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Prosecuting Criminal Conspiracies

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Klein Conspiracy: Conspiracy to Defraud the United States

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I. Background

A. Statute

It is a federal crime "if two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371 (2013). This language is the second clause (or "defraud prong") of the federal conspiracy statute that creates criminal liability for anyone who conspires "either to commit any offense against the United States, *or to defraud the United States . . . .*" *Id.* (emphasis added).

B. History and overview

Violating the defraud prong of the conspiracy statute is often called a "*Klein* Conspiracy" after a seminal decision by the United States Court of Appeals for the Second Circuit. *See United States v. Klein*, 247 F.2d 908, 921 (2d Cir. 1957) (affirming conviction for conspiracy to defraud in connection with tax evasion for whiskey sales where evidence showed concealment of income, including false statements on tax returns and in interrogatory responses). It can also be referred to as "Interference with Governmental Functions" or "Conspiracy to Defraud the United States."

The gist of the crime is an agreement to defraud the United States by interfering or obstructing lawful government functions through "deceit, craft or trickery, [and] by means that are dishonest." *United States v. Caldwell*, 989 F.2d 1056, 1058 (9th Cir. 1993) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). Violating the defraud prong may also be accomplished by conspiring "to cheat the U.S. government of money or property, or to interfere with its operations." *United States v.Whiteford*, 676 F.3d 348, 356 (3d Cir. 2012) (citing *United States v. McKee*, 506 F.3d 225, 238 (3d Cir. 2007)).

C. Elements

Generally, the Government must prove beyond a reasonable doubt that (1) the defendant entered into an agreement, (2) to obstruct a lawful function of the Government, (3) by deceitful or dishonest means, and (4) committed at least one overt act in furtherance of the conspiracy. *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996) (citing *United States v. Caldwell*, 989 F.3d 1056, 1059 (9th Cir. 1993)). As expected, there are some slight variations in the circuits in formulating these elements. *See, e.g., United States v. Spurlock*, 2007 WL 129010, at *3 (5th Cir. Jan. 12, 2007); *United States v.*

Gosselin World Wide Moving, 411 F.3d 502, 516 (4th Cir. 2005); *United States v. Douglas*, 398 F.3d 407, 413 (6th Cir. 2005); *United States v. Mellen*, 393 F.3d 175, 180-81 (D.C. Cir. 2004); *United States v. Pedroni*, 2002 WL 993573, at *1 (3d Cir. Apr. 18, 2002); *United States v. Migliaccio*, 34 F.3d 1517, 1521 (10th Cir. 1994); *United States v. Cyprian*, 23 F.3d 1189, 1202 (7th Cir. 1994); *United States v. Barker Steel Co., Inc.*, 985 F.2d 1123, 1127-28 (1st Cir. 1993); *United States v. Murphy*, 957 F.2d 550, 552 (8th Cir. 1992); *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986).

II. Charging a conspiracy to defraud

A. No need to charge substantive crime

A defendant can be charged with the defraud prong of the conspiracy statute without any charge of violating a separate substantive statute. *United States v. Douglas*, 398 F.3d 407, 412 (6th Cir. 2005) (explaining that it is unnecessary to refer to any substantive offense when charging conspiracy to defraud); *United States v. Khalife*, 106 F.3d 1300, 1303-04 (6th Cir. 1997) (citing *Caldwell*, 989 F.2d at 1059); *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988) ("[C]onspiracies to defraud need not involve the violation of a separate statute."). This is so "because there is no 'substantive' offense underlying a § 371 conspiracy to defraud" and thus the charge is independent of any substantive crime. *Khalife*, 106 F.3d at 1303.

B. Both prongs of conspiracy statute can be charged

A defendant can also be charged with *both* the offense and defraud prongs in the conspiracy statute. *United States v. Damra*, 621 F.3d 474, 506-07 (6th Cir. 2010) (declining to depart "from the general rule that the defraud and offense clauses are not mutually exclusive"); *Khalife*, 106 F.3d at 1304; *United States v. Harmas*, 974 F.2d 1262, 1266 (11th Cir. 1992) (Section 371 "is written in the disjunctive and should be interpreted as establishing two alternative means of committing a violation."). Specifically, "given conduct may be proscribed by both the offense and defraud clauses, and the fact that a particular course of conduct is chargeable under one clause does not render it immune from prosecution under the other." *United States v. Gambone*, 125 F. Supp. 2d 128, 134 (E.D. Pa. 2000) (citing *United States v. Arch Trading Co*., 987 F.2d 1087, 1092 (4th Cir. 1993)); *see also United States v. Haga*, 821 F.2d 1036, 1039 (5th Cir. 1987) (stating that offense and defraud clauses describe two different criminal offenses and therefore an indictment brought under § 371 may allege either or both offenses); *United States v. Stickle*, 355 F. Supp. 2d 1317, 1327-28 (S.D. Fla. 2004), *aff'd*, 454 F.3d 1265 (11th Cir. 2006); *United States v. Trie*, 23 F. Supp. 2d 55, 61 n.8 (D.D.C. 1998); *United States v. Dale*, 782 F. Supp. 615, 618 (D.D.C. 1991) (holding that it is not duplicitous to charge both offense and defraud clauses).

In *dicta* in *Minarik*, the Sixth Circuit deviated from this principle, describing the two clauses as "mutually exclusive," but that case has been strictly limited to its facts and is thus devoid of precedential value. *Compare United States v. Minarik*, 875 F.2d 1186, 1187 (6th Cir. 1989) (holding that the offense and defraud clauses are "mutually exclusive" and that the Government improperly charged the defendant with a conspiracy under the defraud clause), *with United States v. Tipton*, 269 F. App'x 551, 555-56 (6th Cir. 2008) ("[T]he holding of *Minarik* is confined to its facts."); *United States v. Khalife*, 106 F.3d at 1304 (explaining that "mutually exclusive" language in *Minarik* is "[d]icta"); *United States v. Kraig*, 99 F.3d 1361, 1367-68 (6th Cir. 1996) (distinguishing *Minarik*); *United States v. Sturman*, 951 F.2d 1466, 1472-74 (6th Cir. 1991) (explaining that *Minarik* was primarily concerned with confusion caused by the Government changing theories of prosecution, thus depriving defendants of proper notice); *see also Gambone*, 125 F. Supp. 2d. at 134 (discussing *Minarik* and subsequent Sixth Circuit interpretation). The Sixth Circuit subsequently held that *Minarik* does not require proceeding solely under the offense clause. *United States v. Mohney*, 949 F.2d 899, 902 (6th Cir. 1991).

C. Level of specificity required

A conspiracy to defraud charge is not unconstitutionally vague when the indictment alleges with particularity "the essential nature of the alleged fraud" and identifies the specific conduct which furthered the conspiracy. *United States v. Cueto*, 151 F.3d 620, 636 (7th Cir. 1998); *United States v. Helmsley*, 941 F.2d 71, 90-91 (2d Cir. 1991) ("What is required is only that an indictment charging a defraud clause conspiracy set forth with precision 'the essential nature of the alleged fraud.' "); *United States v. Rankin*, 870 F.2d 109, 113-14 (3d Cir. 1989) (holding that an indictment alleging that the defendants intended to impair the lawful function of the United States sufficiently charged a conspiracy to defraud the United States). As a practical matter, the statute requires generality given the wide array of proscribed conduct:

> The meaning of "conspiracy to defraud" is framed in general terms; it is impossible for Congress to anticipate, identify, and define each and every context in which an agreement to act would qualify as a conspiracy to defraud.

Cueto, 151 F.3d at 635. Indeed, courts are reluctant to parse the conspiratorial object too finely. In *United States v. Goldberg*, 105 F.3d 770 (1st Cir. 1997), for example, defendants argued that to sustain its burden of proof, the Government was required to show that *either* the coconspirators' intended to frustrate the IRS *or* that they intended to conceal some other crime. *Id.* at 773. This argument was rejected by the First Circuit because "it makes no doctrinal sense. A conspiracy can have multiple objects . . . and any agreed-upon object can be a purpose of the conspiracy and used to define its character." *Id.* at 774 (citations omitted). The court concluded that the coconspirators shared a purpose to interfere with the IRS functions by filing false income tax returns, and that evidence of the conspiracy was supported by testimony that the defendant was a sophisticated businessman who arranged for the creating and filing of false tax documents over several years. *Cf. Dennis v. United States*, 384 U.S. 855, 863 (1966) (rejecting the argument that defendants' specific purpose of filing false documents in violation of another statute precluded trial for conspiracy to defraud, noting that the indictment under the broader charge of conspiracy is permissible so long as it "properly reflects the essence of the alleged offense").

III. Proving a *Klein* conspiracy

A. Interfering or obstructing a lawful government function

The notion of impeding a government function is quite broad and extends to a wide array of deceptive conduct. The statute places no condition on the method used to defraud the United States, and it reaches any "interference or obstruction of a lawful governmental function 'by deceit, craft or treachery or at least by means that are dishonest.' " *United States v. Collins*, 78 F. 3d 1021, 1037 (6th Cir. 1996); *Harmas*, 974 F.2d at 1267. A conspiracy to defraud does not need to cause monetary loss to the United States Government. *United States v. Puerto*, 730 F.2d 627, 630 (11th Cir. 1984); *see also Goldberg*, 105 F.3d at 773 (explaining that the "purpose" element of 18 U.S.C. § 371 includes conspiracies to "interfere with government functions," rather than being limited to conspiracies that aim to "deprive the government of money or property"); *United States v. Overholt*, 307 F.3d 1231, 1247 (10th Cir. 1993) (finding an 18 U.S.C. § 371 violation when the defendants defrauded "the United States by impeding, impairing, obstructing, and defeating the lawful function of the [EPA] and [DOD]"). It "is well established that the term 'defraud' as used in section 371 is 'interpreted much more broadly than when it is used in the mail and wire fraud statutes.' " *United States v. Ballistrea*, 101 F.3d 827, 831 (2d Cir. 1996) (quoting *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988)).

