Is the *Cherry* Sour? Why Doctrinal Borrowing Has Caused the *Cherry* Doctrine To Converge with RICO Law*

Since Pinkerton*, criminal law has long accepted the proposition that all parties to a conspiracy are criminally liable for the acts of another conspirator so long as those acts were reasonably foreseeable, in furtherance of the conspiracy, and within the scope of the conspiracy. This proposition intersects with the Federal Rules of Evidence in interesting—and constitutionally-suspect—ways, particularly when considering the hearsay exceptions. The Tenth Circuit in* United States v. Cherry *applied this coconspirator liability to the forfeiture by wrongdoing doctrine under FRE 804(b)(6) such that a conspirator who unlawfully renders a witness unavailable for trial foregoes not only the hearsay objection but also the constitutional right of all coconspirators to confront adverse witnesses regarding that witness's out-of-court statement.*

Within the limited scope of Pinkerton *liability, this is intuitive. However, does the logic apply when the conspiracy is alleged to have occurred under the Racketeer Influenced and Corrupt Organization Act ("RICO")? It should not, but following the Fourth Circuit's unpublished decision in* United States v. Adoma*, the die has been cast to circumvent the rights of defendants because of the acts of their coconspirators even when those acts were not foreseeable, in furtherance, or within the scope of the conspiracy.*

INTRODUCTION

Imagine that Jack has joined the Reds Nation,[1] one of our country's most notorious organized drug gangs. Jack, along with a small group, conspires to rob a local laundromat owned by Bob. But, unbeknownst to the coconspirators, Bob has equipped his business with security cameras that capture the entire crime. After the robbery, Bob gives the recording to the police and intends to testify against the coconspirators. The coconspirators, but not Jack, find out about the recording and Bob's plan to testify. They murder Bob to prevent him from testifying at trial. Jack, however, neither had actual knowledge of the plan nor did he participate in any aspect of the murder. Nonetheless, the prosecution

1. This Recent Development explores the issues arising when the crimes of one gang member implicate another gang member due to conspiracy liability. *See infra* Parts II–III. To demonstrate these issues, I have constructed an example using an invented gang. For more information on crime statistics, see *National Youth Gang Survey Analysis: Gang-Related Offenses*, NAT'L GANG CTR., https://www.nationalgangcenter.gov/survey-analysis/gang-related-offenses [https://perma.cc/2C7U-SE44].

successfully enters Bob's proposed testimony into evidence against both the coconspirators and Jack. Because of the Tenth Circuit's holding in *United States v. Cherry*,[2] when Jack's coconspirators murdered Bob, they forfeited not only their own Confrontation Clause rights and hearsay protections, but also Jack's.[3] In other words, the *Cherry* court held that the criminal acts of a defendant's coconspirators may forfeit the Confrontation Clause rights and hearsay protections of both the defendant *and* their coconspirators.[4]

In the prosecution of organized drug trafficking crimes, the above scenario demonstrates the frequent loss of constitutional protections for criminal defendants. Together, the forfeiture of the right to confrontation guaranteed by the Sixth Amendment,[5] exceptions to hearsay statements under the Federal Rules of Evidence ("FRE"), and liability as a coconspirator established by *Pinkerton v. United States*[6] all coincided to the detriment of the criminal defendant in *Cherry*.[7] Under the common law forfeiture by wrongdoing doctrine, a criminal defendant forfeits their right to confront an adverse witness—the right afforded to them by the Confrontation Clause—when they wrongfully render that witness unavailable for trial.[8] But under the federal codification of the forfeiture by wrongdoing doctrine in FRE 804(b)(6) ("FBW hearsay exception"), a defendant may also forfeit their right to a hearsay objection at trial for the same action.[9] Therefore, a defendant who wrongfully renders an adverse witness unavailable for trial may forfeit their hearsay objection to the proposed testimony, their right to confront that adverse witness, or both.

But the FRE also exclude the statements of a defendant from the rule against hearsay.[10] Put simply, a defendant's own statements may be entered into

2. 217 F.3d 811 (10th Cir. 2000).

3. This scenario is loosely based on *United States v. Adoma*, 781 F. App'x 199 (4th Cir. 2019), where the Fourth Circuit considered similar facts. *Id.* at 202–04.

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

5. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

6. 328 U.S. 640 (1946). For an explanation of *Pinkerton* coconspirator liability, see *infra* Section I.A. The three *Pinkerton* prongs require a crime to be committed (1) in furtherance of the conspiracy, (2) within the scope of the conspiracy, and (3) reasonably foreseeable to the coconspirators. *Id.* at 646–48.

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

8. In *Reynolds v. United States*, 98 U.S. 145 (1879), the Supreme Court first recognized the common law forfeiture by wrongdoing doctrine. *Id.* at 158.

9. Congress codified the *Reynolds* rule in FRE 804(b)(6), which provides a lawful exception to hearsay. FED. R. EVID. 804(b)(6).

10. FED. R. EVID. 801(d)(2). Under the hearsay rules, the term "exclusion" is distinct from "exception." Certain types of statements are "excluded" from the hearsay rule as a necessary "result of the adversary system rather than satisfaction of the conditions of the hearsay rule." FED. R. EVID. 801(d)(2) advisory committee's note on proposed rules. An "exception," on the other hand, signifies the "nonapplication of the hearsay rule, rather than [a] positive term[] of admissibility." FED. R. EVID. 803 advisory committee's note on proposed rules.

evidence and used against them. And under FRE 801(d)(2)(E) ("the coconspirator party opponent rule"), this exclusion is expanded to include the statements that one coconspirator makes to another coconspirator when those statements are offered into evidence against the defendant, even if the defendant was not actually part of the conversation.[11] The prosecutor may offer a coconspirator's statement into evidence against the defendant so long as it was made "during and in furtherance of the conspiracy."[12] These criteria ensure that any proffered statement actually reflects a defendant's real involvement in the alleged criminal activity.

The rule established in *Cherry* may be read as a logical extension, then, of the coconspirator party opponent rule. In *Cherry*, the Tenth Circuit held that the FBW hearsay exception incorporates *Pinkerton* coconspirator liability such that a defendant forfeits their hearsay objection to an unavailable witness's proffered testimony when a coconspirator wrongfully renders that potential witness unavailable for trial.[13] The *Cherry* doctrine holds, therefore, that (1) under the coconspirator party opponent rule, the coconspirator's hearsay statement is admissible against the defendant; (2) under FRE 804(b)(6), the hearsay statement by a witness rendered unavailable by the defendant is admissible against the defendant; and (3) the hearsay statement made by a witness rendered unavailable by the defendant's *coconspirator* is admissible against the defendant.[14]

However, the *Cherry* doctrine is anything but a logical extension of the coconspirator party opponent rule: it conflates the gravity of an evidentiary rule governed by the FRE with that of a constitutional protection governed by the Sixth Amendment. Each of the three rules comprising the *Cherry* doctrine—forfeiture of Confrontation Clause rights, forfeiture of the hearsay objection, and admission of a party's own statement—requires a preliminary determination of fact governed by FRE 104(a).[15] To admit evidence supporting the forfeiture of confrontation rights or the hearsay objection, the proponent of the evidence must prove before the judge, by a preponderance of the evidence per FRE 104, that the defendant intended that their own action produce the witness's unavailability. [16] Similarly, the proponent of a coconspirator's

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

12. *Id.*

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

14. *Id.* at 820 ("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 [forfeiture] by misconduct doctrine when the government can satisfy the requirements of *Pinkerton*." (citation omitted)).

15. FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible.").

16. *See* FED. R. EVID. 104; FED R. EVID. 801 advisory committee's note on rules—1997 amendment; *infra* Section I.C.

statement offered against the defendant must prove, by a preponderance of the evidence per FRE 104(b), that a conspiracy indeed existed between each of these coconspirators.[17] Where each of these determinations previously required separate procedural hearings, the *Cherry* doctrine allows a court to determine merely by a preponderance of the evidence that a defendant has forfeited their own Confrontation Clause rights when their *coconspirator* wrongfully renders a potential witness unavailable for trial. The Supreme Court has nonetheless accepted the *Cherry* doctrine's validity, albeit tacitly, by refusing to grant certiorari in subsequent *Cherry* doctrine cases.[18]

Then, in the unpublished decision *United States v. Adoma*,[19] the Fourth Circuit expanded *Cherry* by applying it to Racketeer Influenced and Corrupt Organization Act[20] ("RICO") conspiracy charges.[21] While the *Cherry* doctrine applied explicitly to a *Pinkerton* conspiracy, *Adoma* expanded the *Cherry* doctrine by finding that the less demanding elements of a RICO conspiracy satisfied the coconspirator liability necessary to forfeit a defendant's confrontation rights—that is, the right to cross-examine or otherwise interrogate an adverse witness's statement.[22] This Recent Development, therefore, argues not that *Cherry* itself was wrongly decided,[23] but that expanding the *Cherry* doctrine through *Adoma* impermissibly dilutes the FBW hearsay exception by untethering it from both its FRE 801(d)(2)(E) counterpart and the Advisory Committee on Evidence Rules' ("Committee" or "Advisory Committee") rationale for FRE 801(d)(2)(E).[24]

17. FED. R. EVID. 801(d)(2) ("The statement must be considered but does not by itself establish the . . . existence of the conspiracy or participation in it . . . ."); *see* Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) ("There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.' . . . [T]he existence of a conspiracy and [defendant's] involvement in it are preliminary questions of fact that, under Rule 104, must be resolved by the court. . . . [W]hen the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence.").

18. *See, e.g.*, United States v. Thompson, 286 F.3d 950, 965 (7th Cir. 2002) ("[W]e follow the Tenth Circuit's decision in *Cherry* and hold that the waiver-by-misconduct of one conspirator may be imputed to another conspirator."), *cert. denied*, 537 U.S. 1134 (2003); United States v. Carson, 455 F.3d 336, 364 (D.C. Cir. 2006) (upholding *Cherry* in the D.C. Circuit), *cert. denied*, 549 U.S. 1246 (2007). Although I disagree with the *Cherry* doctrine's central premise that a criminal actor may forfeit their Confrontation Clause rights through the acts of their coconspirator, I grant that the *Cherry* doctrine (for now) is the current law for purposes of this Recent Development.

19. 781 F. App'x 199 (4th Cir. 2019).

20. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968).

21. *Adoma*, 781 F. App'x at 203–04.

22. *See id.*

23. Although I believe that the *Cherry* doctrine wrongly forfeits the constitutional right of a defendant to confront the witnesses against them, the Supreme Court has indicated its unwillingness to decide the issue by denying certiorari in cases where courts have adopted the *Cherry* doctrine. *See supra* note 18 and accompanying text. So instead, this Recent Development focuses on the appropriate standard by which to determine Confrontation Clause forfeiture.

24. *See* FED. R. EVID. 801(d)(2)(E) advisory committee's note on proposed rules.

This Recent Development proceeds in four parts. First, it compares the Advisory Committee's rationale in creating the coconspirator party opponent rule with both the rationale justifying the FBW hearsay exception and the Tenth Circuit's reasoning in *Cherry*. Next, this Recent Development explains how the *Cherry* court used an agency theory of waiver to circumvent the Confrontation Clause issue that arises when the coconspirator party opponent rule is applied to *Pinkerton* cases. This Recent Development then explores the *Adoma* decision and explains why applying *Cherry* to RICO charges unjustifiably expands the *Cherry* doctrine at the expense of our criminal justice system's procedural and evidentiary protections. Finally, this Recent Development argues that what Professor Jennifer Laurin terms "doctrinal borrowing"[25] facilitated the incorporation of RICO conspiracy liability into the FBW hearsay exception. But this borrowing ultimately untethered the protections afforded by the Confrontation Clause from the FBW hearsay exception's rationale that one should not benefit from *their own* criminal wrongdoing.

Instead of further expanding the *Cherry* doctrine as the Fourth Circuit did in *Adoma*, this Recent Development argues in Part IV that the *Cherry* doctrine should be limited by using a just and fair standard to apply the FBW hearsay exception. Whereas courts currently determine by a preponderance of the evidence the admissibility of evidence purporting to show a conspiracy or wrongdoing intended to prevent a witness's testimony, courts should instead adopt a clear and convincing standard by which to judge such evidence.

I. THE ROOTS OF THE *CHERRY* TREE: *PINKERTON*, THE FEDERAL RULES OF EVIDENCE, AND THE CONFRONTATION CLAUSE

First, it is important to disentangle the parts comprising the *Cherry* doctrine. The *Cherry* doctrine extends the coconspirator party opponent rule by attaching it to the FBW hearsay exception. But to understand how and why, it is necessary to explain the bounds of *Pinkerton* coconspirator liability, the hearsay rules and exceptions, the rationale of the Advisory Committee in adopting the relevant rules, and the Confrontation Clause itself.

A. Pinkerton *Coconspirator Liability*

The first prong of the *Cherry* doctrine is derived from *Pinkerton*, which serves as the basis for common law conspiracy liability.[26] Under *Pinkerton*, a

25. *See generally* Jennifer Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (discussing the doctrinal borrowing of qualified immunity concepts in Fourth Amendment jurisprudence).

26. *See* United States v. Cherry, 217 F.3d 811, 816–18 (10th Cir. 2000) (analyzing the underlying facts of *Pinkerton*, the application of *Pinkerton* coconspirator liability by lower courts and other circuits, and the Tenth Circuit's own precedent); *id.* at 818 ("We do agree [with the Eleventh Circuit's

defendant is liable for the actions of that defendant's coconspirators when those actions were (1) intended to further the conspiracy, (2) within the scope of the conspiracy, and (3) reasonably foreseeable.[27] Today, the rule established in *Pinkerton* enables the prosecution of organized crime—most commonly gangs and drug organizations—because it reduces the degree of culpability necessary for a particular defendant to be convicted.[28]

In a three-person bank heist, for example, a getaway driver who never entered the bank but absconded with the two robbers who did would be liable for the substantive offenses of that pair.[29] If the two robbers battered a bank teller by hitting the teller with their guns, then the driver would also be liable for that assault if the assault was reasonably foreseeable and facilitated the robbery.[30]

B. *The Federal Rules of Evidence*

The second foundational block of the *Cherry* doctrine, developed independently of *Pinkerton* liability,[31] is the rule against hearsay. Statements made outside of court, if offered to prove the truth of the matter asserted, are hearsay and thus inadmissible into evidence, barring a specific exception.[32] A statement made outside of court by one defendant to the defendant's coconspirators, therefore, is hearsay.[33] But the FRE exclude such statements

reasoning] 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.").

27. Pinkerton v. United States, 328 U.S. 640, 646–48 (1946). As noted in the Introduction, *supra*, a court must find by a preponderance of the evidence under FRE 104(a) that enough evidence exists for a prosecutor to even argue a *Pinkerton* liability theory before the jury.

28. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.3(a) (3d ed. 2020) (explaining that the *Pinkerton* Court "reconsider[ed]" the degree to which a criminal defendant's act must "have played a part in inducing or aiding the crime"). The LaFave treatise explains that "[c]riminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent to each act." *Id.* However, *Pinkerton* has received mixed reactions from lower courts and state criminal justice systems while the drafters of the Model Penal Code rejected the rule outright. *Id.* ("Most of the state statutes on accomplice liability require more than [the *Pinkerton* elements.]"). But most importantly for this Recent Development, "[t]he rule continues to exist in the federal system." *Id.* (citing United States v. Alvarez, 755 F.2d 830, 849–50 (11th Cir. 1985)). The *Cherry* court also cited *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985), when deciding how to apply *Pinkerton*. *Cherry*, 217 F.3d at 817.

29. *See Pinkerton*, 328 U.S. at 646–48 (explaining the *Pinkerton* prongs).

30. *See id.* (explaining the *Pinkerton* prongs).

31. *See generally* John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 437 (1904) (explaining that the rule against hearsay began in English common law in the 1500s).

32. FED. R. EVID. 801(a)–(c). The rule defines a "statement" as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." FED. R. EVID. 801(a).

33. *See* FED. R. EVID. 801(c). For purposes of this Recent Development, it is assumed that the statement would be offered in court to prove the truth of the matter asserted.

from the hearsay rule, consequently enabling party opponents to admit these statements into evidence.

This category, FRE 801(d)(2) Admissions by a Party Opponent, names five instances in which the statement made by a party itself (or someone found to be speaking on behalf of the party) may be offered into evidence despite the rule against hearsay.[34] This includes FRE 801(d)(2)(E), which permits the introduction of an opposing party's statement into evidence when that statement "was made by the party's coconspirator during and in furtherance of the conspiracy."[35]

Instead of banning such statements, the Advisory Committee accepts their admissibility as a necessary result of our judicial process's "adversar[ial] system."[36] But admission of such statements does not occur without limitations. The Committee excepted some statements made by one defendant to their coconspirator under 801(d)(2)(E) along *Pinkerton*'s bounds by allowing only those statements made "during the course and in furtherance of the conspiracy."[37] The Committee contrasted the coconspirator exclusion with the FRE 801(d)(2)(d) agent/employee exclusion by arguing that, while the "usual test of agency" justifies the agent/employee exclusion,[38] the "agency theory of conspiracy is at best a fiction" that should not extend "admissibility beyond that already established [by *Pinkerton* coconspirator concepts]."[39]

The Committee could have adopted a broad rule generally inclusive of statements one coconspirator says to the other without regard to any substantive limitation. However, the Committee intentionally adopted *Pinkerton*'s "in furtherance" requirement to protect the rights of defendants.[40] This hearsay

34. FED. R. EVID. 801(d)(2).

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

36. FED. R. EVID. 801(d)(2) advisory committee's note on proposed rules.

37. FED. R. EVID. 801(d)(2)(E) advisory committee's note on proposed rules. The Advisory Committee's note to 801(d)(2)(E) does not explicitly mention the third *Pinkerton* prong of foreseeability. *Id.* Nevertheless, a court must find by a preponderance of the evidence under FRE 104(a) that a conspiracy indeed existed between the defendant and their coconspirator for the hearsay exception to apply. FED. R. EVID. 801(d)(2) advisory committee's note on rules—1997 amendment. Because a prosecutor shows this evidence of a conspiracy by proving the *Pinkerton* prongs, it stands to reason by inference that foreseeability must be proven as well.

38. FED. R. EVID. 801(d)(2)(D) advisory committee's note on proposed rules ("Was the admission made by the agent acting in the scope of his employment?").

39. FED. R. EVID. 801(d)(2)(E) advisory committee's note on proposed rules.

40. 30B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 6777 (2020 ed. 2020) ("The adoption of Rule 801(d)(2)(E) and the rejection of the Model Code Uniform Rule approach (which scrapped the ['in furtherance'] requirement) should be viewed as mandating a construction of the 'in furtherance' requirement protective of defendants . . . ." (quoting United States v. Lang, 589 F.2d 92, 100 (2d Cir. 1978))).

exclusion, the coconspirator party opponent rule, therefore mirrors the limitations of the *Pinkerton* rule.[41]

Despite the Committee's effort to distinguish its reasoning behind the employer/agent exclusion from that of the coconspirator party opponent exclusion, tension exists between the legislative history and case law interpreting the latter. The comments of the Senate Committee on the Judiciary, for instance, express an intention to extend conspiracy liability only in limited circumstances by reading into the coconspirator party opponent rule that "a joint venturer is considered . . . a coconspirator for the purposes of this rule even though no conspiracy has been charged."[42] This means that the substantive offense (and logical result of the conspiracy)—a robbery for example—is all that a prosecutor needs to charge in a case against multiple defendants who engaged in a joint criminal act in order for the prosecutor to later use the conspirator party opponent rule. The prosecutor need not charge "conspiracy" as well. But by that same token, "organized crime membership alone does not suffice" to put this hearsay exclusion into play.[43] Accordingly, the prosecutor instead must show that more than simply a conspiracy itself exists and prove that the defendants pursued and acted upon a "specific shared criminal task."[44]

C. *The Confrontation Clause and Forfeiture by Wrongdoing*

The final *Cherry* doctrine subcomponent is the Confrontation Clause, which intersects with the FBW hearsay exception. Like the party opponent hearsay exclusions in FRE 801(d)(2), the FRE also provide for a hearsay exception when the witness who would otherwise provide the in-court statement is unavailable for trial.[45] The FRE specifically provide that "[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 admissible.[46] Thus, the Committee has explicitly accepted the FBW hearsay exception.[47]

In contrast to the coconspirator party opponent rule, the rationale supporting the FBW hearsay exception originates not from the adversarial nature of our criminal justice system, but from the deterrence theory of criminal

41. *See* Pinkerton v. United States, 328 U.S. 640, 646–48 (1946) (discussing the three requirements for coconspirator liability).

42. FED. R. EVID. 801(d)(2)(E) note of the committee on the judiciary, senate report no. 93–1277 (first citing United States v. Rinaldi, 393 F.2d 97, 99 (2d Cir. 1968); and then citing United States v. Spencer, 415 F.3d 1301, 1304 (7th Cir. 1969)).

43. United States v. Gigante, 166 F.3d 75, 83 (2d Cir. 1999).

44. *Id.*

45. FED. R. EVID. 804.

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

47. *See id.*

law. The Committee admitted as much by explaining that the FBW hearsay exception identifies "the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[48] The *Cherry* court similarly reiterated that the FBW hearsay exception ensures that a criminal actor does not benefit from their own wrongdoing.[49] The deterrence theory may also buttress *Pinkerton* liability: when one defendant engages in a behavior that furthers the criminal act of a coconspirator, but where that behavior standing alone is not a criminal act, the defendant should still suffer the consequences of abetting the coconspirator.[50]

However, this is where the Confrontation Clause applies: criminal defendants must have the opportunity to confront adverse witnesses in court.[51] The FBW hearsay exception allows an adverse witness's statement to be entered into evidence against the defendant where the defendant wrongfully rendered the adverse witness unavailable for trial.[52] A defendant who threatens, intimidates, or harms a witness so that the witness cannot or will not testify forfeits not only their hearsay objection to that witness's statement—the FBW hearsay exception—but also their right to confront, or cross-examine, that witness at trial—the right protected by the Confrontation Clause.[53]

The forfeiture of one's right to confrontation has traditionally meant that the defendant forgoes the opportunity to cross-examine that witness.[54] While the Supreme Court first accepted that doctrine in 1878 in *United States v. Reynolds*,[55] the Court did not elaborate upon or clarify the forfeiture of confrontation rights doctrine until *Ohio v. Roberts*[56] was decided almost one hundred years later. *Roberts* limited the types of statements admissible under the forfeiture of confrontation rights doctrine to those with adequate "indicia of reliability."[57] This meant that so long as an unavailable witness's testimony proposed to be entered under FRE 804(b)(6) was sufficiently reliable, the

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

49. United States v. Cherry, 217 F.3d 811, 816 (10th Cir. 2000) (quoting United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)). The Fourth Circuit adopted this reading of the FBW hearsay exception as well. United States v. Gray, 405 F.3d 227, 242 (4th Cir. 2005).

