, the rule that a statement by a conspirator within the scope and in furtherance of the conspiracy is admissible against all other conspirators is codified within the Federal Rules of Evidence. FED. R. EVID. 801(d)(2)(E).

105. *Vicarious Liability*, *supra* note 71, at 375; *Developments*, *supra* note 71, at 993–94. As noted in *Developments*, at the time that the Supreme Court decided *Pinkerton*, the Third Circuit had declined to hold that each participant in a conspiracy was liable for the substantive criminal acts of other conspirators. *Id.* at 994 (citing United States v. Sall, 116 F.2d 745 (3d Cir. 1940)). In *Sall*, the Third Circuit held that proof of the defendant's membership in a conspiracy to conceal alcohol was not sufficient to show him substantively liable for the concealment itself: "It is the act of concealment with criminal intent, and not the previous agreement, which is the gist of that offense." *Sall*, 116 F.2d at 747. The Pinkerton brothers relied on *Sall* for the proposition that participation in a conspiracy did not, on its own, render all conspirators vicariously liable for a single conspirator's substantive crime. Brief for the Petitioners at 19–20, Pinkerton v. United States, 328 U.S. 640 (1946) (No. 719). In rejecting *Sall*, the Supreme Court established throughout the federal courts for the first time that conspirators are vicariously liable for their co-conspirators' criminal acts carried out in furtherance of the conspiracy. *Pinkerton*, 328 U.S. at 646–47.

106. 328 U.S. at 640; *see Vicarious Liability*, *supra* note 71, at 373–74 (*Pinkerton* abolished the common law merger rule and provided that a conspirator may be liable for criminal acts of other conspirators).

107. *Pinkerton*, 328 U.S. at 641.

108. *Id.* at 645.

offenses.[109] The Court held that Daniel's mere participation in the conspiracy was enough to render him liable for all criminal acts by his co-conspirators in furtherance of the conspiracy.[110] In reaching this conclusion, the Court summarized the principle that "an overt act of one partner may be the act of all."[111] Because the overt act required by the federal conspiracy statute could be supplied by the act of a co-conspirator, the Court reasoned, "other acts in furtherance of the conspiracy" should also be attributed to all participants.[112]

The Court recognized that the broad scope of conspiracy liability lent itself to abuses and potential injustice, even as it expanded that scope in *Pinkerton*.[113] Perhaps in response to this potential, the Court suggested that a conspirator is liable for another conspirator's substantive offense only if the offense was "in furtherance of the conspiracy" and "within the scope of the unlawful project."[114] The Court added an additional limitation: the offense must have been reasonably foreseeable "as a necessary or natural consequence of the unlawful agreement."[115]

2. *Justifications of the* Pinkerton *Rule Rest Primarily on a "General Partnership" Theory*

Justice Douglas's opinion for the Court drew heavily on the notion that a conspiracy is a "partnership in crime."[116] Like partners in a business enterprise, Justice Douglas reasoned, each conspirator should be deemed responsible for each other conspirator's actions within the scope of the conspiracy.[117] For this principle, rather than citing opinions interpreting conspiracy law in general, Justice Douglas referred to antitrust cases involving incorporated business entities charged with

109. *Id.* at 648 (Rutledge, J., dissenting in part).

110. *Id.* at 647.

111. *Id.* at 646 (citation omitted).

112. *Id.* at 647.

113. *Id.* at 644 n.4. The Court cited an observation by the Conference of Senior Circuit Judges in 1925 that prosecutors often inject conspiracy charges into indictments in order to convert misdemeanors into felonies or to gain advantage of special rules of evidence that make conspiracy cases "difficult to try without prejudice to an innocent defendant." *Id.* (quoting *Resolutions of Conference of Senior Circuit Judges*, 11 A.B.A. J. 453, 453 (1925)). The Court brushed these concerns aside, noting that it "[did] not find that practice reflected in this present case." *Id.* Of course, the modern federal conspiracy statute provides that a conspiracy to commit a misdemeanor is also punished as a misdemeanor. 18 U.S.C. § 371 (2014).

114. *Pinkerton*, 328 U.S. at 647–48.

115. *Id.* at 648. The Court did not affirmatively state that each of these elements is required, but merely suggested that it would face "[a] different case" if any of them were absent. *Id.* at 647–48. However, each circuit now requires that a conspirator's substantive crime be within the scope and in furtherance of the conspiracy and reasonably foreseeable in order for other conspirators to be vicariously liable for it. *See supra* note 33 and accompanying text.

