SETTING CRITICAL LIMITS ON THE *CHERRY* DOCTRINE: THE FOURTH CIRCUIT DECISION IN *UNITED STATES V. DINKINS*

Ruth A. Moyer*

I. INTRODUCTION

On August 14, 2012, a three-judge panel of the United States Court of Appeals for the Fourth Circuit issued its decision in *United States v. Dinkins*.[1] Applying the "*Cherry* doctrine,"[2] the Fourth Circuit held that an unavailable witness's hearsay statements were admissible against a defendant, even though the defendant did not participate in the wrongdoing that caused the witness's death, when the murder of the witness by the defendant's co-conspirators had been in furtherance of a conspiracy in which the defendant was involved and was reasonably foreseeable to the defendant.[3]

Dinkins ostensibly affirmed the continued viability of the *Cherry* doctrine in the aftermath of the 2008 United States Supreme Court decision *Giles v. California*,[4] which held that the forfeiture-by-wrongdoing exception to the hearsay requirement applied only when the defendant engaged in conduct that was intended to, and did, render a witness unavailable to testify.[5] Yet, as *Dinkins* correctly, albeit implicitly, acknowledged, *Giles*'s requirement of intent fundamentally circumscribed the applicability of the *Cherry* doctrine. Within the factual context of *Dinkins*, the Fourth Circuit reached the correct decision. Yet, in comparatively more ambiguous factual scenarios, *Giles* will undeniably require evidence that a defendant possessed the requisite intent to render a witness unavailable where the government seeks the admission of hearsay evidence under the *Cherry* doctrine.

---

*Associate, Gerald A. Stein, P.C. J.D., *cum laude*, Temple University Beasley School of Law, 2008. The author would like to thank Professor Emeritus Michael E. Libonati; Professors Louis M. Natali, Edward D. Ohlbaum, and James A. Strazzella (Temple University Beasley School of Law); as well as the Honorable Joseph J. O'Neill (Philadelphia Municipal Court) for their kind support.

1. 691 F.3d 358 (4th Cir. 2012). The Honorable Barbara Milano Keenan authored the opinion. *Id.* at 362. The other panel judges, the Honorable Dennis W. Shedd and the Honorable Henry F. Floyd, joined in the opinion. *Id.*

2. *See generally* United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000) (providing the principles of a now common rule).

3. *See id.* at 386. The *Dinkins* court also addressed other issues that the defendants had raised on appeal, including a *Batson* challenge, *see id.* at 379–81 (citations omitted), and the trial court's use of an anonymous jury, *see id.* at 369–79 (citations omitted).

4. 554 U.S. 353 (2008).

5. *See id.* at 359–60; *see also Dinkins*, 691 F.3d at 383 (quoting *Giles*, 554 U.S. at 359) (discussing the Supreme Court's decision). Notably, the Fourth Circuit, through its decision in *Dinkins*, is the first federal circuit court to substantively discuss whether the *Cherry* doctrine has survived *Giles*. *See generally* 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, 300 (2011) ("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.").

II. OVERVIEW OF RELEVANT PRIOR LAW

The following general principles provide a necessary context for the Fourth Circuit's decision in *Dinkins*.

A. Forfeiture-by-Wrongdoing Exception

Under the general proscription on hearsay evidence, a declarant's out-of-court statements may not be admitted to "prove the truth of the matters asserted."[6] Yet, under Rule 804(b)(6) of the Federal Rules of Evidence, a statement "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result" is "not excluded by the rule against hearsay if the declarant is unavailable as a witness."[7] Forfeiture by wrongdoing is a well-established common law exception to the hearsay rule.[8] The exception "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[9]

Although every federal circuit "that has resolved the question has recognized the principle of forfeiture by misconduct," the tests for determining admissibility have differed.[10] In the Fourth Circuit, the court must find "by the preponderance of the evidence that (1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that [the wrongdoing] did, in fact, render the declarant unavailable as a witness."[11]

B. Sixth Amendment

Under the Sixth Amendment of the United States Constitution, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[12] The confrontation requirement of the Sixth Amendment prohibits the use of testimonial hearsay against a criminal defendant, even if such hearsay is reliable, unless the defendant had the

---

6. United States v. Gray, 405 F.3d 227, 240 (4th Cir. 2005); *see also* FED. R. EVID. 801 (defining hearsay); FED. R. EVID. 802 (instructing that unless subject to exception, hearsay is generally inadmissible).