50. *See* LAFAVE, *supra* note 28, § 13.3(a).

51. U.S. CONST. amend. VI.

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

53. Reynolds v. United States, 98 U.S. 145, 158 (1878).

54. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); Mattox v. United States, 156 U.S. 237, 242–43 (1895) ("The primary object of the [Confrontation Clause] was . . . cross-examination of the witness, in which the accused has an opportunity . . . of compelling [the witness] to stand face to face with the jury in order that they may look at [the witness], and judge . . . whether [the witness] is worthy of belief.").

55. 98 U.S. 145 (1878).

56. 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

57. *Id.* at 66.

proponent of that testimony could overcome the defendant's Confrontation Clause rights.[58]

In 2004, the Court overturned the indicia of reliability standard in *Crawford v. Washington*,[59] favoring instead a "testimonial" statements test.[60] While the Court struggles to define the scope of testimonial statements,[61] in *Giles v. California*[62] the Court limited the instances in which a defendant forfeits their confrontation rights to situations in which the particular defendant—not just the coconspirator—intended to render the relevant witness unavailable for trial.[63] Thus, for a defendant to forego both their objection to hearsay and their Confrontation Clause right to cross-examination of the statement of an adverse witness, the proponent of the statement must prove its "non-testimonial" nature.[64]

The *Cherry* court's holding combined three previously unconnected prongs into one doctrine. While *Pinkerton* established what is today recognized as common law conspiracy liability, the Advisory Committee on Evidence Rules enacted this common law into statute by drafting the coconspirator party opponent rule. Similarly, the Committee's drafters wrote the FBW hearsay exception independent of *Pinkerton* and the coconspirator party opponent rule because this exception, by its language, primarily affects individual actors. The *Cherry* holding collapsed any empty space between these rules by applying *Pinkerton* conspiracy liability to both the coconspirator party opponent rule and the FBW hearsay exception.

58. *See id.*

59. 541 U.S. 36 (2004).

60. *Id.* at 59–61.

61. *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 58 (2012) (holding that even if a laboratory's DNA report had been introduced into evidence, it was not testimonial because it was produced to find a rapist, not for the purpose of obtaining evidence to be used against the defendant); Bullcoming v. New Mexico, 561 U.S. 647, 652 (2011) (disallowing the introduction of a laboratory report where the in-court testimony was not given by the scientist who performed the report); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–11 (2009) (describing affidavits as clearly testimonial in nature and refusing to make a forensic evidence exception).

62. 554 U.S. 353 (2008).

63. *Id.* at 361 ("[U]nconfronted testimony [will] *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.").

64. Imagine the following scenario: Jane intentionally renders an adverse witness, Jack, unavailable for trial, and Jack's prior written statement given to police is admitted into evidence through FRE 804(b)(6). Before *Crawford*, to satisfy the dictates of the Confrontation Clause, the prosecutor simply had to prove that Jane killed Jack to prevent his testimony at trial. *See* United States v. Gray, 405 F.3d 227, 242 (4th Cir. 2005). But after *Crawford*, it could be possible that Jack's hearsay statement still satisfies *United States v. Gray*, 405 F.3d 227 (4th Cir. 2005), when that statement is testimonial in nature because *Gray* does not require a defendant to have had the opportunity to cross-examine such a testimonial statement in the way that *Crawford* does. *See Crawford*, 541 U.S. at 59–61. In such a situation, Jane may have a colorable argument that admission *under FRE 804(b)(6)* is proper but that her *Confrontation Clause right* to cross-examination still precludes the statement from entering evidence.

II. THE TREE TRUNK: *CHERRY*

When the Tenth Circuit decided *Cherry*, it became the highest court to decide how *Pinkerton* liability interacted with the coconspirator party opponent rule's precise language.[65] In *Cherry*, the federal government charged five defendants with drug trafficking crimes based on information provided by an informant.[66] Having learned of the informant pretrial, one of the five defendants murdered him.[67] After the murder, the federal government sought to enter the informant's planned testimony against all five defendants under the FBW hearsay exception.[68]

On appeal at the Tenth Circuit, the government successfully convinced the court that such testimony may be admissible for that purpose.[69] The government essentially argued that because the defendants were jointly charged for drug trafficking crimes committed through a conspiracy, the testimony of the informant who was wrongfully rendered unavailable would have been offered against all defendants.[70] The one defendant's murderous actions, therefore, forfeited not only his own hearsay objection but also that of his coconspirators.[71] But because the same act—the murder of the witness—that activates the FBW hearsay exception may also activate the forfeiture of the confrontation right, the government supposed that the murderer's action also forfeited his and his coconspirators' confrontation rights.[72]

The Tenth Circuit agreed with the government. The court determined that such a theory indeed exists whereby the acts of one conspirator forfeit not only the coconspirators' hearsay objections, but also the coconspirators' Confrontation Clause rights: the agency theory of waiver.[73] Put simply, by

65. United States v. Cherry, 217 F.3d 811, 816 (10th Cir. 2000) ("We are aware of only one published case interpreting the terms 'engaged or acquiesced in wrongdoing' since the recent promulgation of Fed.R.Evid. 804(b)(6)."); *id.* at 818 ("We are unaware of any published opinions adopting or rejecting a theory of agency based on *Pinkerton* liability in the context of the doctrine of waiver by misconduct."). For a discussion of the agency argument, see *infra* notes 73–86 and accompanying text.

66. *Cherry*, 217 F.3d at 813.

67. *Id.* at 814.

68. *Id.* at 813.

69. *Id.* at 816 ("The government urges us to adopt 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." (citation omitted)); *id.* at 818 ("Therefore, we conclude that the acquiescence prong of Fed.R.Evid. 804(b)(6), consistent with the Confrontation Clause, permits consideration of a *Pinkerton* theory of conspiratorial responsibility in determining wrongful procurement of witness unavailability . . . .").

70. *See id.* at 815–16 (understanding the government's position to be that the conspiracy underlying the defendants' actions rendered the unavailable witness's testimony admissible).

71. *See id.* at 813.

72. *Id.* at 815–16.

73. *See id.* at 819. While the Tenth Circuit accepted that "[t]he right to confront witnesses is a constitutional right personal to the accused," it nonetheless determined that "there is room for an

choosing to engage in a criminal act with a coconspirator, that coconspirator becomes the agent of the defendant. To arrive at this conclusion, the Tenth Circuit necessarily had to extrapolate from *Pinkerton* to the FBW hearsay exception and then to the forfeiture of Confrontation Clause rights. First, the court reasoned that "[i]t would make little sense to limit forfeiture of a defendant's trial rights"—the forfeiture of the 804(b)(6) hearsay objection—"to a narrower set of facts than would be sufficient to sustain a conviction . . . ."[74] Therefore, so long as the prosecution satisfies the *Pinkerton* elements when one coconspirator has unlawfully rendered an adverse witness unavailable, the hearsay statement is admissible against all defendants. Second, the *Cherry* court found that the word "acquiesce" as used in FRE 804(b)(6) allows for one defendant to forfeit the rights of other coconspirators.[75] This "acquiescence prong," therefore, swallows the three *Pinkerton* prongs.

