SIXTH AMENDMENT — WITNESS CONFRONTATION — FOURTH CIRCUIT HOLDS THAT CO-CONSPIRATOR MISCONDUCT CAN FORFEIT DEFENDANT'S CONFRONTATION RIGHT AND HEARSAY OBJECTION. — *United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied*, No. 12-7923, 2013 WL 598772 (U.S. Feb. 19, 2013).

The forfeiture-by-wrongdoing doctrine, adopted as an exception to the Sixth Amendment's Confrontation Clause and the rule against hearsay, dates back to 1666, when the House of Lords declared that if a witness was kept away "by the means or procurement of [a] prisoner," his prior sworn statement could be read at trial.[1] In *Giles v. California*,[2] the Supreme Court's latest clarification of the Confrontation Clause exception's scope, the Court held that a defendant forfeits his confrontation right only by acting with the intent to prevent testimony.[3] Recently, in *United States v. Dinkins*,[4] the Fourth Circuit held that a co-conspirator's foreseeable misconduct performed after a defendant's arrest can forfeit that defendant's confrontation right and hearsay objection if the act is within the scope and in furtherance of the conspiracy.[5] The ruling, which utilized the agency theory of conspiracy in an effort to satisfy *Giles*, circumvents the requirements for waiver of a fundamental right and defies Supreme Court precedent that the Confrontation Clause does not tolerate subjective, unpredictable tests. While *Dinkins* will not meaningfully deter witness silencing, it will significantly hamper the truth-seeking function of many trials.

In October 2004, James Wise was murdered on a street corner after robbing a member of Special, a large drug-distribution organization in the Bartlett neighborhood of Baltimore.[6] John Dowery, a drug dealer for Special who witnessed the murder, informed police about it and about Special in an effort to lessen his sentence for an unrelated crime.[7] His information led to the arrest and prosecution of Tamall Parker and Tracy Love, two Special "lieutenants," for Wise's murder.[8]

On October 19, 2005, after being selected for the task, James Dinkins, an "enforcer" for Special, and Damien West, a drug dealer for the organization, shot Dowery over a dozen times outside his home.[9] Upon learning that Dowery had survived, Dinkins suggested to West that they "go to the hospital to finish him off," though they never did

1 Lord Morley's Case, 6 How. St. Tr. 769, 771 (H.L. 1666).
2 128 S. Ct. 2678 (2008).
3 *Id.* at 2683.
4 691 F.3d 358 (4th Cir. 2012), *cert. denied*, No. 12-7923, 2013 WL 598772 (U.S. Feb. 19, 2013).
5 *Id.* at 385.
6 *Id.* at 362, 364.
7 *Id.* at 364.
8 *Dinkins*, 691 F.3d at 363–64.
9 *Id.*

so.[10] Dowery later identified Dinkins as his shooter from a photo array,[11] and detectives relocated Dowery out of Bartlett for his safety.[12]

Dowery was not Dinkins's only target. In September 2005, Dinkins shot Shannon Jemmison, a government informant who had been residing in the neighborhood of a drug ring with which Special regularly transacted.[13] Two months later, Dinkins murdered Special member Michael Bryant after "problems arose" during a gun deal.[14]

Dinkins was arrested on December 9, 2005.[15] Six months later, Dowery reported that Melvin Gilbert, Special's leader, had warned him not to return to Bartlett.[16] When Dowery came back for Thanksgiving, Gilbert and Darron Goods, a Special dealer, murdered him.[17]

A federal grand jury in the District of Maryland indicted Dinkins, Gilbert, and Goods in July 2009 on twelve counts, including conspiracy to distribute narcotics and charges related to the Jemmison, Dowery, and Bryant shootings.[18] At trial, Dinkins and Gilbert objected to the government's submission, via Detectives Michael Baier and Gary Niedermeier, of Dowery's statements identifying Dinkins as one of Dowery's shooters in the 2005 incident and describing Special's members and Gilbert's threat.[19] The prosecution replied that the forfeiture-by-wrongdoing hearsay exception covered co-conspirator acts.[20] Under that exception, codified in Rule 804(b)(6) of the Federal Rules of Evidence (FRE), "[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 hearsay rule.[21] Judge Motz agreed with the prosecution and allowed the testimony.[22] A jury convicted the defendants on all but one count, and each received multiple life sentences.[23]

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[10] *Id.* at 364 (internal quotation mark omitted); *see also id.* n.3.