The statute encompasses "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of the government," and "neither the conspiracy's goal nor the means used to achieve it need to be independently illegal." *Cueto*, 151 F.3d at 635 (citing *United States v.*

Jackson, 33 F.3d 866, 870 (7th Cir. 1994)); *United States v. Sans*, 731 F.2d 1521, 1534 (11th Cir. 1984). If the Government's evidence demonstrates that the defendant conspired to impair the function of a federal agency, no other form of injury to the Federal Government is required to establish a conspiracy to defraud the Government. *See United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995). A *Klein* conspiracy can apply to any federal agency or district court. *See, e.g., United States v. Mateos*, 623 F.3d 1350, 1370-71 (11th Cir. 2010) (Medicare); *United States v. Mellen*, 393 F.3d 175, 175 (D.C. Cir. 2004) (Department of Education); *United States v. Overholt*, 307 F.3d 1231, 1247 (10th Cir. 2002) (EPA and DOD); *United States v. Haas*, 171 F.3d 259, 270 (5th Cir. 1999) (FDA); *United States v. Mann*, 161 F.3d 840, 853 (5th Cir. 1998) (Federal Home Loan Bank Board); *Cueto*, 151 F.3d at 636 (FBI); *United States v. Ballistrea*, 101 F.3d 827, 831 (2d Cir. 1996) (FDA); *United States v. Dean*, 55 F.3d 640, 667 (D.C. Cir. 1995) (HUD); *United States v. Notch*, 939 F.2d 895, 901 (10th Cir. 1991) (IRS); *United States v. Rankin*, 870 F.2d 109, 113-14 (3d Cir. 1989) (U.S. District Court). It also extends to state government where the state is an agent of the Federal Government or otherwise administers a federal function. *United States v. Gjerde*, 110 F.3d 595, 601 (8th Cir. 1997); *United States v. Barker Steel Co.*, 985 F.2d 1123, 1136 (1st Cir. 1993).

B. Mental state

The Government must prove that the conspirators intended to harm the Federal Government, which can be established through circumstantial evidence. *United States v. Whiteford*, 676 F.3d 348, 359 (3d Cir. 2012) (citing *United States v. McKee*, 506 F.3d. 225, 238 (3d Cir. 2007)); *United States v. Mann*, 161 F.3d 840, 850-51 (5th Cir. 1998) (concluding that there was sufficient evidence that conspirators "concealed the true nature of the acquisition scheme from federal banking authorities"); *United States v. Adkinson*, 158 F.3d 1147, 1153-57 (11th Cir. 1998) (finding insufficient proof that defendants intended to impede the Government); *United States v. Licciardi*, 30 F.3d 1127, 1131 (9th Cir. 1994) (explaining that it is insufficient to prove only "dishonest means"; specific intent to defraud must be shown and the mental state requirement prevents "ostensibly innocuous conduct" from unwittingly being labeled as criminal); *United States v. Rankin*, 870 F.2d 109, 113-14 (3d Cir. 1989). To that end, a defendant may use a third party to reach and defraud the Government. *See United States v. Tanner*, 483 U.S. 107, 132 (1987); *Licciardi*, 30 F.3d at 1131. Thus, a defendant may be convicted even though "he did not contact agency personnel or submit documents to the agency." *Ballistrea*, 101 F.3d at 829. The prosecution is not required to allege or prove that the United States was the *intended* victim, but must demonstrate that the United States was the *ultimate target* of the conspiracy under the defraud clause. *Harmas*, 974 F.2d at 1268 (citing *United States v. Falcone*, 960 F.2d 988, 990 (11th Cir. 1992) (en banc)).

While conspirators must have an agreed upon objective to impede the Government, it need not be the sole or even a major objective of the conspiracy. *United States v. Gricco*, 277 F.3d 339, 348 (3d Cir. 2002). As in all conspiracy cases, an agreement can be inferred from a "concert of action" and "may exist by tacit agreement; an express or explicit agreement is not required." *Mann*, 161 F.3d at 847. *See generally Goldberg*, 105 F.3d at 774 ("Volumes could be written" on the "subtle problems in discriminating 'purpose' from 'knowledge' and in separating the objects of a conspiracy from its more remote consequences," but "where the conspirators have effectively agreed to falsify IRS documents to misstate or misattribute income, . . . the factfinder may infer a purpose to defraud the government by interfering with IRS functions.").

IV. Some recent cases

A. *United States v. Coplan*

Notwithstanding its breadth, or perhaps because of it, the *Klein* conspiracy has been subject to a number of recent attacks and refinements. The most recent reassessment of *Klein* is from its originating court, the Second Circuit. *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012), involved four partners and

employees of Ernst & Young, LLP (E & Y) and an investment advisor who appealed their convictions in connection with the development of five "tax shelters" that were sold or implemented between 1999 and 2001. The court addressed the scope of the conspiracy to defraud the United States and the sufficiency of the evidence with respect to the criminal intent of certain defendants. The court affirmed the conspiracy conviction as to two of the four defendants and reversed the conviction as to the other two.

Count One of the indictment charged each trial defendant with a conspiracy, in violation of 18 U.S.C. § 371, and described three objectives: (1) to defraud the United States by impairing the function of the IRS (*Klein* conspiracy); (2) to commit tax evasion in connection with one of the tax shelter strategies, in violation of 26 U.S.C. § 7201; and (3) to make false statements to the IRS, in violation of 18 U.S.C. § 1001. At trial, the Government attempted to show that the defendants conspired to conceal the true nature of the five tax shelters by fabricating a series of "cover stories" regarding the purported business purposes of the tax shelters, when in fact the shelters were created solely to avoid taxes.

On appeal, the defendants challenged the legal validity of the *Klein* conspiracy and the sufficiency of the conspiracy evidence. The *Coplan* court commenced its analysis by reviewing the origins and history of the *Klein* conspiracy, noting that the original federal conspiracy statute was appended to an Act amending the tax laws. *Coplan*, 703 F.3d at 59. As part of the 1875 codification, the statute was moved from the internal revenue section to the general penal provisions. The breadth of the statute was subsequently underscored in *United States v. Hirsch*, 100 U.S. 33 (1879), where the Supreme Court held that the conspiracy provision was generally applicable to *all* federal law. In so doing, the High Court described the conspiracy to defraud as "any fraud against [the United States]. It may be against the coin, or consist in cheating the government of its land or other property." *Id.* at 35. *See Coplan*, 703 F.3d at 59.

As the *Coplan* court noted, subsequent Supreme Court decisions expanded the word "defraud" as used in § 371, beyond the common law definition of "using falsity" to the more expansive definition applied by courts today. *Coplan*, 703 F.3d at 60-61 (citing *Haas v. Henkel*, 216 U.S. 462, 479 (1910)) ("[I]t is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government."); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) ("To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions . . . .").

The defendants in *Coplan* argued vigorously that the *Klein* conspiracy was "textually unfounded," and the Second Circuit was highly critical of the Government for its lack of response: "[t]here is nothing in the Government's brief recognizable as statutory interpretation—no discussion of plain meaning, legislative history, or interpretive canons. Indeed, in all 325 pages of its brief, the Government does not even quote the text of § 371." *Coplan*, 703 F.3d at 61. Notwithstanding the Government's lack of responsiveness and "infirmities in the history and deployment of the statute," the Second Circuit concluded that "it is now well established that § 371 'is not confined to fraud as that term has been defined in the common law' but reaches 'any conspiracy for the purpose of . . . obstructing or defeating the lawful function of any department of Government.' " *Id.* (quoting *Dennis v. United States*, 384 U.S. 855, 861 (1966)). The *Coplan* court concluded that "because the *Klein* doctrine derives from and falls within the scope of the law of the Circuit (itself grounded on long-lived Supreme Court decisions), we reject the defendants' challenge to the validity of that theory of criminal liability." *Id.* at 62.

Two of the four defendants also challenged the sufficiency of the evidence supporting the *Klein* conspiracy conviction. After a detailed review of the evidence, a divided court reversed the conspiracy conviction, concluding that the evidence gave equal or nearly equal support to a theory of guilt and a theory of innocence. *Id.* at 69, 72. In a spirited dissent, Judge Kearse contended that the Government had indeed met its burden of proof and established a *Klein* conspiracy: "[t]he numerous warnings and stated

goal to maintain sanitized files need not themselves have been unlawful in order to show, as they did, that Shapiro and Nissenbaum were fully aware of the efforts to conceal the tax purposes of these shelters from the IRS." *Id.* at 107.

B. *United States v. Whiteford*

A recent case out of the Third Circuit, *United States v. Whiteford*, demonstrates both the potential breadth of the *Klein* conspiracy as a prosecutorial tool, and the evidentiary challenges associated with its elements of proof. *United States v. Whiteford*, 676 F.3d 348, 351-56 (3d Cir. 2012). Curtis Whiteford and Michael Wheeler were Army Reserve officers deployed to Iraq in 2003 to work for the Coalition Provisional Authority (CPA), which was created by the Coalition Forces as the temporary governing body in Iraq. Whiteford and Wheeler, together with others, were subsequently charged in a 25-count indictment alleging a bid-rigging scheme that involved directing millions of dollars in contracts to companies owned by an American contractor engaged in construction projects in Iraq.