Furthermore, the *Cherry* court collapsed the distinction between the FBW hearsay exception and the forfeiture of confrontation rights through its interpretation of the word acquiescence as it is used in FRE 804(b)(6).[76] In particular, the *Cherry* court read *Pinkerton* liability into the word acquiesce as used in FRE 804(b)(6) by explaining that one who engages in a criminal conspiracy acquiesces to the actions that a coconspirator takes on the group's behalf.[77] To get to this reading, the *Cherry* court first found that the phrase "engaged or acquiesced in wrongdoing" supports the idea that "waiver can be imputed under an agency theory of responsibility to a defendant who

agency theory of waiver" when one party is acting on another's behalf. *Id.* (citing Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982)). However, the court noted that liability for the commission of a specific intent crime by one defendant could not be imputed to other participants in the conspiracy because of the due process limitations inherent to the *Pinkerton* doctrine. *Id.* at 818. Specifically, the *Cherry* court reasoned that even though "violence may or may not be [a] foreseeable" consequence of a drug conspiracy, that possibility alone is not enough to impute a specific intent crime such as intentional homicide from one defendant to all coconspirators. *Id.*

74. *Id.*

75. *See id.* at 818–20.

76. *See* Adrienne Rose, Comment, *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, 305–06 (2011); *see also* United States v. Thompson, 286 F.3d 950, 964–65 (7th Cir. 2002) (agreeing with the *Cherry* dissent that membership in a conspiracy alone should not be sufficient to establish waiver).

77. *See Cherry*, 217 F.3d at 820. This justification for the *Cherry* doctrine presupposes that a criminal actor engaged in a conspiracy intends for their coconspirator(s) to render a witness unavailable because both coconspirators benefit from the witness's absence at trial. But this calls into question the *Cherry* court's assumption that *forfeiture* by wrongdoing and *waiver* by wrongdoing are equivalent phrases. For a criminal actor to *waive* a constitutional right, they must know that the right exists. *See* Nathaniel Koslof, Cherry *Still on Top: How* Pinkerton *Concepts Continue To Govern Coconspirator Forfeiture of Confrontation Rights Post*-Giles, 55 B.C. L. REV. 301, 327 (2014). But for a criminal actor to *forfeit* a constitutional right, knowledge of the right's existence is irrelevant. *See id.* Thus, intent on the part of the criminal actor is not relevant to the *Cherry* court's analysis even though that court premises its new doctrine on that assumption.

'acquiesced' in the wrongful procurement of a witness's unavailability but did not actually 'engage[ ]' in wrongdoing apart from the conspiracy itself."[78] The *Cherry* court then incorporated the "in furtherance" and "within the scope" elements of *Pinkerton* into that definition.[79]

But the *Cherry* doctrine presumes an agency theory of conspiracy as prescribed by *Pinkerton*.[80] While *Pinkerton* enables prosecutors—by an agency theory—to charge one defendant with the substantive criminal offenses committed by coconspirators, the Advisory Committee explicitly rejected agency as a justification for the coconspirator hearsay objection.[81] Although agency theory is sufficient to *charge* a defendant with the crimes of a coconspirator (provided that the *Pinkerton* prongs are satisfied), a court may not deprive the defendant of constitutionally protected *liberty* without a verdict determined by a fair trial.[82] Therefore, the agency theory alone in that context does not deprive a defendant of any constitutional right.

The *Cherry* court thus borrowed and incorporated *Pinkerton* liability by reading the forfeiture doctrine under an agency theory of waiver.[83] Because the waiver theory presumes the ability of the criminal actor to engage in the conspiracy willingly and freely, the *Cherry* court found that *Pinkerton* coconspirator liability would appropriately protect a defendant's Confrontation Clause rights but also prevent a defendant from benefiting from their wrongful action.[84] The *Cherry* doctrine thus attempts to balance constitutional and law enforcement interests.

78. *Cherry*, 217 F.3d at 816 (citing FED. R. EVID. 804(b)(6)).

79. *Id.* at 820. On the other hand, *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), added *Pinkerton*'s third "reasonably foreseeable" prong to limit *Cherry*'s applicability to only those defendants that "actually acquiesced either explicitly or implicitly to the misconduct." *Id.* at 965.

80. *Cherry*, 217 F.3d at 819 ("[T]here is room for an agency theory of waiver . . . . [where] agency is inferred if an act is within the scope of the conspiracy, thereby resulting in the co-conspirator's individual liability under the substantive criminal law." (citing Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982))).

81. *See supra* text accompanying notes 37–41.

82. *See* U.S. CONST. amend. XIV, § 1.

83. *See Cherry*, 217 F.3d at 818.

84. *See id.* at 820. By incorporating *Pinkerton* coconspirator liability principles, the *Cherry* doctrine assumes (quite rightly, in most cases) that individuals who engage in conspiratorial criminal activity do so in order to commit some type of criminal act. The Tenth Circuit created the *Cherry* doctrine by analyzing the holdings of cases from three different circuits: *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982); *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996); and *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997). *Cherry*, 217 F.3d at 819. While the Second Circuit found that "[b]are knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver," the First Circuit would have limited that holding by requiring "an affirmative act by the particular defendant" before imputing waiver. *Id.* (first quoting *Mastrangelo*, 693 F.2d at 273–74; and then citing *Houlihan*, 92 F.3d at 1280). The D.C. Circuit, on the other hand, found that "mere participation" in a conspiracy is "insufficient to constitute a waiver of a defendant's constitutional confrontation rights." *Id.* at 820 (quoting United States v. White, 838 F. Supp. 618, 623 (D.D.C. 1993), *aff'd*, 116 F.3d 903 (D.C. Cir. 1997)). In the *Cherry* court's view, the Second Circuit's

While the court read this agency theory of conspiracy liability into the FBW hearsay exception through the term acquiescence, it also used that acquiescence prong to read an agency theory of conspirator liability into the Confrontation Clause.[85] The *Cherry* court accordingly applied agency to both the forfeiture of the hearsay objection *and* the Confrontation Clause. Under the *Cherry* doctrine, therefore, the actions of a defendant's coconspirator deprive that defendant of a constitutional right. But this unjustifiably combined what the Supreme Court has held are two separate inquiries: (a) whether a defendant's engagement in a conspiracy has forfeited their hearsay objection, and (b) whether that same behavior by the defendant has forfeited their Confrontation Clause right.[86]

Following *Cherry*, the Supreme Court has developed a jurisprudence detailing how the FBW hearsay exception intersects with the Confrontation Clause.[87] One of those cases, *Giles*, seemed at first to overrule *Cherry*.[88] This was because the Court in *Giles* required a prosecutor to prove that a defendant *intended* to render a witness unavailable for trial.[89] The Tenth Circuit in *Cherry*, on the other hand, only required that the defendant's coconspirator possess that particular intent.[90] Under *Cherry*, therefore, the prosecutor need only show that a defendant themself engaged in a conspiracy and that it was a goal or an act in furtherance of that conspiracy to render an adverse witness unavailable for trial.[91] However, as shown in the following discussion of *United States v. Dinkins*[92]—a Fourth Circuit decision in a *Cherry*-doctrine case—*Giles* only limited *Cherry*'s scope.