[11] *Id.* at 364. West pled guilty to the attempted murder of Dowery. *Id.* n.4.

[12] *Id.* at 365. Dowery testified at Parker and Love's murder trial in January 2006. *Id.*

[13] *Id.* at 363–64.

[14] *Id.* at 364.

[15] *Id.* at 365.

[16] *Id.* at 363, 365; Trial Transcript of May 26, 2009, at 22–23, United States v. Dinkins, No. 1:06-cr-00309 (D. Md. July 8, 2009), ECF No. 399 [hereinafter Baier Transcript].

[17] *Dinkins*, 691 F.3d at 363, 365.

[18] *Id.* at 365–66. The government successfully moved for a joint trial. *Id.* at 366.

[19] *Id.* at 382; Baier Transcript, *supra* note 16, at 34 (Dinkins's objection to Baier's testimony); *id.* at 36 (Gilbert's objection to same); Trial Transcript of May 18, 2009, at 14–16, *Dinkins*, No. 1:06-cr-00309, ECF No. 395 [hereinafter Niedermeier Transcript] (Dinkins's objection to Niedermeier's testimony). Dinkins moved for exclusion before trial, *see* Defendant Dinkins' Supplemental Motion to Exclude Hearsay of John Dowery, *Dinkins*, No. 1:06-cr-00309, ECF No. 279, but the judge waited to issue an oral ruling at trial.

[20] *See* Baier Transcript, *supra* note 16, at 35; Niedermeier Transcript, *supra* note 19, at 14–15.

[21] FED. R. EVID. 804(b)(6).

[22] *See* Baier Transcript, *supra* note 16, at 37; Niedermeier Transcript, *supra* note 19, at 16–17.

[23] *Dinkins*, 691 F.3d at 367 & n.6.

The Fourth Circuit affirmed. Writing for a unanimous panel, Judge Keenan[24] rejected Gilbert's claim that there was insufficient evidence that he and Goods killed Dowery for forfeiture by wrongdoing to apply.[25] Dinkins's involvement, however, was not alleged, and he argued that admitting the testimony violated both FRE 804(b)(6) and the Confrontation Clause.[26] Judge Keenan found that, "to prevent 'abhorrent behavior,'" courts construe FRE 804(b)(6) broadly,[27] and concluded that the rule's term "acquiesce" attributes conduct to one who "accepted or tacitly approved," but did not directly engage in, misconduct.[28] Turning to the Confrontation Clause and noting that the issue was one of first impression in the circuit,[29] Judge Keenan imported conspiratorial liability concepts from *Pinkerton v. United States*[30] into the inquiry, finding that they "strike[] the appropriate balance" between the accused's confrontation right and the need to prevent witness tampering.[31] Pursuant to *Pinkerton*, "conspirators are each other's agents and a principal is bound by the acts of his agents within the scope of the agency."[32] Therefore, the confrontation right is waived when a witness is absent due to either the defendant's own misconduct or a co-conspirator's wrongful act intended to prevent testimony and "in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy."[33]

Applying her test to the facts of the case, Judge Keenan found that Dowery's statements were admissible against Dinkins. First, the appellants partook in the same drug trafficking conspiracy.[34] Second, because Dowery's knowledge posed a threat to Special, his murder was in furtherance and within the scope of that conspiracy.[35] Third, the murder was foreseeable, since Dinkins had previously tried to kill Dowery and had wanted to "finish the job."[36] Fourth, the murder was a natural consequence of the conspiracy, given Special's prior history

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[24] Judge Keenan was joined by Judges Shedd and Floyd.

[25] *Dinkins*, 691 F.3d at 386. Goods never sought exclusion of the statements. *Id.* at 367.

[26] *Id.* at 381–82, 384.

[27] *Id.* at 383 (quoting FED. R. EVID. 804(b)(6) advisory committee's note to 1997 amendment).

[28] *Id.* at 384.

[29] *Id.*

[30] 328 U.S. 640 (1946); *see id.* at 646–47.

[31] *Dinkins*, 691 F.3d at 385.

[32] *Id.* at 384 (quoting United States v. Aramony, 88 F.3d 1369, 1379 (4th Cir. 1996)) (internal quotation marks omitted).

[33] *Id.* at 385. Judge Keenan relied heavily on *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which pronounced the same rule a decade earlier, *id.* at 820. The Fourth Circuit had previously cited *Cherry* approvingly in *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005) (holding that FRE 804(b)(6) does not require an intent to prevent testimony at a particular trial).