Count One of the indictment charged a scheme and artifice to defraud the United States. Defendants were also charged with related substantive offenses of bribery, honest services wire fraud, interstate transportation of stolen property, and possession and transportation of unregistered firearms. Following their convictions, the defendants conceded that the evidence was sufficient to show a conspiratorial agreement to defraud CPA and that overt acts were committed in furtherance of the conspiracy. However, they argued that there was insufficient evidence to prove their own participation in the conspiracy, undertaken intentionally and with knowledge of the conspiracy's objectives. The Third Circuit dispensed with this argument, noting that both defendants were convicted of numerous substantive offenses, including bribery and interstate transportation of stolen property. *Id.* at 357-59. Both defendants also received generous benefits from the contractor co-defendant, outside of the normal procurement process, which included expensive gifts, airline tickets, weapons, and liquor. *Id.*

Defendants' also challenged the sufficiency of the evidence proving that the CPA was part of the United States Government. In making this claim, the defendants asserted that any conviction under 18 U.S.C. § 371 requires that the United States be the intended target of the conspiratorial scheme. The Third Circuit responded along two lines of analysis. First, the defendants were charged under both prongs of § 371: the "offenses" prong and the "defraud" prong. Only the "defraud" prong requires that the conspirators intended to harm the Federal Government, which can be established through circumstantial evidence. *Id.* at 359 (citing *United States v. McKee*, 506 F.3d. 225, 238 (3d Cir. 2007)) (18 U.S.C. § 371 conspiracy to defraud, holding that there was sufficient proof of defendants' "advocacy of non-tax-payment to the federal government as well as overt act and omissions . . . to effectuate those goals"); *Rankin*, 870 F.2d at 113-14. Having rejected the defendants' attack on the "defraud" prong of the conspiracy, the Third Circuit held that under the "offenses" prong of § 371, the prosecution is not required to show that the United States was the intended target of the criminal activity. *Whiteford*, 676 F.3d at 360.

C. *United States v. Mubayyid*

Where the conspiracy to defraud embraces multiple unlawful objects, a jury may convict based upon evidence that the defendants agreed to any one of those objects. The conviction will be sustained even when proof at trial establishes a conspiratorial scheme similar to, but narrower in breadth and scope, than that charged in the indictment. A case in point is *United States v. Mubayyid*, 658 F.3d 35 (1st Cir. 2011), a *Klein* conspiracy, tax fraud, and false statement prosecution stemming from defendants' involvement with Care International, Inc. (Care), a charitable organization known to support and promote Islamic jihad and fighters known as "mujahideen."

The three defendants were indicted in 2005 for scheming to conceal material facts from a federal agency, for conspiring to defraud the United States, and for a series of false tax filings and false statement

offenses. The charges arose from the defendants' affiliation with Care, beginning with Care's incorporation in 1993 by defendant Muntasser. The stated purpose for Care's status as a charitable corporation was providing worldwide humanitarian aid. *Id.* at 40.

The Government's theory at trial was that Muntasser established Care in order to fraudulently obtain tax exempt status, so that contributions being used to fund mujahideen overseas could be deducted from individual tax returns as charitable donations. In furtherance of the scheme to defraud, between 1993 and 2002, each of the three defendants signed and filed at least one IRS Form 990, falsely describing the activities of Care. None of those forms revealed Care's routine activities in support of jihad, which included hosting pro-jihad speakers and selling books and tapes on the subject of jihad. Each Form 990 filed by the defendants described Care as engaging in just four program services: food distribution, cash assistance to widows and orphans, medical assistance to refugees, and grants to other welfare organizations.

Following the Government's presentation of evidence at trial, defendants moved pursuant to Rule 29 for a judgment of acquittal on several of the counts, including the conspiracy to defraud the Government, arguing that the evidence was insufficient to prove the charged crimes. The trial judge granted the motion as to obstructing the Internal Revenue Service. The judge also expressed significant reservations about the sufficiency of the evidence as to the conspiracy to defraud the Government. Following the defendants' case, and in response to their renewed Rule 29 Motion for judgment of acquittal, the district court set aside the jury's verdict as to all three defendants on Count 2, the conspiracy to defraud the Government, in violation of 18 U.S.C. § 371, and as to two of the defendants on Count 1, the scheme to conceal material facts, in violation of 18 U.S.C. § 1001. *Id.* at 46.

According to the district court, the conspiracy to defraud charged a single, unitary objective—obtaining Care's tax-exempt status in 1993 and maintaining it thereafter. *Id.* at 45. The court concluded that the Government had presented insufficient evidence that Muntasser had conspired with *anyone* prior to obtaining Care's tax-exempt status in 1993, that evidence of fraudulent tax filings to maintain Care's tax-exempt status was insufficient, and, therefore, that the Government failed to establish the requisite conspiracy. *Id.*

On appeal, the Government argued that the district court erred in its finding of insufficient evidence to support the conspiracy to defraud the Government and that any variance between evidence presented at trial and allegations contained in the indictment did not prejudice the defendants. The Government contended, and the First Circuit agreed, that there was no evidence of a constructive amendment of the superseding indictment. *Id.* at 49-52.

The court's analysis is instructive and carefully delineates the difference between a constructive amendment of an indictment and a non-fatal variance between pleadings and proof. The court began its analysis by quoting the purpose of the conspiracy to defraud as alleged in the superseding indictment:

> impeding, impairing, interfering, obstructing and defeating through deceit, craft, trickery, and dishonest means the lawful functions of the IRS in the ascertainment, assessment, and determination of whether Care qualified and should be designated as a 501(c)(3) organization in 1993 and should continue to be accorded status as a 501(c)(3) organization thereafter.

Id. at 47.

As noted, the Government argued that the conspiracy to defraud charged a single agreement with two objects: an agreement to *obtain* and *maintain* tax-exempt status for Care. The Government acknowledged that there was no evidence presented at trial of a conspiracy to *obtain* that status and no evidence of any conspiracy to defraud in or about 1993 as alleged in the indictment. The evidence presented at trial proved a narrower conspiracy—a conspiracy to *maintain* tax-exempt status for Care through fraudulent tax filings. The conspiracy to defraud consisted of alleged acts clearly set forth in the

indictment, and any variance between pleadings and proof amounted to no more than a non-prejudicial evidentiary variance. *Id.* at 48.

In response, the defendants offered three rejoinders. First, they insisted that a variance is permissible only where the indictment is narrowed such that it does not alter an "essential element" of the charged offense. Second, the defendants urged that even if the variance were otherwise permissible, it was prejudicial to their defense, requiring the appellate court to affirm the district court. Finally, defendants claimed that the Government failed to produce sufficient evidence of a narrower conspiracy among the defendants.

The First Circuit began its careful analysis by noting the general principle that "a defendant can hardly be heard to complain when the government's proof at trial establishes 'a scheme similar to but somewhat narrower in breadth and malignity than that charged in the indictment.' " *Id.* at 48-49 (quoting *United States v. Mueffelman*, 470 F.3d 33, 38 (1st Cir. 2006)). The court proceeded to reject defendants' contention that the Government's evidence at trial—narrower than the allegations in the indictment—amounted to a constructive amendment of the indictment, noting that case law did not support defendants' theory. *Id.* at 52-53 (citing *United States v. Celestin*, 612 F.3d 14, 25 & n.4 (1st Cir. 2010)); *United States v. Dowdell*, 595 F.3d 50, 68 (1st Cir. 2010); *United States v. Bello-Perez*, 977 F.2d 664, 669 (1st Cir. 1992).

The First Circuit reversed the district court holding that the conspiracy to defraud contained one solitary purpose, such that the Government's narrower evidence at trial constructively amended the indictment. Of particular significance to the court in its analysis was the actual wording of Count 2:

> All of the material in the "manner and means" portion of the indictment, along with the overt acts alleged, is the specification of the ways in which the defendants sought to accomplish the conspiracy. Given the sufficiency of the more broadly stated purpose of the conspiracy and the detailed specification of conduct in its "manner and means" portion, the language at issue could have been omitted altogether without affecting the sufficiency of the indictment.

Id. at 53. In other words, the Government's charging language provided sufficient notice to the defendants, even when the actual evidence at trial was narrower than the more broadly stated purpose of the conspiracy to defraud, contained in the indictment.

The court made short work of defendants' argument that the narrower evidence of a conspiracy to defraud deprived them of their defense. On appeal, defendants claimed that they tailored their defense strategy to their expectation that the Government was obligated to prove the entire conspiracy to defraud as charged. The court opined that the defendants' claim of prejudice "rests uneasily on their misunderstanding about the legal sufficiency of the government's narrower proof." *Id.* at 54. The court concluded that the defendants' misunderstanding could not sustain a claim of prejudice. *Id.* at 54-56.

Finally, the First Circuit addressed the issue of whether in fact the Government proved the narrower conspiracy to defraud as urged by the prosecution. The court began by noting that to prove a *Klein* conspiracy, the Government was required to prove "both 'an *agreement* whose purpose was to *impede the IRS* (the conspiracy)' " and the knowing participation of each defendant in the conspiracy. *Id.* at 57 (emphasis in original) (citing in *United States v. Adkinson*, 158 F.3d 1147, 1154 (11th Cir. 1998)). Evidence presented at trial showed that the defendants, through a series of fraudulent filings, intentionally concealed from the IRS the fact that Care's activities substantially promoted non-charitable activities, including financial support of the mujahideen and promotion of jihad. The consistency of the misrepresentations by each of the defendants over a span of nearly a decade, combined with defendants' failure to disclose precisely those activities most likely to jeopardize Care's tax-exempt status, provided strong circumstantial evidence of criminal intent and the implicit operation of a conspiracy to defraud. *Id.* at 58-59. In addition, the evidence at trial revealed that the defendants were well-known to each other and

succeeded each other as authority figures in a small, closely-knit organization. In conclusion, the First Circuit emphasized that the significance of the defendants' misrepresentations to the IRS, combined with "the single-mindedness of Care's apparent mission," established a conspiracy to fraudulently maintain Care's tax-exempt status. *Id.* at 60. The court proceeded to reverse the district court's judgment of acquittal and reinstated the jury's verdict as to the *Klein* conspiracy. *Id.* at 74.