III. THE *CHERRY* TREE GROWS: FROM *DINKINS* TO *ADOMA*

Following the Tenth Circuit's creation of the *Cherry* doctrine, several other circuits, including the Fourth Circuit, have adopted its reasoning. The D.C. Circuit adopted the *Cherry* doctrine in 2006,[93] and the Fourth Circuit considered the issue for the second time in 2012 when it heard *Dinkins*.[94] However, the Fourth Circuit decided *Dinkins* post-*Giles* in a jurisprudential

rule was too broad and the First Circuit's and the D.C. Circuit's rules were too narrow. *See id.* ("[I]nvolvement in a conspiracy may not be sufficient, standing alone, to waive confrontation rights, [but] the *White* analysis is incomplete.").

85. Rose, *supra* note 76, at 301–02.

86. *See id.* at 301–02, 302 n.103 (first quoting Crawford v. Washington, 541 U.S. 36, 68 (2004); and then quoting Giles v. California, 554 U.S. 353, 361 (2008)).

87. *See infra* Part IV.

88. *See Giles v. California*, 544 U.S. 353, 361 (2008).

89. *Id.*

90. *See* United States v. Cherry, 217 F.3d 811, 821 (10th Cir. 2000).

91. *Id.*

92. 691 F.3d 358 (4th Cir. 2012).

93. United States v. Carson, 455 F.3d 336, 364 n.24 (D.C. Cir. 2006).

94. *Dinkins*, 691 F.3d at 384–85.

context in which it seemed that the Supreme Court had effectively overturned *Cherry*.[95] Nonetheless, *Dinkins* upheld *Cherry* and provided the Fourth Circuit a launching pad from which to expand the *Cherry* doctrine.

Like *Cherry*, *Dinkins* concerned a conspiratorial drug trafficking operation involving multiple defendants.[96] But where *Cherry* involved a small-scale drug trafficking operation among five defendants, the organization in *Dinkins* was a formal drug gang with a defined hierarchy, territory, and purpose.[97] When a member of the gang became a government informant, the named *Dinkins* defendant sought to murder the informant to render him unavailable for trial.[98] Like the *Cherry* court, the *Dinkins* court admitted the unavailable witness's hearsay statements pursuant to the FBW hearsay exception.[99]

The *Dinkins* court, like the *Cherry* court, found that "traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis."[100] The Fourth Circuit found that the term acquiesce as used in FRE 804(b)(6) implies conspiracy liability because it includes "wrongdoing that . . . is . . . attributable to [the] defendant because he accepted or tacitly approved the wrongdoing."[101] Again, like the *Cherry* court, the *Dinkins* court argued that an agency theory of waiver connected *Pinkerton* coconspirator liability to the forfeiture doctrine.[102] The Fourth Circuit went one step further, however, when it found that the "application of *Pinkerton* liability standards" should be "coextensive with the scope of forfeiture by wrongdoing."[103]

This reasoning enabled the Fourth Circuit to extend the *Cherry* doctrine yet again in *Adoma*. In *Adoma*, the Fourth Circuit became the first court to incorporate RICO charges under 18 U.S.C. §§ 1959(a)(1) and 1962(d) into the FBW hearsay exception and the forfeiture of confrontation rights framework.[104] Although RICO premises criminal liability on an affiliation theory, whereby a defendant exposes themself to liability simply by interacting with their

95. Giles v. California, 554 U.S. 353, 361 (2008). Because *Giles* requires a prosecutor to prove that a defendant *intended* to render the witness unavailable for trial, it seemed that *Cherry* was overruled. *See supra* Part II.

96. *Dinkins*, 691 F.3d at 362–63.

97. *See id.*

98. *Id.* at 364.

99. *Id.* at 384.

100. *Id.*

101. *See id.* (citing United States v. Thompson, 286 F.3d 950, 964 (7th Cir. 2002)).

102. *See id.* ("The principle underlying the *Pinkerton* doctrine 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.'" (quoting United States v. Aramony, 88 F.3d 1369, 1379 (4th Cir. 1996))). The Fourth Circuit gave particular weight to the *Cherry* court's approach to balancing the rights of a criminal defendant with law enforcement's need to prevent a criminal defendant from benefiting from their own wrongdoing. *See id.* at 384–85.

103. *Id.* at 385. The *Dinkins* decision was issued four years after *Giles*, upon which the *Dinkins* court based this coextensiveness argument. *See id.*

104. *See* United States v. Adoma, 781 F. App'x 199, 204 (4th Cir. 2019).

coconspirator(s), it is unclear whether *Pinkerton* liability is proven by virtue of RICO conspiracy liability or whether these are two distinct doctrines where the latter is a broader category including within itself the former.[105] But as the borrowing argument supposes,[106] it should come as no surprise that *Pinkerton* and RICO conspiracy concepts would merge when combined with evidentiary law.

Satisfaction of the elements of a RICO conspiracy, however, does not satisfy the elements of a *Pinkerton* conspiracy. Instead, a RICO conspiracy under 18 U.S.C. § 1962 only requires that a group of criminal actors endeavor to further a criminal enterprise, "even if the conspirator does not commit a predicate act."[107] While a *Pinkerton* conspiracy requires a defendant to commit the predicate criminal offense of entering a "criminal affiliation" through which the defendant is liable for the actions of their coconspirator, a RICO conspiracy imposes liability for an inchoate offense[108] alone.[109] As compared with a *Pinkerton* conspiracy, a RICO conspiracy imposes liability on a much broader range of actions not foreseen by the Advisory Committee.[110] For example, one prong of the *Pinkerton* doctrine requires a coconspirator to have *acted* in furtherance of the overall conspiracy; under RICO, the prosecutor need only show that the coconspirator "have possessed knowledge of only the general contours of the conspiracy."[111] Therefore, "a defendant not guilty of the substantive offense may still be convicted of conspiracy if there is proof of an agreement to commit the substantive crime."[112] As a result, the opinion in

105. *See* Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying* Pinkerton *Liability to RICO Actions*, 56 MO. L. REV. 931, 956–57 (1991) (noting that while "American law is loath to predicate criminal liability upon 'affiliation,'" doing so adequately combats the underlying concern of "aligning with another or others to achieve some unlawful purpose"); *id.* at 956 n.132 ("A person may be found to be 'affiliated' with an organization . . . when there is . . . a close working alliance or association between him and the organization . . . ." (quoting Bryson v. United States, 396 U.S. 64, 69 n.7 (1969))). Some criminal court proceedings have identified *Pinkerton* liability as overlapping with RICO, and civil court proceedings have done so as well. *See* Mark Noferi, *Towards Attenuation: A New Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 123–24, 123 n.183 (2006).

106. For an explanation of borrowing and convergence theory, see *infra* Part IV.

107. CGC Holding Co. v. Broad & Cassel, 773 F.3d 1076, 1088 (10th Cir. 2014).

108. An "inchoate offense" is "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment." *Inchoate Offense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

109. *See* Brenner, *supra* note 105, at 965–66, 974 & n.187.

110. *Id.* at 965 ("Federal law recognizes six varieties of affiliative liability: (a) aiding and abetting commission of a substantive offense; (b) attempting to aid and abet commission of a substantive offense; (c) aiding and abetting an attempt to commit a substantive offense; (d) conspiring to commit a substantive offense; (e) conspiring to aid and abet the commission of a substantive offense; and (f) *Pinkerton* liability [though not as part of RICO].").

111. United States v. Zichettello, 208 F.3d 72, 100 (2d Cir. 2000); *see* Dean Browning Webb, *Judicially Fusing the* Pinkerton *Doctrine to RICO Conspiracy Litigation Through the Concept of Mediate Causation*, 97 KY. L.J. 665, 665 n.4 (2008).

112. Webb, *supra* note 111, at 666 n.4.

Adoma distorts the reasoning of the Advisory Committee regarding the coconspirator exclusion and unjustifiably conflates *Pinkerton* coconspirator liability with RICO liability. The borrowing and convergence doctrine, however, explains this extension.