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

8. *See generally Giles*, 554 U.S. at 359–64 (providing the history of the forfeiture-by-wrongdoing exception and examples of cases interpreting the exception).

9. FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendment (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).

10. *Id.*

11. *Gray*, 405 F.3d at 241.

12. U.S. CONST. amend. VI.

opportunity to cross-examine the out-of-court declarant.[13] Testimonial hearsay includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[14] As the Supreme Court has instructed, although a declarant's out-of-court statement may satisfy the admissibility requirements of a hearsay exception, the statement is *inadmissible where the statement is testimonial and no prior opportunity for cross examination of the declarant occurred.*[15]

Nonetheless, the Supreme Court has instructed that where a witness is unavailable due to forfeiture by wrongdoing, "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds."[16] As the Court noted in *Davis v. Washington*,[17] "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."[18] Critically, however, in its 2008 decision *Giles v. California*,[19] the Court clarified that the forfeiture-by-wrongdoing exception to the confrontation requirement applied only where the defendant engaged in conduct that *was intended to*, and did, procure the declarant's absence so that he was unable to testify as a witness.[20] The *Giles* Court instructed that intent is necessary as a matter of both (1) a correct interpretation of Rule 804(b)(6) and (2) the defendant's Sixth Amendment confrontation rights.[21]

C. Conspiracy Theory of Liability

Under general principles of conspiratorial liability, a person is "liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy."[22] As the Supreme Court instructed in *Pinkerton v. United States*,[23] conspiratorial liability does not

---

13. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004); *see also Giles*, 554 U.S. at 358 (citing *Crawford*, 541 U.S. at 68) ("[I]f the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him.").

14. *Crawford*, 541 U.S. at 52 (quoting Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae the National Association of Criminal Defense Lawyers, The American Civil Liberties Union and the ACLU of Washington in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754961, at *3) (internal quotation marks omitted).

15. *See id.* at 68.

16. *Id.* at 62.

17. 547 U.S. 813 (2006).

18. *Id.* at 833.

19. 554 U.S. 353 (2008).

20. *See id.* at 359–60.

21. *See id.* at 367–68 (quoting FED. R. EVID. 804(b)(6) (2010) (restyled 2011); *Davis*, 547 U.S. at 833; 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:134, at 235 (3d ed. 2007)) (citing 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 253, at 176 (6th ed. 2006); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.03[7][b], at 804-25 (Joseph M. McLaughlin ed., 2d ed. 2012)).

22. United States v. Ashley, 606 F.3d 135, 142–43 (4th Cir. 2010).

23. 328 U.S. 640 (1946).

exist where "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."[24] The Fourth Circuit has explained that the principle underlying *Pinkerton* "is that conspirators are each other's agents; and a principal is bound by the acts of his agents within the scope of the agency."[25]

D. The Cherry *Doctrine*

Eight years before the *Giles* decision, the United States Court of Appeals for the Tenth Circuit held that a criminal defendant waives his Confrontation Clause rights and objections to the hearsay statements of an unavailable witness "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."[26] In reaching this holding, the Tenth Circuit in *United States v. Cherry*[27] applied "the principles of conspiratorial liability enunciated in *Pinkerton v. United States* in the context of Rule 804(b)(6) and the Confrontation Clause waiver-by-misconduct doctrine."[28]

Cherry asserted that "*Pinkerton*'s formulation of conspiratorial liability is an appropriate mechanism for assessing whether the actions of another can be imputed to a defendant for purposes of determining whether that defendant has waived confrontation and hearsay objections."[29] The Tenth Circuit elaborated, "Failure to consider *Pinkerton* conspiratorial responsibility affords too much weight to Confrontation Clause values in balancing those values against the importance of preventing witness tampering."[30] *Cherry* concluded that a "co-

---

24. *Id.* at 647–48.