V. Conclusion

The *Klein* conspiracy is clearly an effective tool that prosecutors should consider when assessing the appropriate criminal charges to address fraudulent conduct. Charging the conspiracy to defraud prong of § 371 provides an alternative means of establishing the conspiracy. It also enables the prosecution to develop a theory of fraudulent conduct which is broader than common law fraud or fraud as defined in the mail and wire fraud statutes.

The *Klein* conspiracy also affords prosecutors the ability to address a wide array of frauds that ultimately obstruct the Federal Government, regardless of whether there was a financial loss and regardless of whether an individual defendant had direct contact with a federal agency.

However, the conspiracy to defraud prong is not without its limitations and courts have expressed concerns about its scope. *See Mubayyid*, 658 F.3d at 59 ("We are of course always wary of the dangers associated with a § 371 conspiracy.") (quoting *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997) ("[T]he defraud clause of section 371 has a special capacity for abuse because of the vagueness of the concept of interfering with a proper government function.")). In light of the concerns raised in *Coplan*, *Whiteford*, and *Mubayyid*, prosecutors would be well advised to consider charging both prongs of § 371 when applicable, and to draft the object (or objects) of the conspiracy to defraud with prospective trial evidence clearly in mind.

Finally, the *Klein* conspiracy—like all conspiracy statutes—enables prosecutors to develop and present the full panoply of evidence of an intended fraud. In other words, it provides a means for prosecutors to "tell the story" of criminal conduct in such a way that juries can decide the truth of the matter. ❖

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Drug Conspiracies: The Confrontation Clause and Federal Evidence Rule 801(d)(2)(E)

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I. Introduction

Combating illegal drug manufacturing and trafficking networks is a core priority for the Department of Justice. The Department of Justice utilizes the Organized Crime Drug Enforcement Task Force (OCDETF) to focus on large-scale drug trafficking organizations, but every Assistant United States Attorney (AUSA) who prosecutes narcotics cases within the criminal sections of their United States Attorney's office (USAO) contributes to this important effort. Most AUSAs start their careers as federal prosecutors in the general crimes units of their USAOs. While in the trenches, narcotics cases can form a large part of the line AUSAs' caseloads.

Regardless of the type of controlled substance or size of the drug trafficking organization, at the most basic level a drug trafficking organization is merely a conspiracy on a larger scale. Federal prosecutors utilize 21 U.S.C. § 846 to prosecute conspiracies for drug trafficking offenses. According to the Executive Office for United States Attorneys, USAOs charged § 846 in 5,658 cases in FY 2012. These cases represent 40 percent of the 13,998 narcotics cases filed in FY 2012. Why indict a federal drug conspiracy? AUSAs have great flexibility in proving a conspiracy case. For example, the evidence presented at trial defines the conspiracy, not the dates in the indictment. The elements required to establish a violation of § 846 vary slightly depending on the circuit, but in general the Government must prove that: (1) two or more persons, directly or indirectly, reached an agreement to violate the controlled substances act; (2) those persons knew of the unlawful purpose of the agreement; (3) the defendant joined in the agreement willfully; and (4) the conspiracy involved a certain type and quantity of controlled substance. *See United States v. Turner*, 319 F.3d 716, 721-23 (5th Cir. 2003); *United States v. Gamez-Gonzalez*, 319 F.3d 695, 700 (5th Cir. 2003); *United States v. Dumes*, 313 F.3d 372, 382 (7th Cir. 2002). If one overt act in furtherance of the conspiracy occurred in your district, you can indict a conspiracy operating anywhere in the country. 18 U.S.C. § 3237(a) (2013); *United States v. Santiago*, 83 F.3d 20, 25 (1st Cir. 1996).

Federal prosecutors may employ Federal Rule of Evidence 801(d)(2)(E) to prove up a violation of § 846 through the use of statements by coconspirators who do not testify at trial. This allows a prosecutor to "tell the story" of a criminal conspiracy through witnesses who describe exactly what the coconspirators said in furtherance of the criminal enterprise. Although commonly referred to as the coconspirator exception to the hearsay rule, the Federal Rules of Evidence do not consider this hearsay. *See* FED. R. EVID. 801(d). Consequently, every federal prosecutor who works narcotics cases must have a basic understanding of Federal Evidence Rule 801(d)(2)(E).

On its face, the Confrontation Clause of the Sixth Amendment of the United States Constitution appears to provide a barrier to the use of Rule 801(d)(2)(E) in this manner. The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

witnesses against him." U.S. CONST. amend. VI. Taken at face value, a tension appears to exist between Rule 801(d)(2)(E) and the Confrontation Clause of the Sixth Amendment. In practice, the Confrontation Clause of the Sixth Amendment does not interfere with a prosecutor's ability to use Rule 801(d)(2)(E) in many circumstances. This article provides an overview of Rule 801(d)(2)(E), explores the Supreme Court and recent courts of appeals' interpretations of the Confrontation Clause, and reviews two drug conspiracy cases where Rule 801(d)(2)(E) and the Confrontation Clause appeared to clash and produce unsettling results.

II. In the beginning: Rule 801(d)(2)(E)

Long before the development of the Federal Rules of Evidence, the Supreme Court ruled that the Government could introduce coconspirator statements from conspirators who did not testify. *United States v. Gooding*, 25 U.S. 460, 468-69 (1827) (admitting into evidence, through the coconspirator, the declarations of defendant who illegally engaged in the slave trade). One hundred and sixty years after *United States v. Gooding*, the Supreme Court decided the case of *Bourjaily v. United States*, 483 U.S. 171 (1987).

In *Bourjaily*, the Court upheld the admission of coconspirator statements made to an FBI informant and that the Government had introduced during a preliminary inquiry. *Id.* at 184. In reference to Rule 801(2)(d)(E), the Court noted that it has "repeatedly reaffirmed the exception as accepted practice." *Id.* at 183 (citing *Glasser v. United States*, 315 U.S. 60, 73-75 (1942); *United States v. Nixon*, 418 U.S. 683, 700-01 (1974)). "To the extent that these cases have not been superseded by the Federal Rules of Evidence, they demonstrate that the co-conspirator exception to the hearsay rule is steeped in our jurisprudence." *Bourjaily*, 483 U.S. at 183. Prior to *Bourjaily*, the Government could not use the coconspirator statement to "lift itself by its own bootstraps to the level of competent evidence." *Glasser*, 315 U.S. at 75 (coconspirator statements were admissible against a defendant only if there was "proof aliunde"). However, in *Bourjaily*, the Court determined that Congress's enactment of the Federal Rules of Evidence in 1975 allowed courts to consider hearsay when determining the admissibility of coconspirator statements, including the statement itself. *Bourjaily*, 483 U.S. at 187-89. *See* FED. R. EVID. 104(a) (preliminary questions concerning the admissibility of evidence shall be determined by the court and the court, in making its determination, is not bound by the rules of evidence, except those with respect to privileges).

A 1997 Amendment to Rule 801(d)(2)(E) incorporated the *Bourjaily* decision into this rule. The 1997 Amendment also resolved an issue that the Court left open—whether the coconspirator statement can by itself establish the conspiracy or if additional evidence is required. *See* FED. R. EVID. 801(d)(2)(E). The Notes of the Advisory Committee on Rules unequivocally state that the trial court must consider additional information such as "the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question." *Id.* The Advisory Committee on Rules found that "[e]very court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement." *Id.*

Before a prosecutor may introduce coconspirator statements, the trial court requires the Government to establish by a preponderance of the evidence both the existence of a conspiracy and that the statements were made in furtherance of that conspiracy. *Bourjaily*, 483 U.S. at 175-76; *United States v. Patterson*, 2013 WL 1365720, at *6 (10th Cir. Apr. 5, 2013); *United States v. Weaver*, 507 F.3d 178, 181-82 (3d Cir. 2007); *United States v. Ruiz*, 987 F.2d 243, 246-47 (5th Cir. 1993); *United States v. Breitkreutz*, 977 F.2d 214, 218 (6th Cir. 1992) ("There are three foundational prerequisites which must be established to admit a coconspirator's statements under Rule 801(d)(2)(E): that a conspiracy existed; that defendant was a member of the conspiracy; and that the declarant's statement was made during the course and in furtherance of the conspiracy."); *United States v. Martinez de Ortiz*, 907 F.2d 629, 631-32 (7th Cir.

1990). A statement does not actually have to successfully further the conspiracy, but need only promote it. *United States v. Weaver*, 507 F.3d 178, 182 (3d Cir. 2007). The Government cannot admit coconspirator statements after the conspiracy has concluded. *Bruton v. United States*, 391 U.S. 123, 124, 135-36 (1968) (an admission of a nontestifying defendant made after an arrest violated the defendant's Confrontation Clause rights); *Krulewitch v. United States*, 336 U.S. 440, 444 (1949) (denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved).

A pretrial hearing to determine admissibility is not required in all cases. *See United States v. Rivera-Donate*, 682 F.3d 120, 131 (1st Cir. 2012); *United States v. Johnson*, 535 F.3d 892, 897 (8th Cir. 2008); *United States v. Ruiz*, 987 F.2d 243, 246 (5th Cir. 1993); *United States v. Blevins*, 960 F.2d 1252, 1256 (4th Cir. 1992). The First Circuit requires a district court faced with a challenge to the admission of a coconspirator's statement to provisionally admit the statement and then wait until the end of the trial to determine admissibility. *United States v. Vazquez-Botet*, 532 F.3d 37, 65 (1st Cir. 2008); *United States v. Colon-Diaz*, 521 F.3d 29, 35 (1st Cir. 2008).