[34] *Dinkins*, 691 F.3d at 385.

[35] *Id.*

[36] *Id.* at 386 (internal quotation marks omitted).

of targeting informants, including Dowery and Jemmison.[37] Lastly, the murder aimed to and did prevent Dowery's testimony.[38]

Because the Sixth Amendment is not left "to the vagaries of the rules of evidence,"[39] judges must separately determine whether admission of a statement comports with the rule against hearsay and with the Confrontation Clause. While the Fourth Circuit reasonably held that FRE 804(b)(6)'s acquiescence prong allows a co-conspirator to forfeit the accused's hearsay objection,[40] it erred in finding that conspiratorial forfeiture accords with the Confrontation Clause's act and intent elements under the agency theory of conspiracy. Agency concepts bypass the criteria for waiver of a fundamental right and, when misconduct postdates the defendant's arrest, require judges to subjectively and unpredictably decide whether arrest ended the accused's conspiratorial role. *Dinkins* will not appreciably deter witness tampering, and will instead make criminal trials less reliable by admitting incontrovertible statements collected in inexact forms from biased sources.

The Confrontation Clause generally excludes testimonial hearsay evidence unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[41] While misconduct "extinguishes confrontation claims,"[42] the exception applies only "when the defendant engage[s] in conduct designed to prevent the witness from testifying."[43] In the conspiratorial forfeiture context, the defendant's co-conspirators, not the defendant, engage in witness silencing. But under *Pinkerton*'s agency theory, the acts of one are the acts of all, so when Gilbert and Goods acted intending to prevent Dowery from testifying, it was as if Dinkins had done so himself. In other words, agency concepts shift the conduct and intent elements of the forfeiture-by-wrongdoing exception from the defendant to his co-conspirators.

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[37] *Id.* at 385–86.

[38] *Id.* at 386. The panel also sustained other rulings made by Judge Motz. First, it held that a joint trial was appropriate, because consolidation was more efficient and amply protective of the defendants' rights. *Id.* at 367–69. Second, it found that it was proper to empanel an anonymous jury, since the risk to the jurors' safety exceeded the danger of infringing upon the defendants' rights. *Id.* at 374–79. Third, the panel upheld the prosecution's peremptory strike of an African American potential juror, accepting its race-neutral rationales as nonpretextual. *Id.* at 379–81. Finally, the panel affirmed the denial of Goods's motion for a post-verdict judgment of acquittal, as there was sufficient evidence for a rational jury to find Goods guilty of murder. *Id.* at 386–88.

[39] Crawford v. Washington, 541 U.S. 36, 61 (2004).

[40] Many federal appellate courts have held that co-conspirator acts trigger Rule 804(b)(6). *See* United States v. Johnson, 495 F.3d 951, 971–72 (8th Cir. 2007); United States v. Martinez, 476 F.3d 961, 966 (D.C. Cir. 2007); United States v. Thompson, 286 F.3d 950, 963–65 (7th Cir. 2002); United States v. Cherry, 217 F.3d 811, 818–21 (10th Cir. 2000); United States v. Mastrangelo, 693 F.2d 269, 273–74 (2d Cir. 1982).

[41] *Crawford*, 541 U.S. at 68.

[42] *Id.* at 62.

[43] Giles v. California, 128 S. Ct. 2678, 2683 (2008) (emphasis omitted). *Dinkins* is the first post-*Giles* case to assess the conspiratorial forfeiture doctrine under the Confrontation Clause.

Agency concepts offend the Confrontation Clause for two reasons. First, they violate the requirements for waiver of a fundamental right. Although the Supreme Court labels the constitutional doctrine *forfeiture* by wrongdoing, *Giles* implicitly converted it into a *waiver* by focusing on the silencer's intent.[44] Waiver requires "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[45] And since the confrontation right is "fundamental"[46] and "personal to the accused,"[47] he must engage in those acts himself;[48] an agent's acts cannot serve as a substitute.[49] Because a conspirator likely does not appreciate that a potential consequence of joining a conspiracy is the loss of his confrontation right,[50] that act