IV. THE TREE OR THE FOREST? DOCTRINAL BORROWING AND CONVERGENCE

As a preliminary matter, the codification of the common law coconspirator hearsay exclusion in the FRE finalized the incorporation, or borrowing, of the *Pinkerton* conspirator prongs into evidence law.[113] According to Professor Laurin's reading of the work of Professors Nelson Tebbe and Robert Tsai, "borrowing" is "a strategy of doctrinal persuasion and transformation that 'draws on one domain of . . . knowledge in order to interpret, bolster, or otherwise illuminate another domain.'"[114] While the latter professors analyze borrowing as a constitutional lawmaking strategy, borrowing occurs in the public as well as private legal domain, both within and outside of constitutional law.[115] As a consequence—or logical endpoint—of borrowing, the analytical framework by which judges (or other legal policy and lawmakers) include concepts of one legal discipline into another facilitates the convergence of previously distinct legal fields.[116]

Once one legal doctrine enters the sphere of another through borrowing, that process "tend[s] to generate a cascade of pressure on doctrinal barriers, prompting courts to engage in further blurring of the boundaries between previously distinct legal arenas and to gradually move the target doctrine toward a point of convergence with the source."[117] This "'hydraulic' property" of borrowing ensures that the one legal doctrine imported into the second exerts a formative pressure such that both doctrines eventually coalesce.[118] Convergence, therefore, is a necessary and expected feature initiated by borrowing, which itself provides judges and policy makers with an effective analytical and rhetorical tool capable of reshaping the law.

However, the ultimate end of borrowing—convergence—does not consistently lead to a more coherent legal theory. That dissonance is present in *Adoma*. Although evidentiary law itself is not constitutional, the rules of evidence (both federal and common law) implicate constitutional values, particularly in criminal cases, because these rules subject the defendant to a

113. *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 462–63 (2010) (defining "borrowing" in the constitutional law context).

114. *See* Laurin, *supra* note 25, at 672 (quoting Tebbe & Tsai, *supra* note 113, at 463).

115. *See id.* at 741–42 (citing borrowing in copyright and trademark law).

116. Laurin, *supra* note 25, at 710.

117. *Id.*

118. *See id.*

potential deprivation of liberty.[119] Accordingly, evidence law is also bound with criminal law and has incorporated principles of criminal law within the rules themselves. For instance, the coconspirator party opponent rule explicitly adopts the criminal law concept of conspiracy liability.[120] Both the FRE and the common law recognize that the "responsibility of the party" in making the self-inculpating statement to their coconspirator warrants that statement's admissibility into evidence.[121]

Nonetheless, the forfeiture of confrontation rights explicitly implicates constitutional considerations separate from evidentiary concerns.[122] While FRE 804(b)(6) provides the hearsay exception to the forfeiture doctrine, *Crawford*, *Giles*, and their progeny explicate the forfeiture doctrine's Confrontation Clause considerations.[123] Although commentators at the time of *Giles* expected that opinion to "effectively overrule[] . . . *Cherry*,"[124] that has not been the case.[125] Instead, *Adoma* shows that the Fourth Circuit is willing to expand *Cherry*'s holding from applying *Pinkerton* coconspirator liability in the Confrontation Clause forfeiture by wrongdoing context to include RICO enterprise liability.

Convergence nonetheless explains how the *Adoma* court reached its flawed decision. First, the coconspirator party opponent rule created a hearsay exception premised upon *Pinkerton* coconspirator liability.[126] This underscores that a defendant is responsible for making self-inculpating statements to their coconspirators because of the defendant's inherent agency in making such a statement.[127] This enabled the *Cherry* court to apply an agency theory of conspiracy to the FBW hearsay exception: the court must hold a defendant responsible for engaging in a conspiracy that rendered the witness unavailable because of the inherent agency in joining that conspiracy.[128] But of course, the

119. *See, e.g.*, Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57, 58–60 (2015) (explaining the extent to which courts choose to uphold constitutional values and disregard evidentiary rules when the latter conflict with the former); Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 91–92 (2008) (arguing for the "constitutionalizing" of evidence law to provide better procedural safeguards at trial).

120. FED. R. EVID. 801 advisory committee's note on rules—1997 amendment (discussing statements by coconspirators).

121. FED. R. EVID. 801(d)(2) advisory committee's note on proposed rules ("[T]he responsibility of a party is considered sufficient to justify reception [of the statement] in evidence against him . . . ."). But, as noted, *see supra* Part III, the concept of "conspiracy" under FRE 801(d)(2)(E) is not limited to criminal law because only a joint endeavor united by a common interest attaches liability for the hearsay exclusion.

122. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . .").

123. *See* Giles v. California, 554 U.S. 353, 358–59 (2008); *Crawford*, 541 U.S. at 51–52.

124. Rose, *supra* note 76, at 318.

125. United States v. Dinkins, 691 F.3d 358, 383 (4th Cir. 2012) ("The *Giles* decision did not materially alter application of the forfeiture-by-wrongdoing exception . . . .").

126. *See* FED. R. EVID. 801(d)(2)(E) advisory committee's note on proposed rules.

127. *See id.*

128. United States v. Cherry, 217 F.3d 811, 819–20 (10th Cir. 2000); *see supra* Part II.

scope of that liability was limited by the three *Pinkerton* prongs: in furtherance, within the scope, and foreseeability.[129]

Since the enactment of RICO, a federal conspiracy common law has developed in parallel to that of *Pinkerton* conspiracies.[130] But the broad, overarching scope of RICO conspiracy liability dwarfs the scope of *Pinkerton* conspiracy liability because RICO typically applies regardless of *Pinkerton*'s scope requirement.[131] In particular, a defendant under RICO may be liable for the acts of a coconspirator even without proof of the scope, foreseeability, and in furtherance prongs of *Pinkerton*.[132] Moreover, substantive conspiracy or other charges apply under RICO regardless of a defendant's "commission of a substantive offense."[133] When a prosecutor brings a case hinged on *Pinkerton* liability, they may either charge the defendant with conspiracy itself as a substantive offense or simply charge the defendant with the crimes committed by their coconspirator(s); but in either case, the prosecutor must prove the three *Pinkerton* elements.[134] Otherwise, affiliative liability does not attach under *Pinkerton*.[135] Therefore, the convergence of federal RICO conspiracy principles with those of the common law *Pinkerton* prongs expanded the nature by which a court may find a defendant to have waived their hearsay objection under FRE 804(b)(6) and, consequently, their confrontation right.

The convergence of *Pinkerton* with RICO conspiracy liability as exemplified by *Adoma* also illustrates how borrowing can reduce procedural protections for defendants because *Adoma* enables a prosecutor to use the FBW hearsay exception by proving a conditional fact under FRE 104(b) ("the conditional fact rule"). In the context of the *Cherry* doctrine, this necessitates discussion of FRE 104(b) and the prosecutor's burden of proof.[136] First, FRE 104(b) requires a prosecutor to prove the relevance of a conditional fact—or a fact the existence of which necessarily depends on proof of some other fact—only by a preponderance of the evidence.[137] When that conditional fact then enables the prosecutor to use another evidentiary rule that depends on the proof

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

130. *See* Webb, *supra* note 111, at 669–80 (discussing Supreme Court cases interpreting the RICO statute).

131. *See* Brenner, *supra* note 105, at 960–70.

132. *See* Webb, *supra* note 111, at 665 n.4.