116. *Pinkerton*, 328 U.S. at 644.

117. *Id.* at 646–47.

colluding to fix prices.[118] Justice Douglas did not explain why the broad principle of vicarious liability for antitrust offenses, which by their nature include an element of collusion, should expand to encompass any substantive crime committed in furtherance of any conspiracy.

Later commentators have expanded on the agency rationale in *Pinkerton*. As an agent of the principal, an accomplice (or co-conspirator) "is in agreement with the principal's actions," and "therefore worthy of punishment."[119] However, this agency rationale falters in the criminal context where a co-conspirator's contribution is tenuous or insubstantial.[120] Similarly, in joining a conspiracy, a conspirator forfeits her personal autonomy, effectively saying, "your acts are my acts."[121] Holding this conspirator liable for her co-conspirators' reasonably foreseeable acts is therefore permissible.[122]

B. CRITICISM OF *PINKERTON*

The first vigorous criticism of the *Pinkerton* rule followed on the majority opinion's heels.[123] In his dissenting opinion, Justice Rutledge reminded the Court that Daniel Pinkerton was incarcerated when his brother carried out many of the substantive crimes, and no evidence suggested that Daniel aided in or even knew about them.[124] The dissent invoked a number of "dangers for abuse" in the state of conspiracy law before *Pinkerton*, including "[t]he looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, [and] the psychological advantages of such trials for securing convictions by attributing to one proof against another."[125] Expanding the scope of conspiracy liability to include substantive offenses in furtherance of the conspiracy exacerbates these dangers.[126] Justice Rutledge also took issue with the Court's reliance on "private commercial law" to expand the

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118. *Id.* at 644 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166–67 (1940) (oil companies charged with conspiring to fix gasoline prices)); *id.* at 647 (citing United States v. Kissel, 218 U.S. 601, 605–06 (1910) (lender charged with conspiring with sugar company to lend money in exchange for a controlling share of a rival sugar company)).

119. Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1355–56 n.13 (1998) (citing Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 110 (1985)).

120. *Id.*

121. Dressler, *supra* note 119, at 111.

122. Kimberly R. Bird, Note, *The Natural and Probable Consequences Doctrine: "Your Acts Are My Acts!"*, 34 W. ST. U. L. REV. 43, 49 (2006).

123. *See Pinkerton*, 328 U.S. at 648 (1946) (Rutledge, J., dissenting in part).

124. *Id.*

125. *Id.* at 650.

126. *Id.*

vicarious liability of business partners into "the criminal field."[127] To Justice Rutledge, guilt of a crime "remains personal, not vicarious."[128]

Justice Jackson, a former Attorney General, added to Justice Rutledge's concerns in his concurring opinion in *Krulewitch v. United States*.[129] Justice Jackson devoted much of his opinion to expounding the abuses of conspiracy law in general, particularly the incentives it gives prosecutors to rely on it excessively and the dangers of prejudice it poses to defendants.[130] He saved specific criticisms for the Court's holding in *Pinkerton*, however.[131] Like Justice Rutledge, Justice Jackson observed that *Pinkerton* allows a conspirator to suffer conviction of a substantive crime, effectively becoming an aider or abettor, despite no evidence that he had control over or even knew of its commission.[132]

Many commentators have noticed that *Pinkerton* allows for conviction of a serious crime based not on a finding of whatever mental state the crime requires, but on mere negligence.[133] The phrase "reasonably foreseeable" invokes the "reasonable person" of tort liability, and implies a broader scope of foreseeable consequences than does a requirement of intent or knowledge.[134] In effect, *Pinkerton* renders a conspirator criminally liable for any crime that she "should have known" her co-conspirators might commit; that is, if she was negligent with regard to its likelihood.[135] In basing liability on mere negligence, *Pinkerton* punishes "a conspirator who never agreed to, aided, or participated in, the commission of the collateral offense."[136]

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127. *Id.* at 651–52.

128. *Id.*

129. Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). Justice Jackson served as Attorney General from 1940 to 1941, when he was appointed to the Supreme Court to replace Justice Hughes. JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON 235–36 (1996). He took no part in the decision in *Pinkerton*. *Pinkerton*, 328 U.S. at 648.

130. *Krulewitch*, 336 U.S. at 445–46, 452–54 (Jackson, J., concurring).

131. *Id.* at 451.