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[44] While motive and knowledge are immaterial to forfeiture, Ralph Ruebner & Eugene Goryunov, Giles v. California*: Sixth Amendment Confrontation Right, Forfeiture by Wrongdoing, and a Misguided Departure from the Common Law and the Constitution*, 40 U. TOL. L. REV. 577, 588 (2009), waiver demands "an intentional relinquishment . . . of a known right," Johnson v. Zerbst, 304 U.S. 458, 464 (1938). By holding that the forfeiture-by-wrongdoing exception "applies only if the defendant has in mind the particular purpose of making the witness unavailable," 128 S. Ct. at 2687 (quoting 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:134, at 235 (3d ed. 2007)), *Giles* functionally transformed it into a waiver. Prior to *Giles*, two courts had read an intent element into the exception, and both utilized waiver terminology. *See* United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (holding that a defendant who acts intending to prevent testimony "waives his right"); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982) (holding that a defendant who acts intending to prevent testimony "waives his right to confrontation under the *Zerbst* standard"). *Giles*'s alteration of the doctrine's rationale further signals the conversion. Whereas *Crawford* justified forfeiture on the equitable maxim that no one should profit from his own wrongs, *see* 541 U.S. at 62 (citing Reynolds v. United States, 98 U.S. 145, 158–59 (1879)), a rationale that applies equally regardless of knowledge or intent, *Giles* noted that the doctrine was aimed at removing the incentive to silence a witness, 128 S. Ct. at 2691, a goal that cannot be attained unless the accused knows of his right.

[45] Brady v. United States, 397 U.S. 742, 748 (1970). Because "acquiescence in the loss of fundamental rights" is not presumed, Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937), the Sixth Amendment nullifies FRE 804(b)(6)'s acquiescence prong.

[46] Pointer v. Texas, 380 U.S. 400, 403 (1965).

[47] Olson v. Green, 668 F.2d 421, 429 (8th Cir. 1982); *see also* Faretta v. California, 422 U.S. 806, 819 (1975) ("[The Sixth Amendment] grants to the accused personally the right to make his defense."); *Pointer*, 380 U.S. at 406 ("[T]he confrontation guarantee of the Sixth Amendment . . . is 'to be enforced against the States . . . according to the same standards that protect [that] personal right[] against federal encroachment.'" (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964))).

[48] *See* Phillips v. Wyrick, 558 F.2d 489, 496 (8th Cir. 1977) ("A waiver of the confrontation right must be effected personally by [the] accused . . . ."); *see also* United States v. Teague, 953 F.2d 1525, 1531 (11th Cir. 1992) (noting that personal and fundamental rights may be waived only by the defendant); United States v. Joshi, 896 F.2d 1303, 1307 (11th Cir. 1990) (noting that personal waiver is required where "a fundamentally important personal right" is involved); Winters v. Cook, 489 F.2d 174, 178 (5th Cir. 1973) (similar).

[49] *See* Clemmons v. Delo, 124 F.3d 944, 956 (8th Cir. 1997) (counsel cannot waive defendant's confrontation right); *cf.* Florida v. Nixon, 543 U.S. 175, 187–88 (2004) (counsel may not, without the defendant's express consent, waive the defendant's trial rights by entering a guilty plea). An attorney is his client's agent. *See* Coleman v. Thompson, 501 U.S. 722, 753–54 (1991).

[50] Ascertaining a defendant's awareness of his rights entails speculation. Miranda v. Arizona, 384 U.S. 436, 468–69 (1966). Since courts strongly presume against the waiver of fundamental rights, Glasser v. United States, 315 U.S. 60, 70 (1942), such knowledge should not be inferred.

does not itself constitute a waiver. Yet under *Dinkins*, a defendant's confrontation right may be waived regardless of whether he performs any acts after joining the conspiracy, intelligent or otherwise.[51]

Second, even if a co-conspirator could waive a defendant's confrontation right, agency concepts wrongfully subjectivize the analysis when wrongdoing occurs after the defendant's arrest. They require a court to determine whether a defendant withdrew from his conspiracy upon arrest, since one is not answerable for post-withdrawal co-conspirator acts.[52] While arrest does not assure withdrawal,[53] it permits such a finding in some venues. In the Second Circuit, the factfinder balances "the length and location of the internment, the nature of the conspiracy, and any other available evidence."[54] Elsewhere, the factfinder has unfettered discretion.[55] Outcomes of open-ended and unguided standards depend heavily "on which factors the judge considers and how much weight he accords each of them."[56] Because unpredictability precludes "meaningful protection,"[57] vague standards offend "categorical constitutional guarantees," such as the right to confront witnesses.[58]