133. Brenner, *supra* note 105, at 966.

134. This is because FRE 104(a) first allows a prosecutor to show, by a preponderance of the evidence, that a defendant engaged in a conspiracy under *Pinkerton*. FED. R. EVID. 104(a). Having proven the conspiracy, the prosecutor may then show that that the defendant is guilty of the crimes of their coconspirators by virtue of the conspiracy. *See supra* note 37 and accompanying text. Because prosecutors have discretion regarding what charges to bring in a given case, this theoretical prosecutor then may choose whether to charge criminal conspiracy.

135. *See supra* note 37 and accompanying text.

136. *See supra* Introduction.

137. FED. R. EVID. 104(b); Bourjaily v. United States, 483 U.S. 171, 175–76 (1987).

of that conditional fact, this means that the subsequent use of the second rule is possible through proof based on a preponderance standard.[138] In the context of the *Cherry* doctrine, therefore, this means that a prosecutor need only prove a *Pinkerton* conspiracy by a preponderance of the evidence before gaining access to the hearsay and Confrontation Clause waivers.

The Fourth Circuit in *Adoma* then further expanded this logical chain by applying the conditional fact rule to a RICO conspiracy.[139] As noted, a RICO conspiracy (unlike a *Pinkerton* conspiracy) does not require that the defendant commit a substantive offense or act in furtherance of the conspiratorial goals.[140] Therefore, proving a RICO conspiracy for purposes of the conditional fact rule—with the ultimate goal of using FRE 804(b)(6) or arguing forfeiture of a defendant's Confrontation Clause rights—is even less protective of a defendant's rights than proving a typical *Pinkerton* conspiracy for purposes of FRE 104(b). The *Adoma* court failed to account for this expansion of the forfeiture doctrine when that court did not adequately determine the correct standard by which to find the forfeiture of the defendants' Confrontation Clause rights. Although the majority rule in both federal and state court proceedings determines whether the *Pinkerton* prongs are satisfied by a preponderance of the evidence according to FRE 104(a), the minority—and more appropriate—rule applies the clear and convincing evidence standard.[141] While the preponderance standard is appropriate for determining whether the defendant has forfeited their hearsay objection under FRE 804(b)(6), that same standard is insufficient to protect the defendant's constitutional rights guaranteed by the Sixth Amendment.

Because the right to confrontation is a constitutional guarantee and "forfeiture of constitutional rights is generally disfavored," a more equitable standard would "resolve close cases in the defendant's favor."[142] This equitable standard is that of clear and convincing proof, which a court would still evaluate under FRE 104(b). Only by clear and convincing proof should a court find that a defendant has engaged in a conspiracy through which the actions of a coconspirator forfeited the confrontation rights of the defendant. The clear and

138. *See* FED. R. EVID. 104(b). For example, assume that a plaintiff wishes to enter a hearsay statement for the truth allegedly made by a defendant. That statement is typically admissible under FRE 801(d)(2)(A) as an "opposing party's statement." *See* FED. R. EVID. 801(d)(2)(A). But suppose that there is a legitimate factual question as to whether a defendant truly made that statement (such as some evidence tending to show a third person made that statement). Under FRE 104(b), the plaintiff need only establish by a preponderance of the evidence that the defendant did in fact make that statement in order to then invoke FRE 801(d)(2)(A). *See* FED. R. EVID. 104(b).

139. *See* United States v. Adoma, 781 F. App'x 199, 204 (4th Cir. 2019).

140. Brenner, *supra* note 105, at 960–70; Webb, *supra* note 111, at 665 n.4.

141. *See* Aaron R. Petty, *Proving Forfeiture and Bootstrapping Testimony After* Crawford, 43 WILLAMETTE L. REV. 593, 601–02 (2007).

142. *Id.* at 609.

convincing proof standard should apply only to the *Cherry* doctrine when the forfeiture concerns a defendant's confrontation rights.

When the question is whether a defendant engaged in a conspiracy for purposes of FRE 801(d)(2)(E)—which governs whether a party opponent's hearsay statements may be admitted—the court should continue to apply the preponderance standard. This is appropriate in that context because no constitutional right is at stake in the context of the coconspirator party opponent rule.[143] Furthermore, an underlying RICO charge should only lead to the forfeiture of a defendant's Confrontation Clause rights by the *Cherry* doctrine when the RICO conspiracy also satisfies the *Pinkerton* prongs. This is because the scope of RICO conspiracy liability is well beyond that of *Pinkerton*. Accordingly, the *Adoma* Court unjustifiably expanded the *Cherry* doctrine to forfeit a defendant's confrontation rights in the RICO context.

CONCLUSION

The Confrontation Clause demonstrates that the framers envisioned a criminal justice system that is both fair and adversarial. While the Confrontation Clause requires that criminal defendants have the ability to confront the adverse witnesses against them, the Supreme Court has repeatedly found that a criminal defendant may forfeit that right when they wrongfully render such a witness unavailable for trial.[144] On the one hand, this preserves the fairness of our criminal justice process by ensuring that such a defendant does not benefit from their wrongful acts; on the other hand, this preserves the adversarial nature of that process by admitting otherwise inadmissible testimony. This forfeiture of confrontation rights by wrongdoing, therefore, arguably serves legitimate governmental interests by preventing harms such as witness tampering and murder.

But when a criminal defendant themself wrongfully renders a witness unavailable for trial, they willingly choose to forfeit their own confrontation right. That same logic applies to a *Pinkerton* conspiracy: a criminal defendant who willingly entered into a criminal conspiracy deserves the punishment garnered by the acts of the defendant's coconspirators so long as the *Pinkerton* prongs are satisfied. The fairness of our criminal justice system then enables a prosecutor to argue under the *Cherry* doctrine that a coconspirator's pretrial murder of an adverse witness has forfeited not only the coconspirator's confrontation rights but also those of the defendant who did not participate in the murder.

143. No constitutional right is at stake because the rule against hearsay itself is not constitutionally created. *See* FED. R. EVID. 802. The only reason that the coconspirator party opponent rule may involve constitutional concerns is to the extent that the rule allows admission into evidence of a statement that would violate the Confrontation Clause.

144. *See supra* Section I.C.

Removing the evidentiary and constitutional safeguards guaranteed to a criminal defendant because of the actions of the defendant's coconspirators as defined by RICO, however, does not enhance the fairness of our criminal justice system. Indeed, doing so detracts from that fairness. Whereas *Pinkerton* liability requires the affirmative act of a defendant entering into a criminal conspiracy, RICO conspirator liability attaches for inchoate offenses. Furthermore, such RICO liability does not require a coconspirator's criminal act to have been in furtherance of the original conspiracy or to have been reasonably foreseeable to the other defendants. Therefore, *Adoma* impermissibly extended the *Cherry* doctrine beyond its *Pinkerton* bounds.

Only one remedy would maintain *Cherry*'s validity, as the Supreme Court seems to desire. First, the Fourth Circuit should renounce its decision and other circuits should refuse to adopt *Adoma*'s reasoning.[145] Second, courts should adopt a clear and convincing evidentiary standard in *Cherry* doctrine cases. This means that when holding the FRE 104(a) hearing, a prosecutor must prove to the judge by a clear and convincing standard, and not by a preponderance of the evidence, that a *Pinkerton* conspiracy existed. Only then may a prosecutor argue that a coconspirator's wrongful actions against an adverse witness forfeited the confrontation rights of all coconspirators. This more accurately ensures that our criminal justice system remains both fair and adversarial.

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145. Because the Fourth Circuit chose not to publish *Adoma*, it has no precedential value. Therefore, the next Fourth Circuit panel to take up a *Cherry*-type case could easily ignore the *Adoma* holding.

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