25. United States v. Aramony, 88 F.3d 1369, 1379 (4th Cir. 1996) (quoting United States v. Manzella, 791 F.2d 1263, 1267 (7th Cir. 1986)) (internal quotation marks omitted).

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

27. 217 F.3d 811.

28. *Id.* at 816 (citation omitted). The Tenth Circuit noted several lower federal court decisions that "addressed more generally the applicability of imputed agency" in the forfeiture-by-wrongdoing context. *See id.* at 818–20 (citing United States v. Houlihan, 92 F.3d 1271, 1279, 1280 (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, 273–74 (2d Cir. 1982); Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982); United States v. White, 838 F. Supp. 618, 623 (D.D.C. 1993), *aff'd*, 116 F.3d 903 (D.C. Cir. 1997)). For example, in *United States v. Mastrangelo*, the court noted that "[b]are knowledge" of a plot to kill a witness and a failure to give warning to authorities may be sufficient to constitute waiver." *Mastrangelo*, 693 F.2d at 273–74. *But see White*, 838 F. Supp. at 623 (instructing that "mere failure to prevent the [witness's] murder, or mere participation in the alleged drug conspiracy at the heart of the case, must surely be insufficient to constitute a waiver of a defendant's constitutional confrontation rights").

29. *Cherry*, 217 F.3d at 818.

30. *Id.* at 820.

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*."[31]

Notably, although "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."[32] To a certain extent, the *Cherry* doctrine seemingly "pressed the envelope of the forfeiture doctrine by imputing witness tampering to the accused on the basis of the *Pinkerton* doctrine, holding conspirators complicit in foreseeable but unplanned crimes by their confederates."[33] Nonetheless, other courts subsequently adopted the *Cherry* analysis.[34] Importantly, however, some observers concluded that the 2008 *Giles* decision voided the *Cherry* doctrine "in cases involving conspiracies where the defendant did not intend the witness tampering."[35]

III. 2012 FOURTH CIRCUIT DECISION IN *UNITED STATES V. DINKINS*

United States v. Dinkins centered around three defendants: Melvin Gilbert led a large-scale narcotics trafficking organization in Baltimore known as "Special"; James Dinkins was Special's "enforcer"; and Darron Goods sold drugs for Special.[36] At some point, Gilbert learned that Shannon Jemmison, who lived in the neighborhood, was a government informant.[37] On September 10, 2005, in exchange for several thousand dollars, Dinkins "shot Jemmison several times at point-blank range, killing him."[38]

Meanwhile, John Dowery, a Special drug dealer, had witnessed an unrelated murder.[39] Dowery provided information to law enforcement about both the murder and about the Special organization.[40] As a result of Dowery's information, two "high-ranking" Special "lieutenants" were arrested.[41] Dowery consequently became known as a "snitch."[42] On October 19, 2005, Dinkins and

---

31. *Id.* (citing Pinkerton v. United States, 328 U.S. 640, 647–48 (1946)).
32. Rose, *supra* note 5, at 300.
33. Donald A. Dripps, *Controlling the Damage Done by* Crawford v. Washington*: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 537 (2010).
34. *See, e.g.*, United States v. Thompson, 286 F.3d 950, 964, 965 (7th Cir. 2002) (noting agreement "with the reasoning of the majority in *Cherry*" and holding that "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").
35. Rose, *supra* note 5, at 318.
36. *See* United States v. Dinkins, 691 F.3d 358, 362–63 (4th Cir. 2012).
37. *See id.* at 363–64.
38. *Id.* at 364.
39. *Id.*
40. *Id.*
41. *See id.* at 363, 364.
42. *Id.* at 364.

another Special member shot Dowery multiple times.[43] When Dinkins learned that Dowery had not died from his wounds, Dinkins remarked, "We have to go to the hospital to finish him off."[44] Dinkins did not pursue this plan, however.[45]