132. *Id.*

133. *See, e.g.*, *Developments*, *supra* note 71, at 996; Marcus, *supra* note 97, at 7 n.28.

134. *Developments*, *supra* note 71, at 996.

135. Marcus, *supra* note 97, at 7 n.28.

136. *Id.* When early drafts of the Model Penal Code rejected *Pinkerton*-style co-conspirator liability, among the reasons given in the comments was *Pinkerton*'s provision for liability for serious crimes based on a showing of nothing more than negligence. MODEL PENAL CODE § 2.04(3) cmt. 2 (Tentative Drafts Nos. 1–4, 1968). Of course, negligence itself is the requisite mental state for some substantive crimes, such as negligent homicide. *See, e.g.*, MODEL PENAL CODE § 210.4 (1985). For a negligent crime, to hold a conspirator liable based on the reasonable foreseeability that a co-conspirator would commit it might not seem incongruous. However, the negligence proscribed in, say, negligent homicide statutes is not the negligence that *Pinkerton* contemplates. A negligent homicide statute targets deviations from the standard of care that a reasonable person would take with regard to the risk of inadvertently causing death. *See ID.* § 210.4 explanatory note (definition of negligent homicide); *id.* § 2.02(2)(d) (definition of "negligently"). *Pinkerton* charges conspirators with liability in any reasonably foreseeable crime by a co-conspirator. The Model Penal Code rejected its application

The bulk of *Pinkerton*'s criticism has rested on the broad scope of its application. Punishing one conspirator for the substantive crime of another, particularly a serious one, based on nothing more than membership in the same conspiracy leads to serious proportionality problems.[137] A defendant's only defenses to a co-conspirator's substantive crime will be that the crime does not satisfy the elements of *Pinkerton* or that the defendant withdrew from the conspiracy before the crime was committed.[138] The potential scope of a conspiracy and the acts that might be "in furtherance" of it are so broad, however, that few criminal acts by co-conspirators will fall outside them.[139] Withdrawal is also difficult to prove, because it requires evidence of an affirmative act to defeat the object of the conspiracy;[140] mere inaction will not suffice.[141]

C. The Eleventh and Ninth Circuits Have Concluded That Due Process Limits the Reach of Vicarious Liability Under *Pinkerton*

As the *Pinkerton* rule grew in popularity among state and federal prosecutors in the 1970s, federal courts began to address their concerns with its breadth in terms of due process limits.[142] The first decisions to suggest a due process limit to vicarious liability of conspirators did so vaguely and in passing, implying that *Pinkerton* itself may represent a due process "floor."[143] In later decisions, several circuits began to expound the idea that due process constrains *Pinkerton*'s application

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even to crimes of negligence, providing instead that a co-conspirator or accomplice "command[] or assist[] in performing the behavior that is reckless or negligent." Model Penal Code § 2.04(3) cmt. n.28 (Tentative Drafts Nos. 1–4, 1968).

137. Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. Colo. L. Rev. 17, 56 (1979).

138. *Vicarious Liability*, *supra* note 71, at 377–78.

139. *Id.* at 377. The U.S. Sentencing Guidelines restrict the scope of *Pinkerton* somewhat by defining "relevant conduct" for the purpose of determining the base offense level to include "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S. Sentencing Guidelines Manual § 1B1.3 (2013). "Jointly undertaken criminal activity" in turn is defined not by the scope of the entire conspiracy, but only by the activity in which the individual defendant agreed to participate. *Id.* § 1B1.3 cmt. 2. The Sentencing Guidelines, of course, do not state principles of liability, and the comments to § 1B1.3 state that the principles that determine the applicable guideline range are not necessarily the same as those that determine when a defendant will be liable as a conspirator. *Id.* In any event, however, the Guidelines represent another example of retreat from *Pinkerton*.

140. *Vicarious Liability*, *supra* note 71, at 377–78 (citing Hyde v. United States, 225 U.S. 347, 369 (1912)). At least one commentator has argued that this construction of the withdrawal defense is an unconstitutional shifting of the burden of proof to the defendant. Barton D. Day, Note, *The Withdrawal Defense to Criminal Conspiracy: An Unconstitutional Allocation of the Burden of Proof*, 51 Geo. Wash. L. Rev. 420, 441 (1983).

141. *Vicarious Liability*, *supra* note 71, at 377.

142. Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 Am. U. L. Rev. 585, 598 (2008).