III. Confrontation Clause and Rule 801(d)(2)(E)

A. Historical interplay between the Confrontation Clause and Rule 801(d)(2)(E)

The Confrontation Clause of the Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. IV. Defense counsel have argued that the admission of out-of-court coconspirator statements by nontestifying co-defendants violates the Confrontation Clause of the Sixth Amendment enunciated in *Bruton v. United States*, 391 U.S. 123 (1968). *See United States v. Singh*, 494 F.3d 653, 658-59 (8th Cir 2007). The Supreme Court held in *Bruton* that the admission of an incriminating statement by a nontestifying co-defendant at a joint trial violates the defendant's rights under the Confrontation Clause. *Bruton*, 391 U.S. at 137. In *Bruton*, a postal inspector, during the course of questioning both defendants in a St. Louis jail, obtained a confession from one defendant that both defendants had committed the armed robbery. *Id.* at 124. The confession in *Bruton* clearly occurred after the commission of the crime. *See id.* In *Singh*, the Eighth Circuit concluded that the Supreme Court's ruling in *Bruton* does not preclude the admission of otherwise admissible statements by a coconspirator under Rule 801(d)(2)(E) because statements made by a coconspirator in furtherance of the conspiracy do not happen after the fact, as in *Bruton*. *Singh*, 494 F.3d at 658. Prosecutors need to clarify that the Court in *Bruton* prohibited the admission of a nontestifying co-defendant's co-implicating confession. Subsequent case law has made clear that a prosecutor can avoid *Bruton* problems by redacting the statement to remove references to the defendant. *See Richardson v. Marsh*, 481 U.S. 200, 208-11 (1987); *United States v. Lighty*, 616 F.3d 321, 350 (4th Cir. 2010).

Moreover, the "Confrontation Clause does not require a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying [unindicted] co-conspirator." *United States v. Inadi*, 475 U.S. 387, 387 (1986). In *Inadi*, the Government sought to admit recorded statements made to and by an unindicted coconspirator in a methamphetamine conspiracy. *Id.* at 390. At the district court's request, the Government subpoenaed the witness, but he did not show for trial. *Id.* The Supreme Court reversed the Third Circuit, which had ruled that the Confrontation Clause established an independent requirement that the Government as a condition to admission of any out-of-court statements must show the declarant's unavailability. *Id.* The Court reasoned that the unavailability rule did not apply to "co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Id.* at 395.

The Supreme Court in *Bourjaily* specifically rejected the argument that the Confrontation Clause bars all coconspirator statements under Rule 801(d)(2)(E). *Bourjaily*, 483 U.S. at 182 ("A literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.' " (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980))). In evaluating the coconspirator case law and relying in part on *Ohio v. Roberts*, the *Bourjaily* court upheld the Sixth Circuit's finding that the admission of a coconspirator's statement did not violate the petitioner's rights under the Confrontation Clause of the Sixth Amendment. *Bourjaily*, 483 U.S. at 182. In *Roberts*, the Supreme Court formulated a reliability test to determine whether the Government could admit such statements under the Confrontation Clause. *Roberts*, 448 U.S. at 66. The Court found that once a trial court established that a statement fell within Rule 801(d)(2)(E), the trial court did not have to put the coconspirator statement through the Confrontation Clause reliability test. *Id.* Echoing the *Inadi* decision, Chief Justice Rehnquist wrote the *Bourjaily* majority opinion,

> We think that these cases demonstrate that co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion. Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E).

Bourjaily, 483 U.S. at 183-84.

In short, the Supreme Court had concluded that the Rule 801(d)(2)(E) test provided the necessary guarantees of trustworthiness of the statement. In 2004, the Supreme Court decided *Crawford v. Washington* and potentially opened up a small window where the Confrontation Clause may prohibit the admission of coconspirator statements otherwise admissible under Rule 801(d)(2)(E).

B. *Crawford v. Washington*

The Supreme Court arguably abrogated *Roberts* in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court barred the admissibility of testimonial out-of-court witness statements under the Confrontation Clause unless the witnesses are unavailable and the defendants had a prior opportunity to cross-examine them, regardless of whether such statements are deemed reliable by the court. *Id*. at 68. In *Crawford*, the Government introduced recorded statements made by the defendant's wife in a police station after receiving the Miranda warning. *Id.* at 38-39. The state trial court admitted these statements under the *Roberts* reliability test. *Id.* at 41. The Supreme Court found that admitting the defendant's wife's statements violated the defendant's Sixth Amendment rights. Writing for the majority, Justice Scalia wrote:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Id. at 68. *Crawford* cited to the petitioner's brief for examples of inadmissible testimonial statements, but it concluded this reference with a vague reasonable expectation phrase:

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar

> pretrial statements that declarants would reasonably expect to be used prosecutorially . . . ."

Id. at 51. The Supreme Court also cited to the FBI informant fact pattern in *Bourjaily* as an example of admissible nontestimonial statements. *Id.* at 58. By leaving the interpretation of "testimonial" to the trial courts, the Supreme Court left open the possibility that district courts could now bar previously admitted coconspirator statements under Rule 801(d)(2)(E). Justice Rehnquist, who concurred in the judgment in *Crawford* but dissented in the Court's overruling of *Roberts*, expressed prophetic concern that the Court's ruling had unnecessarily created uncertainty at the trial court level:

> [T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 75-76. Although the Supreme Court in Crawford referenced *Bourjaily* as an example of the proper admission of nontestimonial statements, the *Crawford* decision may have called into doubt the holding of *Bourjaily* that addressed whether the Confrontation Clause required trial courts to undergo a Confrontation clause analysis on coconspirators statements that satisfied the requirements of Rule 801(d)(2)(E). Did *Crawford* overrule *Bourjaily* on this point of law? Would it change how trial courts would admit statements under Rule 801(d)(2)(E) in drug conspiracy cases?

IV. Left in the dark by *Crawford*

"Following the decision in Crawford, the courts of appeals have struggled with the definition of 'testimonial hearsay.' " *United States v. Hendricks*, 395 F.3d 173, 180 (3d Cir. 2005). In *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), the Sixth Circuit reviewed *Crawford* and delved into the competing theories of what constitutes a testimonial statement. In *Cromer*, the Sixth Circuit held that statements made by a confidential informant constituted testimonial statements. *Id.* at 675. In reaching this conclusion, the Court considered writings by two constitutional scholars, Professor Akhil Reed Amar of Yale Law School and Professor Richard Friedman of the University of Michigan Law School. According to Professor Amar, testimonial statements under the Confrontation Clause included formalized statements such as, "affidavits, depositions, video tapes, and the like." *Id.* (quoting Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (proposing that the Confrontation Clause "encompasses only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like")). Professor Friedman on the other hand, believed in using a broader reasonable person test to interpret the term "testimonial." *Cromer*, 389 F.3d at 673 (citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1240-41 (2002)). The Sixth Circuit found that Friedman's reasonable person test best fit the underlying reasoning in *Crawford* and would prevent witnesses from testifying in informal ways that avoid confrontation. *Id.* at 674.

Other circuits have followed the standard set by the Sixth Circuit in *Cromer* and utilized a reasonable person test to determine whether statements qualify as testimonial. *United States v. Rivera-Donate*, 682 F.3d 120, 132 n.11 (1st Cir. 2012) ("[S]tatements made in furtherance of the conspiracy, or casual remarks not reasonably expected to be available for use at a later trial" do not constitute testimonial statements within the framework of *Crawford*); *United States v. Gilbertson*, 435 F.3d 790, 795-96 (7th Cir. 2006) (adopting reasonable person test where the declarants have an eye toward criminal prosecution); *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) ("We hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime."); *United States v. Hendricks*, 395 F.3d 173, 183 n.9 (3d Cir. 2005) (finding coconspirator statements caught on a taping device

nontestimonial because they were made unwittingly); *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) ("*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."); *cf. United States v. Singh*, 494 F.3d 653, 658 (8th Cir. 2007) (holding that coconspirator statements are generally nontestimonial and therefore do not violate the Confrontation Clause as interpreted by the Supreme Court in *Crawford*).

Generally speaking, courts have found that statements to other conspirators, undercover agents, confidential informants, acquaintances, and within business records are admissible under Rule 801(d)(2)(E) and nontestimonial under *Crawford*. *United States v. Patterson*, 2013 WL 1365720, at *8 (10th Cir. Apr. 5, 2013) (citing *Crawford* for the proposition that statements made between coconspirators in furtherance of a conspiracy are "nontestimonial and present no Sixth Amendment problem"); *United States v. Lee*, 374 F.3d 637, 644 (8th Cir. 2004) (finding that casual statements to acquaintances, statements to a coconspirator, and business records are not testimonial); *United States v. Reyes*, 362 F.3d 536, 540-41 (8th Cir. 2004) (finding statements made by a coconspirator to undercover agents nontestimonial and admissible); *cf. United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004) (holding that statements made by a confidential informant constituted testimonial statements). In brief, *Crawford* did not overrule *Bourjaily* within the context of nontestimonial statements, but it did create a *Cromer* situation where the Sixth Circuit referred to publications by two law professors to determine the definition of a testimonial statement under the Confrontation Clause. The language of *Crawford* and the objective belief of a reasonable person test indicate that the Government may face difficulty in admitting into evidence coconspirator statements made to law enforcement officers not working in an undercover capacity.

V. Law enforcement interrogations

A. Background

In *Crawford*, Justice Scalia specifically identified "police interrogations" as testimonial evidence barred by the Confrontation Clause. Law enforcement has interaction with citizens outside of the police station every day. In the federal context, agencies such as the Border Patrol, United States Park Police, and the United States Marshals have constant interaction with citizens on the border, in federal parks, and around federal property, to name just a few situations. OCDETF cases also involve local task-force officers and uniformed state highway patrols who interdict narcotic shipments. The United States Postal Investigative Service conducts controlled deliveries with uniformed delivery persons who may elicit statements. The Supreme Court has found that, within the province of the Fourth Amendment, mere police questioning and asking for an identification, even when officers have no basis for suspecting a particular individual, does not constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 434, 437 (1991) (confirming prior case law that established that "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required"); *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). However, in these situations, does every conversation with a uniformed law enforcement officer constitute a police interrogation under *Crawford*?