After the attempted murder of Dowery, Dinkins killed Special member Michael Bryant because, in part, Bryant was upset that Dinkins had attempted to kill Dowery.[46] Dinkins was finally arrested on December 9, 2005.[47]

In January 2006, Dowery testified at the state trial of the lieutenants.[48] Law enforcement made efforts to protect Dowery, relocating him for his safety.[49] At some point, Gilbert relayed a message to Dowery: "I know where you are at. I know where you walk your girl to the bus stop. I can get you out there. Don't come around here."[50] Nevertheless, Dowery returned to his previous home on Thanksgiving Day 2006.[51] Gilbert and Goods shot Dowery several times, killing him.[52]

A federal grand jury charged Dinkins, Gilbert, and Goods, as well as other defendants, in a twelve-count indictment; the main count of the indictment was the charge of conspiracy to distribute narcotics.[53] Dinkins and Gilbert were also charged with the murder of Jemmison.[54] Dinkins was charged in connection with the attempted murder of Dowery and with the murder of Bryant.[55] Gilbert and Goods were charged with the murder of Dowery.[56]

The three defendants were tried jointly in the United States District Court for the District of Maryland.[57] At trial, the government presented Dowery's hearsay statements to law enforcement pursuant to the forfeiture-by-wrongdoing exception.[58] Dowery's hearsay statements were "highly relevant to the government's theory of the case."[59] Importantly, the government presented Dowery's hearsay statements as evidence against Dinkins pursuant to Rule 804(b)(6).[60]

---

43. *Id.*
44. *Id.* (internal quotation marks omitted).
45. *Id.* n.3.
46. *Id.* at 364–65.
47. *Id.* at 365.
48. *See id.*
49. *Id.*
50. *Id.* (internal quotation marks omitted).
51. *Id.*
52. *Id.*
53. *Id.* (citing 21 U.S.C. §§ 841(a)(1), (b)(1)(B), (b)(1)(C), 846 (2006)).
54. *Id.* at 366 (citing 18 U.S.C. §§ 2, 1512(a)(1)(A), (a)(1)(C) (2006)).
55. *Id.* (citing §§ 2, 924(c)(1)(A)(iii)).
56. *Id.* (citing §§ 2, 1512(a)(1)(A), (a)(1)(C)).
57. *See id.* at 358–59, 362.
58. *See id.* at 367, 382.
59. *Id.* at 382. Dowery's statements included: (1) a description of Special's members and structure; (2) an identification of Dinkins as one of the shooters from the October 2005 attempted murder; and (3) the threatening message that Dowery had received from Gilbert after witness-relocation measures. *See id.*
60. *Id.*

Dinkins, Gilbert, and Goods were convicted and sentenced to life imprisonment.[61] On appeal to the United States Court of Appeals for the Fourth Circuit, Dinkins argued that the district court "erred by admitting Dowery's hearsay statements into evidence."[62] In particular, Dinkins contended that the forfeiture-by-wrongdoing exception was inapplicable to Dowery's hearsay statements regarding Dinkins' acts because Dinkins was uninvolved in any wrongdoing that caused Dowery's death.[63] Dinkins asserted that by the time of Dowery's murder in November 2006, Dinkins had already been imprisoned for nearly a year, "and no evidence was presented to show that he participated in the murder."[64]

By contrast, the government argued that the statements were "admissible under the principles of conspiratorial liability" that the Supreme Court outlined in *Pinkerton v. United States*.[65] The government contended that Dinkins' incarceration when his co-conspirator gang members "eliminated Dowery as a witness, a task Dinkins initiated when he originally shot Dowery in 2005, did not entitle Dinkins to escape responsibility for Dinkins' acts of attempting to prevent Dowery from testifying."[66]