143. *Id.* at 591, 599–602.

short of the doctrine's logical extent.[144] If the due process clauses restrain the extent to which conspirators may be held liable for their co-conspirators' crimes under *Pinkerton*, then they similarly restrain the extent of vicarious responsibility for acts of witness tampering under *Cherry*, which adopts *Pinkerton* wholesale.

An example of an early case reading *Pinkerton* as a due process floor for co-conspirator liability is the Fifth Circuit's opinion in *United States v. Decker*.[145] In *Decker*, two defendants appealed from their convictions under *Pinkerton* of drug-trafficking offenses committed by co-conspirators.[146] The court endorsed the suggestion of a dissenting opinion in an earlier Fifth Circuit case that vicarious criminal liability "may raise obvious due process objections."[147] Nevertheless, the court upheld the conviction because the elements of *Pinkerton* were satisfied.[148] This necessarily implies that the court found *Pinkerton*'s requirement of reasonable foreseeability sufficient to satisfy any due process concerns arising from vicarious criminal liability. Later Fifth Circuit decisions, as well as decisions from the Fourth and Sixth Circuits, have taken a similar view.[149]

Courts began to move beyond treating *Pinkerton* merely as a due process floor for co-conspirator responsibility, and instead suggesting that *Pinkerton* itself violates due process when carried to its logical extent.[150] In *United States v. Alvarez*, a drug trafficker killed a federal agent during an undercover buy-bust operation.[151] Several conspirators were convicted of the murder under *Pinkerton*, and argued on appeal that the killing was so attenuated from the object of the conspiracy that the convictions violated due process.[152] The Eleventh Circuit first noted three categories of crimes for which a co-conspirator may be found liable under *Pinkerton*. The first two are common subjects of *Pinkerton* convictions: substantive crimes that were already the object of the

144. Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 128–29, 142–43 (2006).

145. 543 F.2d 1102 (5th Cir. 1976); *see* Kreit, *supra* note 142, at 600.

146. *Decker*, 543 F.2d at 1103.

147. *Id.* (citing Park v. Huff, 506 F.2d 849, 864 (5th Cir. 1975) (Thornburry, J., dissenting)).

148. *Id.* at 1104.

149. *See* United States v. Christian, 942 F.2d 363, 367–68 (6th Cir. 1991) (concluding that defendants' convictions under *Pinkerton* for firearm possession were supported by the reasonably foreseeable eventuality that guns will be carried or used during drug deals, and therefore that the convictions did not raise due process concerns); United States v. Chorman, 910 F.2d 102, 112 (4th Cir. 1990) (concluding that a conviction under *Pinkerton* did not "run afoul of possible due process limitations"); United States v. Moreno, 588 F.2d 490, 493 (5th Cir. 1979) (acknowledging that "vicarious guilt may have due process limitations," but upholding the conviction because the co-conspirators' act was not "so attenuated as to give [the court] due process concerns"); Kreit, *supra* note 142, at 603–04.

150. United States v. Alvarez, 755 F.2d 830, 850 (11th Cir. 1985); *see* Noferi, *supra* note 144, at 130.

151. *Alvarez*, 755 F.2d at 838–39.

152. *Id.* at 839–40.

conspiracy, such as drug possession during a drug-trafficking conspiracy, and crimes which facilitate the achievement of a conspiracy's goals, such as firearm possession during a drug-trafficking conspiracy.[153] The third, however, was not a common basis for *Pinkerton* liability: crimes that, though reasonably foreseeable, are an unintended consequence of the conspiracy.[154] The court observed that convictions of unintended crimes under *Pinkerton*, though technically consistent with the doctrine, may offend due process.[155] The court upheld the convictions in *Alvarez*, however, because the conspirators were "more than 'minor' participants in the drug conspiracy," and the murder was "not so attenuated as to run afoul of the potential due process limitations on the *Pinkerton* doctrine."[156] The Tenth Circuit subsequently held that due process constrained *Pinkerton* liability in declining to extend it to a first-degree murder that was not an object of the conspiracy.[157]