Conspiratorial forfeiture not only is constitutionally suspect, but also will hardly curb witness tampering, a key objective of both *Dinkins* and *Giles*.[59] Because the "second-hand rendition of [a] statement" may be "far less powerful" than the declarant's own testimony and may make acquittal more likely, it is often in the defendant's interest to silence a witness when the penalty for the crime for which he is on trial exceeds that of the misconduct,[60] especially before the witness has

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[51] *Dinkins*'s claim that acquiescence is an act, 691 F.3d at 384, contravenes the law elsewhere. *See* Aguilar Gonzalez v. Mukasey, 534 F.3d 1204, 1209 (9th Cir. 2008); United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978); Palmentere v. Campbell, 344 F.2d 234, 238 (8th Cir. 1965).

[52] *See, e.g.*, United States v. Agueci, 310 F.2d 817, 839 (2d Cir. 1962).

[53] *See, e.g.*, United States v. Flaharty, 295 F.3d 182, 192 (2d Cir. 2002).

[54] *Id.* at 193 (quoting United States v. Panebianco, 543 F.2d 447, 454 n.5 (2d Cir. 1976)) (internal quotation mark omitted).

[55] *See* United States v. West, 877 F.2d 281, 289 n.4 (4th Cir. 1989) (noting that arrest "create[s] a question" for the factfinder, without providing explicit guidance on how to devise an answer); United States v. Cohen, 516 F.2d 1358, 1364 (8th Cir. 1975) (similar).

[56] Crawford v. Washington, 541 U.S. 36, 63 (2004). *Flaharty*'s test is even less predictable than the nine-factor test rejected in *Crawford*, because most of the factors renounced by *Crawford* were susceptible to yes-or-no determinations, *see* State v. Crawford, 54 P.3d 656, 661 n.3 (Wash. 2002), while the *Flaharty* factors yield qualitative and quantitative answers.

[57] *Crawford*, 541 U.S. at 68.

[58] *Id.* at 67; *see also id.* at 67–68; Michigan v. Bryant, 131 S. Ct. 1143, 1175–76 (2011) (Scalia, J., dissenting) (accusing the majority of violating *Crawford* by announcing an unpredictable balancing test); Davis v. Washington, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (similar); 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6371.2, at 46 (Supp. 2012) (noting that *Crawford* values predictability by "seek[ing] a bright-line rule").

[59] *See Dinkins*, 691 F.3d at 384–85; *supra* note 44.

[60] Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 517 (1997); *see also* Marc McAllister, *Down but Not Out: Why* Giles *Leaves Forfeiture by Wrong-*

shared all that he knows.[61] Since "only a tiny number of parties" likely refrain from engaging in witness tampering because of the forfeiture-by-wrongdoing doctrine's penalty,[62] extending the doctrine to co-conspirator acts will do little to achieve *Dinkins*'s preventative aim.

Instead, *Dinkins* will impair the reliability of verdicts. While assurances of a statement's truthfulness do not dilute the Confrontation Clause inquiry,[63] "the central function of [a] trial" is to uncover the truth.[64] Silencing a witness is not an admission of the veracity of his testimony, which can be damaging regardless of its truth.[65] Statements admitted under forfeiture by wrongdoing are acutely unreliable. Declarants often are accomplices or co-conspirators, who have incentives to lessen their own roles by amplifying those of others,[66] or government informants trading favorable testimony for leniency for other crimes.[67] Moreover, because forfeiture applies to *all* of the absent witness's statements,[68] police officers often relay unsworn and unrecorded verbal statements "that cannot be qualified, modified, or retracted" at trial.[69] These statements are hard "to reconstruct accurately and pose risks of improper evidence-shaping and selective memory,"[70] to say nothing of the challenge of discrediting the authority-figure messenger.

While all evidence admitted under the forfeiture-by-wrongdoing doctrine poses risks of inaccuracy, the prospect of admitting false evi-

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doing Still Standing, 59 CASE W. RES. L. REV. 393, 419 (2009) (describing a scenario in which the forfeiture-by-wrongdoing doctrine can "create[] a perverse incentive" to kill a witness).

[61] John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 869 n.213 (1996).

[62] Anthony Bocchino & David Sonenshein, *Rule 804(b)(6) — The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 68 (2008).

[63] *See Crawford*, 541 U.S. at 61.