In response, the Fourth Circuit noted that it had "not yet considered the question whether hearsay statements may be admitted under the forfeiture-by-wrongdoing exception pursuant to a conspiracy theory of liability, when a defendant's co-conspirators engaged in the wrongdoing that ultimately rendered the declarant unavailable as a witness."[67] The *Dinkins* court concluded that "traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis."[68] Thus, the Fourth Circuit held "that the district court properly admitted the Dowery hearsay statements against Dinkins under the forfeiture-by-wrongdoing exception to the Confrontation Clause pursuant to *Pinkerton* principles of conspiratorial liability."[69]

The *Dinkins* court reasoned that the "language of Rule 804(b)(6) supports the application of *Pinkerton* principles of conspiratorial liability in the forfeiture-by-wrongdoing context, by requiring that the defendant either have 'wrongfully caused—*or acquiesced in* wrongfully causing—the declarant's unavailability.'"[70] To that extent, *Dinkins* cited the reasoning of the Tenth

---

61. *Id.* at 367.

62. *Id.* at 381–82. Gilbert also challenged on appeal the admissibility of the statements; yet, his claim did not implicate the *Cherry* doctrine. *See id.* at 386.

63. *Id.* at 383–84.

64. *Id.* at 384.

65. *Id.* (citing Pinkerton v. United States, 328 U.S. 640, 647–48 (1946)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 386.

70. *Id.* at 384 (quoting FED. R. EVID. 804(b)(6)).

Circuit in *Cherry*.[71] *Dinkins* stated, "We are persuaded by [*Cherry*'s] reasoning that application of principles of conspiratorial liability in the forfeiture-by-wrongdoing context strikes the appropriate balance between the competing interests" of "Confrontation Clause values" and "the importance of preventing witness tampering."[72]

Dinkins instructed, "Mere participation in a conspiracy will not trigger the admission of testimonial statements under a forfeiture-by-wrongdoing theory."[73] Instead, a defendant waives "his Confrontation Clause rights when (1) the defendant 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."[74]

Critically, however, the Fourth Circuit addressed the implications of *Giles* on the *Cherry* doctrine.[75] The *Dinkins* court acknowledged that *Giles* clarified that the forfeiture-by-wrongdoing exception applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[76] *Dinkins* thus explained that although the "proper application of *Pinkerton* liability standards in the forfeiture-by-wrongdoing context generally will be coextensive with the scope of forfeiture by wrongdoing as articulated in *Giles*, a court's decision under the second prong in *Cherry* must be supported by evidence that the defendant 'engaged in conduct *designed* to prevent the witness from testifying.'"[77]

Analyzing the facts surrounding Dinkins' involvement in Dowery's "unavailability," the Fourth Circuit concluded that Dowery's murder "was in furtherance, within the scope, and reasonably foreseeable as a natural consequence of an ongoing conspiracy of which Dinkins was a member."[78] The *Dinkins* court observed, "Dowery's murder certainly was reasonably foreseeable to Dinkins, in view of the fact that he and [a] co-conspirator . . . nearly had

---

71. *See id.* at 384–85 (citing Giles v. California, 554 U.S. 353, 359 (2008); United States v. Gray, 405 F.3d 227, 242 (4th Cir. 2005); United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000)) (noting that its "conclusion is supported by decisions of our sister circuits applying principles of conspiratorial liability in this context").

72. *Id.* at 385 (quoting *Cherry*, 217 F.3d at 820) (internal quotation marks omitted).

73. *Id.*

74. *Id.* (citing *Cherry*, 217 F.3d at 820).

75. *See id.* at 383, 385 (citing *Giles*, 554 U.S. at 359).

76. *Id.* at 383 (quoting *Giles*, 554 U.S. at 359) (internal quotation marks omitted).

77. *Id.* at 385 (quoting *Giles*, 554 U.S. at 359). Nonetheless, the Fourth Circuit concluded that *Giles* "did not materially alter application of the forfeiture-by-wrongdoing exception." *Id.* at 383. *Dinkins* elaborated that "the plain language of Rule 804(b)(6) imposes this evidentiary requirement"; furthermore, *Dinkins* noted that even before the *Giles* decision, the Fourth Circuit had "upheld the admission of evidence under a theory of forfeiture by wrongdoing only when the government has shown by a preponderance of the evidence that the defendant's wrongdoing 'was intended to render the declarant unavailable as a witness.'" *Id.* (quoting *Gray*, 405 F.3d at 241).