The Ninth Circuit recognized another due process boundary cutting across *Pinkerton* liability: a defendant's conviction of a substantive offense under *Pinkerton* offends due process if the offense was not reasonably foreseeable to that defendant based on her own involvement in the conspiracy.[158] In *United States v. Castaneda*, the defendant was convicted of seven counts of using a firearm under 18 U.S.C. § 924(c) on a *Pinkerton* liability theory.[159] The predicate offense supporting one count was the drug conspiracy at the heart of the prosecution, and that for the other six was possession of a controlled substance with intent to distribute.[160] The only piece of evidence connecting the defendant to the drug conspiracy was six recorded phone calls.[161] In one call, while engaging in small talk with a customer of the operation, the defendant relayed remarks by her husband about an intended drug transaction.[162] In others, the defendant merely related information about difficulties her husband and other conspirators had encountered.[163] The Ninth Circuit acknowledged that firearm possession is generally reasonably foreseeable in a drug distribution conspiracy, but found that this "drugs-guns nexus" did not apply where a conspirator's involvement in the conspiracy is so

153. *Id.* at 850 n.24 (citing United States v. Luis-Gonzalez, 719 F.2d 1539, 1545 n.4 (11th Cir. 1983); United States v. Brant, 448 F. Supp. 781, 782 (W.D. Pa. 1978)).

154. *Id.* at 850.

155. *Id.*

156. *Id.* at 850–51.

157. United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000).

158. United States v. Castaneda, 9 F.3d 761, 768 (9th Cir. 1993).

159. *Id.* at 764.

160. *Id.*

161. *Id.* at 767.

162. *Id.*

163. *Id.*

minor that firearm possession was not foreseeable to that conspirator.[164] According to the court, the defendant was a "paradigm example" of such minor involvement, and therefore her convictions violated due process.[165]

In the Eleventh and Ninth Circuits, then, a conspirator must play more than a minor role in the conspiracy in order to be held vicariously liable for the substantive crimes of co-conspirators. The bounds of this due process limit are somewhat different between the two circuits. In the Eleventh, a minor participant avoids liability only if her co-conspirators' substantive crime resulted from an unexpected contingency, while the Ninth Circuit asks whether imputing liability to her would be fair in light of the nature of her participation. In other words, the Eleventh Circuit's approach focuses on the nature of the substantive crime, while the Ninth Circuit focuses on the nature of the defendant's conduct. These small differences are variations on a common principle: Even where *Pinkerton* is satisfied, the due process clause limits the degree to which a minor participant in a conspiracy may be deemed culpable for her co-conspirators' substantive crimes.

D. The Due Process Concerns That Constrain *Pinkerton* Substantive Liability Should Constrain Application of the *Cherry* Rule as Well

Because it imports *Pinkerton* vicarious liability wholesale, the criticisms that courts and commentators have leveled at *Pinkerton* apply equally to the *Cherry* rule. The wrongful conduct of the defendant's co-conspirator is attributed to the defendant where that conduct is merely reasonably foreseeable, regardless of whether it was an unintended consequence of the unlawful agreement.[166] This extremely broad standard could permit prosecutors to introduce otherwise inadmissible and highly damaging declarations against the defendant even where the defendant played no role in the wrongful conduct that rendered the declarant unavailable. The *Cherry* rule therefore gives rise to the same "dangers for abuse" the dissenting justices described in *Pinkerton*.[167]

The breadth of the *Cherry* rule also leads to the same proportionality concerns that underlie *Pinkerton* co-conspirator liability. Like *Pinkerton*, the *Cherry* rule rests on mere reasonable foreseeability, the hallmark of ordinary civil negligence. To be sure, forfeiture of the protections of the Confrontation Clause and the hearsay rule is not as severe a consequence as the loss of liberty that may follow a conviction under

164. *Id.*

165. *Id.*

166. Though the Tenth Circuit declined to expand *Pinkerton* substantive liability to unexpected first-degree murders, it did not exclude unexpected efforts to silence witnesses from its application of *Pinkerton* to Rule 804(b)(6). United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000).

167. *See* Pinkerton v. United States, 328 U.S. 640, 650–52 (1946) (Rutledge, J., dissenting in part).