In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court addressed two fact patterns that call into question what constitute a police interrogation within the context of *Crawford* and the Sixth Amendment. In *Davis*, the Court did not strictly define police interrogations within the Confrontation Clause context, but it did set some parameters. Justice Scalia writing for the majority wrote,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

> circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

Applying this standard, the *Davis* Court evaluated two sets of statements. The first set of statements occurred in response to questioning by a 911 phone operator during an ongoing emergency. *Id.* at 817-18. The Supreme Court held that responses to a 911 operator technically met the definition of police interrogation, but did not constitute testimonial statements within the province of the Confrontation Clause because they described an ongoing emergency rather than events which happened in the past. *Id.* at 827.

The Court also evaluated statements made in the companion case, *Hammon v. Indiana*, where the state introduced testimony from a responding officer who interviewed the victim of a battery at her house the night of the incident but who later failed to show up for trial. In contrast to *Davis*, the Court found that the statements in *Hammon* resulted from interrogation proceedings similar to those in *Crawford* and prohibited their admission as testimonial statements. *Id.* at 829-30. The *Davis* Court focused on the fact that the *Hammon* witness answered questions in an isolated setting and responded to questions about past events. *Id.* at 827-28. Therefore, the Court found that the *Hammon* statements mirrored *Crawford* as "an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." *Id.* at 830. Although the statements examined in this case do not fall under Rule 801(d)(2)(E), *Davis* implicates the admissibility of coconspirator statements made to law enforcement within the context of this rule because it addresses when a declarant would "objectively foresee that his statement might be used in the investigation or prosecution of a crime." *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005). The timing of the witness statements is a critical element in the analysis. The statements in *Hammon* occurred after the crime, whereas in *Davis* the statements occurred during the incident in question. By finding the statements in *Hammon* testimonial, the Court also found that police interrogations, within the context of *Crawford*, may include those outside of the formal setting of a police station.

B. *United States v. Baines*

A case from the District of New Mexico demonstrates that *Crawford* left the door open for an intrepid defense counsel and an adventurous trial court to interpret testimonial coconspirator statements made to law enforcement and prohibit the admission of those statements even though the evidence indicated the statements were made in furtherance of the conspiracy.

In *United States v. Baines*, 486 F. Supp. 2d 1288, 1300 (D.N.M. 2007), the district court barred the admission of coconspirator statements under *Crawford*, despite finding them admissible under Rule 801(d)(2)(E). In *Baines*, the defendants, traveling in separate cars with Pennsylvania license plates but in a caravan formation, stopped at a routine Border Patrol checkpoint on Interstate 25 in Dona Ana County, New Mexico. Dona Ana County is located in the south-central part of New Mexico and borders both Texas and Mexico. Interstate 25 runs north/south between the United States and Mexico. Border Patrol Agent Jose Meza questioned the occupants of the first car, Fuller and Campbell, regarding their citizenship and travel plans. Fuller responded that they were traveling from the Grand Canyon to Pennsylvania, which the agent found odd because of the checkpoint's location south of the Grand Canyon and on a north/south highway. Agent Meza received permission to search the trunk of the car and smelled marijuana, but did not locate any narcotics. During the initial search, Agent Meza noticed a minivan with Pennsylvania plates behind Fuller's vehicle. Agent Meza asked Fuller about the second car and Fuller responded that they were traveling together and said, "yes, we're friends." *Id.* at 1291. After sending the first car to a secondary inspection point, Agent Meza spoke with the passengers of the minivan, Johnson and defendant Baines. Agent Meza inquired into their citizenship and asked if they were traveling with

Fuller's car. Johnson and the defendant indicated affirmatively. A subsequent canine inspection of Fuller's car at the secondary point revealed 50 pounds of marijuana and two loaded .9-mm. pistols.

The court held a pretrial hearing after the defendant filed a motion contesting the admission of the statements made by coconspirators Johnson and Fuller to Agent Meza. *Id.* at 1293-94. The court conducted the standard Rule 801(d)(2)(E) three-part analysis under Tenth Circuit precedent and *Bourjaily*. *Id.* Using the coconspirator statements and other evidence, the Government established that the defendants traveled together, carried large quantities of narcotics concealed in Fuller's car, had rented the cars together, started their trip together, and had prior relationships with one another. The court found by a preponderance of the evidence that a conspiracy existed, that the declarants and the defendants were both members of the conspiracy, and that the statements were made in furtherance of the conspiracy. *Id.* The court specifically determined that both Fuller's and Johnson's statements to Agent Meza occurred prior to the discovery of the marijuana and the failure of the conspiracy. *Id.* at 1296. Therefore, the Fuller and Johnson statements to Agent Meza were admissible under Rule 801(d)(2)(E). *Id.* at 1293-97.

The district court then conducted a Confrontation Clause analysis utilizing *Crawford*, *Davis*, and the Tenth Circuit reasonable person test articulated in *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005). The court held that the Confrontation Clause directly superseded Rule 801(d)(2)(E) and that the *Bourjaily* Court's reliance on *Roberts* made the *Bourjaily* decision open to question on whether it applied to the circumstances in this case. *Id.* Finding that "a reasonable person in the position of Fuller and Johnson would objectively foresee that his or her statement might be used in the investigation or prosecution of a crime," the court concluded that Agent Meza's questioning of Fuller and Johnson at the checkpoint while wearing a uniform constituted a police interrogation. *Id.* at 1298. When making this determination, the court cited to cases where other courts had prohibited the admission of statements that arose from custodial interrogations of detained individuals occurring after the commission of the crime. *Id.* at 1299 (citing *United States v. Vieyra-Vazquez*, 205 F. App'x 688, 691 (10th Cir. 2006); *United States v. Gonzalez-Marichal*, 317 F. Supp. 2d 1200, 1202 (S.D. Cal. 2004)).

This case follows the trend set by *Davis*, where the Supreme Court expanded the definition of a police interrogation beyond the formal police station inquiry. Both *Baines* and *Davis* based their reasoning on cases of custodial interrogation within a formal police station setting. However, *Baines* expands on the holding in *Davis* to include circumstances where law enforcement questions defendants while they are in the process of committing the crime. Arguably, this decision falls outside of *Crawford* and *Davis*, yet the ambiguity created by the Supreme Court and the reasonable expectation test of the Tenth Circuit created a small window that allowed for an expansive interpretation of testimonial statements, and consequently a more restrictive use of Rule 801(d)(2)(E). Perhaps *Baines* represents an outlier case rather than a trend?

C. *United States v. Sutherland*

An unpublished case from the District of South Dakota provides a similar case study to *Baines*, and indicates a possible trend of a broader application of the Confrontation Clause within the context of Rule 801(d)(2)(E) statements arising from law enforcement encounters. In *United States v. Sutherland*, 2008 WL 4858322, at *1 (D.S.D. Nov. 10, 2008), a uniformed state trooper asked the co-defendant questions during a traffic stop. Even though the court did not quite grasp which statements the Government planned to admit, the court determined that all statements made to law enforcement both "during and after the traffic stop" did not fall within Rule 801(d)(2)(E) because the "conspiracy's objectives—to transport the drugs—had failed." *Id.* at *3. The court does not clarify why the conspiracy's objectives had failed during the traffic stop. However, in its analysis, the court cited to CHRISTOPHER B. MUELLER & LAIR C. KIRPATRICK, FEDERAL EVIDENCE § 8:61 (2008) for the proposition that when a conspirator knowingly speaks to law enforcement agents, "what he says almost always fails the furtherance requirement." *Id.* This interpretation is distinguished from *Baines*, where the court found that the conspiracy continued until law enforcement actually discovered the narcotics. *Baines*, 486 F. Supp. 2d

at 1296. The *Sutherland* court also found that "[e]ven if . . . statements made to law enforcement fall within the limits of Rule 801(d)(2)(E), the Court still would find them to be inadmissible under *Crawford v. Washington*, since such statements are testimonial . . . ." *Sutherland*, 2008 WL 4858322, at *4. In a footnote, the court distinguished *United States v. Singh*, 494 F.3d 653 (8th Cir. 2007), and other Eighth Circuit cases by noting that those holdings do not control because they address coconspirator statements "to other conspirators, confidential informants, or undercover officers . . . ." *Id.* at *4 n.1. Notably, the district court in *Sutherland* did not need to decide admissibility of the statements under *Crawford*, but did so regardless. Although this case has no precedential authority, it still illustrates a possible gap in the law where a district court may prohibit the admission of statements made to law enforcement even though they were made in furtherance of the conspiracy. The Court here did not make any distinction between "during and after the traffic stop" and thus left that question open.

VI. What's next?

Moving forward, the question remains whether AUSAs can introduce under *Crawford* out-of-court coconspirator statements made to uniformed law enforcement during and in furtherance of a drug conspiracy. For example, can an AUSA introduce "concealment statements" where a coconspirator lies to law enforcement to promote the conspiracy? By not defining testimonial in *Crawford*, the courts of appeals have adopted a reasonable person test that appears to have left open a small window where, within the context of a police encounter, a court may find the admission of those statements barred by the Confrontation Clause. Perhaps *Baines* and *Sutherland* represent outliers. Prosecutors should continue to argue that statements made in furtherance of the conspiracy are by nature nontestimonial under *Crawford*. The bulk of the case law supports this argument, and the underlining reasoning articulated by the Supreme Court in *Inadi*, that these "statements provide evidence of the conspiracy's context that cannot be replicated," still holds true. Additionally, using *Davis*, prosecutors could argue that the coconspirator statements made to law enforcement occurred in an emergency setting. Either way, USAOs on the southwest border that prosecute large numbers of drug conspiracy cases and who plan on using statements from Border Patrol traffic stops should take seriously the development of *Crawford*'s progeny and the impact it may have on their future cases. Federal conspiracy cases that involve state and local uniformed law enforcement may also feel an unsettling impact delivered by courts that use a similar analysis to *Baines* and *Sutherland*. ❖

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Conspiracy and Firearms—Will Firearm Conspiracy Charges Add Value to Federal Prosecutions?