78. *Id.* at 385.

succeeded in murdering Dowery the year before . . . ."[79] The Fourth Circuit added, "Dinkins' acts of wrongdoing, as well as those of his co-conspirators, were intended to prevent, and in fact did prevent, Dowery from testifying."[80]

IV. SIGNIFICANCE OF THE *DINKINS* DECISION

Although *Dinkins* ostensibly concluded that the *Cherry* doctrine had survived *Giles*,[81] as a practical matter, the Fourth Circuit fundamentally restricted the scope of the *Cherry* doctrine. *Giles*'s critical intent requirement largely compelled this result.[82] The Fourth Circuit's reasoning in *Dinkins* is particularly significant in that *Dinkins* is the first federal circuit court decision to substantively discuss whether the *Cherry* doctrine has remained viable after the 2008 *Giles* decision.[83]

As one scholar has aptly noted, the *Cherry* doctrine "signal[s] a willingness to transfer the requisite *Giles* intent from one defendant to another."[84] The Fourth Circuit decision in *Dinkins* correctly recognized that *Giles* mandated that hearsay is inadmissible under the forfeiture-by-wrongdoing exception unless the government demonstrates that the defendant possessed the intent to render the witness unavailable.[85] Thus, under *Dinkins*, even where the *Cherry* doctrine is applicable, courts may not "transfer the requisite *Giles* intent from one defendant to another" as the *Cherry* doctrine might suggest.[86]

The Fourth Circuit instructed in *Dinkins* that a witness waives his confrontation rights when "(1) [h]e 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."[87] Importantly, however, consistent with *Giles*, the *Dinkins* court cautioned that where a court admits hearsay under this second scenario, the court's decision "must be supported by evidence that the defendant 'engaged in conduct *designed* to prevent the witness from testifying.'"[88]

---

79. *Id.* at 386.

80. *Id.* *Dinkins* also noted, "[I]n view of other evidence . . . establishing a pattern of intimidation and violence with respect to government informants by members of Special, we consider that Dowery's ultimate murder was a natural consequence of the ongoing conspiracy." *Id.*

81. *See supra* notes 75–77 and accompanying text.

82. *See Dinkins*, 691 F.3d at 385–86 (quoting *Giles*, 554 U.S. at 359).

83. *See supra* note 5.

84. Marc McAllister, *Down But Not Out: Why* Giles *Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393, 434 (2009).

85. *See Dinkins*, 691 F.3d at 385–86 (quoting *Giles*, 554 U.S. at 359).

86. *See* McAllister, s*upra* note 84, at 434.

87. *Dinkins*, 691 F.3d at 385 (citing United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000)).

88. *Id.* (quoting *Giles*, 554 U.S. at 359).

To that extent, *Dinkins* indicated that a defendant *does not* waive his confrontation rights where the witness's unavailability was "within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy"[89] but there is no evidence that the defendant "engaged in conduct *designed* to prevent the witness from testifying."[90] Therefore, *Dinkins* attempted to comport the *Cherry* doctrine with the *Giles* requirement of intent. As the *Dinkins* decision suggests, *Giles*'s crucial focus on intent *must remain a touchstone* of a court's analysis where the government seeks to admit an unavailable witness's hearsay pursuant to the *Cherry* doctrine.

As an illustration, the facts in *Dinkins* amply supported the conclusion that Dinkins had intended to prevent Dowery from testifying and that he engaged in conduct in furtherance of this intent.[91] As the Fourth Circuit noted, "Dowery's murder certainly was reasonably foreseeable to Dinkins, in view of the fact that he and [a] co-conspirator . . . nearly had succeeded in murdering Dowery the year before . . . ."[92] Thus, although Dinkins was incarcerated at the time of Dowery's murder,[93] his actions clearly demonstrated that he intended to prevent Dowery from testifying and that he had engaged in some conduct in furtherance of this intent.