Pinkerton. Forfeiture is nonetheless a punishment, imposed with the aims of stripping a wrongdoer of the benefits of her wrongdoing and deterring future wrongful conduct.[168] Denying a defendant important trial rights based on conduct with regard to which she was merely negligent stretches the forfeiture rule's equitable rationale to an uncomfortable degree, as a defendant cannot consciously take advantage of wrongful conduct of which she is unaware. The *Cherry* rule also does not mesh well with the forfeiture doctrine's deterrent aim, as punishments have little value in deterring negligence.[169]

Like *Pinkerton* co-conspirator liability in general, then, the *Cherry* rule risks holding minor participants accountable for conduct that is culpable to a degree well out of proportion to their own minimal involvement. Under the Eleventh Circuit's reasoning in *Alvarez*, for example, introducing a murdered witness's statements against, say, minor participants in a drug trafficking conspiracy who were neither involved in nor aware of the killing would offend due process. In such a case, the wrongful conduct that rendered the witness unavailable would be too far attenuated from the object of the conspiracy to be fairly attributed to conspirators who played only a minimal role.[170] The Ninth Circuit's reasoning in *Castaneda* may also be easily translated to the *Cherry* context. Where a minor participant in a conspiracy could not reasonably foresee a co-conspirator's wrongful action to silence a witness in light of her role, attributing that co-conspirator's conduct to her for forfeiture purposes is inconsistent with due process. Where a co-conspirator's action against a witness is too attenuated from the defendant, whether in light of the object of the conspiracy or the defendant's role in it, conviction under *Pinkerton* and forfeiture of hearsay and confrontation objections under *Cherry* deprive the defendant of due process in the same manner. Federal courts should apply the due process limits identified in *Alvarez* and *Castaneda* in the *Cherry* context, and ensure that minor players will not suffer dire evidentiary consequences based on misconduct of which they were unaware and over which they had no control.

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168. *See* Giles v. California, 554 U.S. 353, 366 (2008) (noting that the forfeiture-by-wrongdoing rule rests on the principle that "no one shall be permitted to take advantage of his wrong") (citing Reynolds v. United States, 98 U.S. 145, 159 (1878)); United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002) (noting that the forfeiture rule is intended "to deter criminals from intimidating or 'taking care of' potential witnesses against them").

169. *Cf.* Herring v. United States, 555 U.S. 135, 144 (2009) (holding that Fourth Amendment violations resulting from simple negligence are not "sufficiently deliberate that [the exclusionary rule] can meaningfully deter" them). *But see id.* at 153 (Ginsburg, J., dissenting) (arguing that the imposition of consequences for negligent behavior encourages greater care).

170. *Cf.* United States v. Alvarez, 755 F.2d 830, 850–51 (11th Cir. 1985).

CONCLUSION

The *Cherry* rule, like the forfeiture-by-wrongdoing doctrine in general, is aimed at "abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[171] Presumably, most would agree that defendants should not be permitted to purchase a witness's silence with violence or other wrongful conduct. But by imputing forfeiture of the confrontation right against every conspirator who should reasonably have foreseen that one among them would wrongfully silence a witness, the *Cherry* rule cuts too wide a swath. The rule should be abolished altogether, or, at the very least, limited in the manner that some circuit courts have limited *Pinkerton*.

The *Cherry* rule is incompatible with the Supreme Court's interpretation of the Confrontation Clause. In *Crawford*, the Court tied the confrontation right to how common law courts understood it when the Sixth Amendment was ratified. At that time, it did not appear that those common law courts imputed forfeiture by wrongdoing among co-conspirators. Commentators' observations that few courts recognized vicarious liability for substantive crimes of co-conspirators before *Pinkerton* support this conclusion. Moreover, like the California forfeiture statute that the Court rejected in *Giles*, the *Cherry* rule premises forfeiture of a defendant's confrontation right on a pretrial determination of guilt. The modern understanding of the confrontation right leaves no place for the *Cherry* rule. For that reason, district and circuit courts presented with a choice of whether to adopt the *Cherry* rule should reject it, and the rest should overturn the opinions that have adopted it.

Even if the *Cherry* rule can coexist peacefully with the Confrontation Clause, due process concerns restrain its application short of the logical extent of *Pinkerton*. The courts of appeals have identified two due process limits on the scope of *Pinkerton* liability that should apply to *Cherry* as well. In *Alvarez*, the Eleventh Circuit observed that convictions under *Pinkerton* of minor conspirators for substantive crimes that were an unintended consequence of the conspiracy and attenuated from its objective violate due process. In *Castaneda*, the Ninth Circuit concluded that due process requires courts to measure the foreseeability of co-conspirators' substantive crimes by the extent of the defendant's own participation, and not by the overarching objective of the conspiracy itself. Courts that have adopted the *Cherry* rule should observe these due process limits, and determine whether the extent and character of a conspirator's participation in the conspiracy is sufficient to justify holding

171. FED. R. EVID. 804 advisory committee's note (1997) (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).

her accountable for her co-conspirator's wrongful conduct against a witness.