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Firearm prosecutions typically rely on possession or use of a firearm by a single defendant. Title 18, § 922(g) and (n) is used to prosecute felons in possession and other individuals who possess firearms based on the defendant's status as a prohibited person. *See* 18 U.S.C. § 922(g), (n) (2013). However, conspiracy statutes may prove to be a valuable tool in prosecuting defendants who either possess firearms or act in concert with others who either possess or use firearms in the commission of offenses. This article focuses on two such conspiracy tools— the federal firearm conspiracy statute and the *Klein* conspiracy.

I. The firearms conspiracy statute—18 U.S.C. § 924(o)

What do pirates on the high seas, convenience store robbers in Hampton, Virginia, members of an Outlaw Motorcycle Club operating with a chapter in Dayton, Ohio, and drug stash-house thieves in Miami, Florida, all have in common? All of these defendants were successfully prosecuted under 18 U.S.C. § 924(o) (among other offenses) for conspiracy to violate 18 U.S.C. § 924(c). While most prosecutors consider conspiracy charges and substantive § 924(c) charges, conspiracy to violate § 924(c) may well prove to be a valuable tool to combat a variety of charges where firearm use is integral to the criminal conduct.

What is § 924(o)? Section 924(o) reads:

> A person who conspires to commit an offense under [18 U.S.C. § 924(c)] shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

18 U.S.C. § 924(o) (2013).

This statute was passed as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796 (1994). As its plain language indicates, it prohibits conspiracy to violate § 924(c), which in turn prohibits a person from either "use[ing] or carr[ying]" a firearm during and in relation to a crime of violence or a drug trafficking crime or the possession of a firearm in furtherance of a crime of violence or a drug trafficking offense. 18 U.S.C. § 924(c)(1)(A) (2013). At a minimum, § 924(c) requires imposition of a mandatory consecutive sentence of 5 years, which increases to 7 years if the firearm is brandished, or 10 years if the firearm is discharged. *Id.* These

mandatory, consecutive sentences do not apply to § 924(o) prosecutions. "Unlike § 924(c) . . . § 924(o) by its terms does not require a consecutive sentence and, similarly, § 924(c)'s mandatory minimums do not textually apply to violations of § 924(o)." *United States v. Mays*, 285 F. App'x 269, 275 (6th Cir. 2008). *See also United States v. Fowler*, 450 F. App'x 494, 495 (6th Cir. 2011) ("The district court[was] most likely influenced by its erroneous belief that a 10-year consecutive sentence was mandated by the § 924(o) firearms-conspiracy conviction."). This distinguishes § 924(o) from the narcotics conspiracy statute, which provides that "[a]ny person who . . . conspires to commit any offense under this subchapter [Title 21, Chapter 13, Subchapter I] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2013). Section 924(o) is more akin to the general conspiracy statute, 18 U.S.C. § 371, which provides a five-year penalty for conspiracy to "commit any offense against the United States, or to defraud the United States . . . ." 18 U.S.C. § 371 (2013).

What advantages does § 924(o) have over other conspiracy statutes? Section 924(o) offers a more serious penalty for its violation than does § 371. It provides for a 20-year maximum penalty, or life if the weapon qualifies under the statute's provisions. As stated above, the maximum penalty for a § 371 violation is five years. The narcotics conspiracy statute does provide that a violation subjects the defendant to the "same" penalties as the substantive violation, meaning that the Title 21 penalties will vary depending on the drug and the quantity involved. *See* 21 U.S.C. § 846 (2013); *Mays*, 285 F. App'x at 275. Section 924(o) offers a middle ground between these two conspiracy statutes.

What advantages does § 924(o) have over the substantive crime of § 924(c)? Section 924(c) offers greater penalties for its violation. A crime committed under § 924(c), however, is separate and distinct from one committed under § 924(o). "[B]ecause sections 924(c) and 924(o) require different levels of proof as to conduct and *mens rea* and call for vastly different penalties, they consequently charge different offenses." *United States v. Luong*, 627 F.3d 1306, 1311 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 185 (2011) (citing *United States v. Clay*, 579 F.3d 919, 933 (8th Cir. 2009)); *United States v. Stubbs*, 279 F.3d 402, 409 (6th Cir. 2002), *overruled on other grounds by United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003). *See also United States v. Robinson*, 627 F.3d 941, 958 (4th Cir. 2010) ("Because [§ 924(c)] require[s] proof the substantive crime was actually committed while [§ 924(o)] does not, and the latter requires proof of agreement but the former do not, these convictions satisfy the Double Jeopardy Clause."). Moreover, § 924(c) requires either the use or carry of a firearm or the possession of a firearm. The § 924(o) charge may be available when firearm possession or use is part and parcel of the underlying crime, but the particular defendant may not actually use or possess the firearm. *See United States v. Young*, 34 F. App'x 934, 935 (4th Cir. 2002) (affirming § 924(o) conviction when defendants did not use or carry the firearms used during a carjacking and murder but knowingly agreed to commit criminal acts with others to further the carjacking and murder and knew of the presence of firearms during the commission of the crimes).

What advantages does a § 924(o) charge offer? Section 924(o) offers a conspiracy charge addressing crimes that, at their core, involve firearms use and possession. This charge is particularly well-suited to gang-related crimes that rely on firearm use and possession to control the gang activity. This charge is also well-suited to cover Hobbs Act robberies and narcotics offenses where the use and possession of firearms are critical elements of the offense. In addition, as with all conspiracy charges, § 924(o) allows for the introduction of conspiracy evidence during the entire duration of the conspiracy, rather than limit it to a substantive crime. When the introduction of evidence under Federal Rule of Evidence 404(b) proves difficult, a firearms conspiracy charge may allow for introduction of evidence regarding firearm use. Here are summaries of three disparate cases where § 924(o) was charged successfully.

A. *United States v. David F. Mays*—Northern District of Ohio

This case involved thirteen defendants who were members of the Outlaw Motorcycle Club (OMC), an international club with a chapter in Dayton, Ohio, among other places. As a result of an investigation into the OMC, these defendants were charged with RICO violations, drug trafficking, and firearm offenses, including § 924(o). Defendant Mays was convicted of a RICO conspiracy and a § 924(o) conspiracy, and received a sentence of 121 months on the RICO conspiracy and a consecutive 120 month sentence on the firearm conspiracy count. Mays challenged his § 924(o) conviction as unconstitutional under the Commerce Clause for lack of a jurisdictional nexus to interstate commerce. The Sixth Circuit rejected this argument. *United States v. Mays*, 285 F. App'x 269, 276 (6th Cir. 2008). The indictment charged that the firearms conspiracy involved drug trafficking crimes and crimes of extortion. "So long as Mays's co-conspirators engaged in such conduct, the jurisdictional nexus is satisfied. . . . [T]he record is replete with evidence that Mays's co-conspirators engaged in such activity and that Mays used or carried a firearm during and in relation to these activities." *Id.* at 272. The court also rejected Mays's argument that the § 924(o) conviction was based on "state-law" crimes. The statute clearly refers to § 924(c), which unequivocally states that the underlying crime must be either a crime of violence or a drug trafficking offense "for which the person may be prosecuted in a court of the United States . . . ." 18 U.S.C. § 924(c)(1)(A) (2013). "Thus, in finding Mays guilty, the jury determined that the firearms conspiracy involved crimes punishable under federal, not state, law. And because the underlying federal laws are sufficiently connected to interstate commerce, there is no Commerce Clause problem with the § 924(o) conviction." *Mays*, 285 F. App'x at 272.

B. *United States v. Rolon*—Southern District of Florida

Two defendants, both of whom had extensive felony records, were arrested after they agreed to participate and took substantial steps toward completing a "reverse" home invasion of a drug stash house in Miami, Florida. They planned to steal cocaine from a stash house and, in preparation for the crime, one defendant stated he would bring either a .9-mm. Glock or an AR-15 assault rifle with him and that "he would not hesitate to 'blow up someone's head' if necessary" during the robbery. *United States v. Rolon*, 445 F. App'x 314, 316 (11th Cir. 2011), *cert denied*, 132 S. Ct. 1818 (2012). When arrested prior to the execution of the robbery, the defendants had police hats and shirts in their vehicle along with law enforcement badges, a .9-mm. loaded Ruger handgun, and a loaded .9-mm. Smith &Wesson handgun. The defendants were convicted at trial of narcotics conspiracy, Hobbs Act conspiracy, § 924(o) conspiracy, § 924(c), and felon in possession charges. They were sentenced to life in prison and the convictions were affirmed. (The District Court sentenced the defendants to life on the § 924(o) counts, but these sentences exceeded the 20-year statutory maximum and were later corrected. *Rolon*, 445 F. App'x at 318 n.4).

C. *United States v. Hasan*—Eastern District of Virginia

In the early morning hours of April 1, 2010, on the high seas between Somalia and the Seychelles, five defendants attacked the USS Nicholas, lit to disguise itself as a vulnerable merchant vessel. The attack skiff was manned by three defendants who had a loaded rocket-propelled grenade launcher and assault rifles. After a brief exchange of gunfire, the USS Nicholas crew captured all defendants. They were charged in the Eastern District of Virginia (the first district where they were brought into) and convicted after trial of piracy and assault crimes as well as firearm offenses. The firearms crimes included § 924(o), with the enhanced penalty for conspiracy to carry and use a rocket-propelled grenade launcher, a destructive device. They were sentenced to mandatory life sentences on the piracy offenses and 240 months on the § 924(o) offense, among other sentences, and the convictions were affirmed on appeal. *United States v. Hasan*, 747 F. Supp. 2d 642, 682-85 (E.D. Va. 2010), *aff'd United States v. Dire*, 680 F.3d 446, 477 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 982 (2013). The opinions in this case clarify, among other things, that § 924(c) and (o) both apply to crimes committed

outside of the United States, as long as the crime of violence, consistent with the language of § 924(c), "may be prosecuted in a court of the United States." *Hasan*, 747 F. Supp. 2d at 682-85.