[64] Portuondo v. Agard, 529 U.S. 61, 73 (2000); *see also Crawford*, 541 U.S. at 61 ("[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence . . . .").

[65] 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, 521 (2003). The frustration associated with a wrongful accusation may make silencing a lying witness even more enticing. *Id.* Due to multiple deficiencies, FRE 403 does not adequately screen out unreliable evidence. *See id.* at 525; Kroger, *supra* note 61, at 861–62; D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 348–49 (1989).

[66] Flanagan, *supra* note 65, at 471 & nn.72–73 (collecting cases); *id.* at 521. An accomplice's incriminating statements are "presumptively unreliable," Lee v. Illinois, 476 U.S. 530, 541 (1986), and "inevitably suspect," Bruton v. United States, 391 U.S. 123, 136 (1968).

[67] Rebecca Sims Talbott, Note, *What Remains of the "Forfeited" Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-by-Wrongdoing Rule in Light of* Crawford v. Washington *and* Giles v. California, 85 N.Y.U. L. REV. 1291, 1316–17 & n.150 (2010) (citing cases).

[68] *See* Flanagan, *supra* note 65, at 524.

[69] James F. Flanagan, *We Have a "Purpose" Requirement* if *We Can Keep It*, 13 LEWIS & CLARK L. REV. 553, 565 (2009); *see also* Flanagan, *supra* note 65, at 525 & n.433.

[70] Talbott, *supra* note 67, at 1317–18; *see also* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1836 (2001) (noting that a witness may "intentionally or inadvertently" be led "to tailor his . . . statements to suit what the police already know").

dence is most troublesome in the conspiratorial forfeiture context. The Supreme Court has held that "if a witness is absent by [a defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."[71] When a defendant silences a witness himself, equitable considerations justify admission of unreliable evidence against him as a "legitimate consequence[]" of that act.[72] But under conspiratorial forfeiture, a co-conspirator may silence a witness without the help or sanction of the defendant, whose only related wrong might be his enrollment in the conspiracy. Since the loss of the accused's confrontation right does not naturally follow from that act, the equities do not normally justify that result. *Dinkins*'s adverse impact will be immense. Every circuit to decide the matter has adopted a preponderance standard for forfeiture findings,[73] and judges can rely on the challenged evidence in deciding its admissibility.[74] Courts have also read foreseeability broadly in the forfeiture context.[75] Therefore, prosecutors can readily meet their burden to admit hearsay statements under conspiratorial forfeiture.

It is natural for courts to curtail the procedural guarantees of criminal defendants when those safeguards ostensibly permit the guilty to evade conviction. Crime-ring participants make remarkably unsympathetic defendants. "But that [a] defendant should be confronted by the witnesses who appear at trial is . . . a constitutional right unqualifiedly guaranteed."[76] And the Founders enumerated certain rights precisely "to establish them as legal principles to be applied by the courts."[77] As "guardians of those rights,"[78] courts must firmly resist their erosion.

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[71] Reynolds v. United States, 98 U.S. 145, 158 (1878).

[72] *Id.*

[73] *See Dinkins*, 691 F.3d at 383; United States v. Johnson, 495 F.3d 951, 972 (8th Cir. 2007); United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001); United States v. Price, 265 F.3d 1097, 1103 (10th Cir. 2001); United States v. Dhinsa, 243 F.3d 635, 653–54 (2d Cir. 2001); United States v. White, 116 F.3d 903, 911–12 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); Steele v. Taylor, 684 F.2d 1193, 1202–03 (6th Cir. 1982).

[74] *See* United States v. Emery, 186 F.3d 921, 927 (8th Cir. 1999) (doubting the need for independent proof); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (allowing the judge to consider hearsay evidence in deciding forfeiture); *see also* Bourjaily v. United States, 483 U.S. 171, 180–81 (1987) (permitting, under FRE 104(a), consideration of co-conspirator's statements as proof of a conspiracy's existence).

[75] 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, 302 & n.106 (2011); *see also* United States v. Martinez, 476 F.3d 961, 966 (D.C. Cir. 2007) (finding conspiratorial forfeiture because the defendant "was aware that his co-conspirators were willing to engage in murder"); United States v. Carson, 455 F.3d 336, 363–64 (D.C. Cir. 2006) (holding that the lower court permissibly *inferred* an agreement to kill witnesses).

[76] Maryland v. Craig, 497 U.S. 836, 863 (1990) (Scalia, J., dissenting).

[77] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[78] 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).