Yet, suppose that Dinkins had never attempted to murder or intimidate Dowery; in fact, Dinkins had never expressed any animosity towards Dowery. In this hypothetical scenario, the Fourth Circuit's conclusion concerning the admissibility of Dowery's hearsay statements as evidence against Dinkins would have conceivably been quite different. The government would likely have been unable to demonstrate that Dinkins (1) intended for his co-conspirator to render Dowery unavailable and (2) had engaged in some conduct in furtherance of this intent.

As one scholar has cogently observed, "There is a need for some proportion between the individual's act and its consequences, so there must be some proof of individual knowledge, approval, or participation in the intimidation to avoid an unfair result."[94] Consequently, pursuant to *Giles*, the mere reasonable foreseeability of Dowery's murder to Dinkins, by itself, would not have justified the admission of hearsay under the forfeiture-by-wrongdoing exception.

Furthermore, the *Dinkins* court asserted that the "language of Rule 804(b)(6) supports the application of *Pinkerton* principles of conspiratorial liability in the forfeiture-by-wrongdoing context, by requiring that the defendant either have 'wrongfully caused—*or acquiesced in* wrongfully causing—the declarant's

---

89. *Id.*
90. *Id.* (quoting *Giles*, 554 U.S. at 359) (internal quotation marks omitted).
91. *See id.* at 386.
92. *Id.*
93. *See id.* at 384.
94. James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 518 (2003).

unavailability.'"[95] Yet, as *Giles* makes clear, such acquiescence cannot justify the admission of hearsay under the forfeiture-by-wrongdoing exception without a demonstrated intent and some action in furtherance of that intent.

Critically, the fundamental purpose of Rule 806(b)(4) is to prevent the "abhorrent behavior" of rendering witnesses unavailable "which strikes at the heart of the system of justice itself."[96] Problematically, however, the pre-*Giles* formulation of the *Cherry* doctrine, overly broad in scope, improperly deprived a defendant of his fundamental confrontation rights merely because one of his co-conspirators had secured a witness's absence in order to prevent the witness's testimony.[97] The Supreme Court in *Giles* clearly mandated that the forfeiture-by-wrongdoing exception should penalize only those individuals who secure the absence of a witness with the *intent* to render the witness "unavailable."[98] To that extent, if the forfeiture-by-wrongdoing exception is to be a meaningful sanction for those who engage in the "abhorrent behavior" of witness tampering, it should not penalize a conspirator uninvolved in his co-conspirator's witness tampering.

Ultimately, the Fourth Circuit in *Dinkins* concluded that the *Cherry* doctrine has remained viable post-*Giles*.[99] At the same time, however, the *Dinkins* court adeptly reconciled the *Cherry* doctrine with the fundamental intent requirement of *Giles*.[100] As the Fourth Circuit acknowledged in *Dinkins*, "application of principles of conspiratorial liability in the forfeiture-by-wrongdoing context" must balance the competing interests of "Confrontation Clause values" and "preventing witness tampering."[101] The Fourth Circuit's reasoning, which effectively balanced these competing interests, provides much-needed guidance for other courts that must confront the proper scope of the *Cherry* doctrine post-*Giles*.

---

95. *Dinkins*, 691 F.3d at 384 (quoting FED. R. EVID. 804(b)(6)).

96. FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendment (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)) (internal quotation marks omitted).

97. *See* Dripps, *supra* note 33, at 537.

98. *See* Giles v. California, 554 U.S. 353, 359 (2008).

99. *See Dinkins*, 691 F.3d at 384–85 (quoting *Giles*, 554 U.S. at 359; United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000)).

100. *See id.* (quoting *Giles*, 554 U.S. at 359; *Cherry*, 217 F.3d at 820).

101. *Id.* at 385 (quoting *Cherry*, 217 F.3d at 820) (internal quotation marks omitted).

*