II. Using *Klein* conspiracy in the firearms context—18 U.S.C. § 371

While § 924(o) has been used to target a diverse group of defendants, the *Klein* conspiracy is most often used in the gun context with regard to one type of defendant—the corrupt firearms dealer. Corrupt firearms dealers, such as those who knowingly sell firearms and ammunition to felons or traffickers, can pose prosecution challenges. Many of the Gun Control Act (GCA) provisions that govern the operation of these businesses are relatively narrow violations, making it difficult to introduce the entire scope of the dealer's illegal conduct into evidence. Including a *Klein* conspiracy charge can permit the Government to introduce evidence about the dealer's entire course of conduct, including its financial activities, and, where the coconspirators are felons or firearms traffickers, can make it easier to try the dealer along with the purchasing felons or traffickers.

A *Klein* conspiracy charge relies on the general conspiracy statute, which states in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (2013).

Unlike a typical conspiracy charge, a *Klein* conspiracy focuses on the "to defraud the United States" element of § 371. Under the *Klein* theory of prosecution, however, a conspiracy to defraud the United States does not have to be "the cheating of the government out of property or money, but 'also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.' " *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). Thus, to prove a *Klein* conspiracy, the Government must show (1) the defendant entered into an agreement, (2) to obstruct a lawful function of the Government, (3) by deceitful or dishonest means, and (4) at least one overt act was committed in furtherance of the conspiracy. *See United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996); *United States v. Caldwell*, 989 F.2d 1056, 1058-59 (9th Cir. 1993).

In the firearms context, the object of a *Klein* conspiracy is usually obstructing or interfering with the lawful functions of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). *See* Indictment, *United States v. Collett*, 2:08-CR-00112 (D. Me. June 11, 2008) (charging Collett, a federal firearms licensee, and Williams, a felon, with a *Klein* conspiracy by completing firearms sales through straw purchasers); Indictment, *United States v. McLeod*, 00-CR-0813 (S.D. Fla. Oct. 3, 2000) (charging federal firearms licensee owner and employee with *Klein* conspiracy for illegally transferring silencers without the necessary ATF registration and for selling firearms to felons using straw purchasers). The GCA makes it unlawful for any person except a licensed dealer, known as a federal firearms licensee (FFL), to engage in the business of dealing in firearms. 18 U.S.C. § 922(a)(1)(A) (2013). It places certain record-keeping requirements on FFLs and grants the Attorney General the authority to promulgate further regulations regarding FFL records. The GCA also grants the Attorney General the right to periodically inspect FFLs to ensure that they comply with their record-keeping and other requirements. The Attorney General has delegated the responsibility for enforcing the GCA, including the provisions related to FFLs, to ATF.

Among other things, an FFL is required to obtain a completed ATF Form 4473 before a firearm can be sold or transferred to any unlicensed person. 18 U.S.C. § 923(g) (2013); Firearms Transaction Record, 27 C.F.R. § 478.124 (2013). FFLs may not complete a transfer to an unlicensed person without conducting a background check and recording the information on the ATF Form 4473. 18 U.S.C. § 922(t)

(2013); Sales or Deliveries of Firearms on and after November 30, 1998, 27 C.F.R. § 478.102 (2013). FFLs are also required to record the acquisition and disposition of every firearm in an acquisition and disposition (A&D) record and to maintain the A&D record at their licensed business premises. FFLs are required to record the make, model, and serial number of each firearm they take into inventory, the date of its acquisition, the name and address (or federal firearms license number) of the person from whom the firearm is acquired, the date on which the firearm is disposed of, and the name and address (or federal firearms license number or Form 4473 transaction number) of the person to whom the dealer transferred the firearm. 18 U.S.C. §§ 922(b)(5), 923(g) (2013); Record of Receipt and Disposition, 27 C.F.R. § 478.125 (2013). ATF is specifically prohibited from establishing "any system of registration of firearms, firearms owners, or firearms transactions or dispositions . . . ." 18 U.S.C. § 926 (2013). Instead, ATF relies upon FFL records to trace firearms recovered in crimes through its National Tracing Center. Thus, the records FFLs are required to maintain are critically important because, among other things, they document the firearm purchaser's eligibility to own a firearm and permit ATF to trace firearms that are recovered at crime scenes.

Corrupt firearms dealers frustrate the functions of ATF by creating false paperwork to hide their illegal sales and make them appear to be part of a lawful firearms business. Such dealers can do this in a number of ways, including selling to a known straw purchaser or by filing false theft/loss reports with ATF for firearms sold without the required records. Because this false information obstructs the functions of ATF, a *Klein* conspiracy charge is appropriate and can significantly strengthen the Government's case against a corrupt dealer. Consider the following example.

> John and Jane Smith operate Corrupt Firearms, LLC, a licensed firearms dealer. A local gang member and convicted felon, Bill, wants to buy firearms from Corrupt Firearms. The Smiths want to sell firearms to Bill, but they know that Bill cannot pass the required background check. They also know that their business is subject to ATF inspection and that during such inspections, they will have to account for all firearms they have acquired. Such firearms will need to either be in Corrupt LLC's inventory or recorded as lawfully transferred to someone else and recorded in their A&D records and, if the purchaser is not another FFL, on an ATF Form 4473. They also know that the potential consequences for transferring the firearm to Bill with no paperwork are essentially the same as transferring the firearm with false paperwork—the loss of their FFL and criminal prosecution. However, the chances of their illegal sales being discovered decreases if they have Bill bring a straw purchaser in to complete the required ATF Form 4473 for him. The straw purchaser not only makes any sales to Bill look lawful because a non-felon is recorded as being the purchaser of the firearm, but it also provides a defense to the Smiths that they thought they were selling to the straw purchaser and did not realize the sale was to Bill. From Bill's perspective, the straw purchaser makes his purchase of firearms from the Smiths appear legal (and makes the Smiths more comfortable selling to him), and any traces of those guns when they are used in a crime end with the straw purchaser and not with him.

In addition to the considerable number of Gun Control Act (GCA) violations, this scenario is also a *Klein* conspiracy. Not only is Bill trying to obtain firearms illegally, and the Smiths are trying to sell firearms to him illegally, but all three of them, along with any straw purchasers, have entered into an agreement and then engaged in overt acts, creating false records, to hide their illegal conduct from ATF. They have conspired to obstruct ATF's lawful government function of enforcing the GCA and combating firearms trafficking.

Like most other conspiracies charged under § 371, a *Klein* conspiracy is punishable by up to five years in prison. Why, then, would the Government want to add a *Klein* conspiracy charge against the Smiths and Bill when it already has potential charges with a maximum penalty of 10 years (transferring a firearm to felon, 18 U.S.C. § 922(d)(1), possession of a firearm by a felon, 18 U.S.C. § 922(g)), and

plenty of individual record-keeping charges? A *Klein* conspiracy should be considered because it provides the Government with the ability to paint a fuller picture of the scope of the illegal activity and the harm caused by such activity, especially by the FFL.

In other words, by using a *Klein* conspiracy theory, the Government is able to tell the whole story about the Smiths' criminal conduct. It can introduce into evidence actions that are not themselves illegal but that tend to show the overall plan to deceive ATF and file false ATF reports and records. In doing so, the Government can take what can appear to be confusing, technical GCA record-keeping violations and put them into the context of the larger narrative of what they really are—illegal conduct designed to permit the FFL to make money by selling firearms to felons without getting caught. It can also permit the introduction of evidence of large numbers of record-keeping violations that can be too numerous to charge individually. For example, a single straw purchase can violate numerous GCA record-keeping provisions:

- 18 U.S.C. § 922(a)(6) (false or fictitious statement with regard to any fact material to lawfulness of sale of firearm)
- 18 U.S.C. § 922(b)(5) (licensee failing to note in his records name, age, and place of residence of firearm purchaser)
- 18 U.S.C. § 922(m) (dealer making false entry in records, misdemeanor)
- 18 U.S.C. § 922(t) (background check on purchaser)
- 18 U.S.C. § 923(g)(1)(A) (requiring FFLs to maintain records as required by regulation)
- 18 U.S.C. § 924(a)(1)(A) (false statement in dealer records, felony)

Charging and proving each one of these crimes at trial is cumbersome and can turn the trial into a technical discussion of ATF record-keeping requirements. By charging a *Klein* conspiracy, the conduct at the root of the various record-keeping violations still comes into evidence, which can strengthen the overall case, but it is now presented within a larger context of obstructing ATF and not within the narrow confines of the various requirements of the record-keeping laws and regulations.

In addition, because the object of the conspiracy is obstructing the lawful functioning of ATF, the Government should also be able to introduce evidence as to the purposes of that lawful functioning. Thus, instead of the FFL attempting to paint the GCA as mere "record-keeping" requirements, the Government has the opportunity to put into evidence the purpose behind the GCA and its regulations—keeping guns out of the hands of felons and other dangerous persons and enabling law enforcement to trace crime guns, providing important leads in the investigation of violent crimes.

A *Klein* conspiracy can also often pave the way for introducing more information regarding the FFL's motivation for selling firearms to felons, including its financial gain. Very few GCA violations are specified unlawful activities for money laundering charges, and so often the financial aspects of the FFL's illegal conduct are not part of GCA prosecutions. The money an FFL makes is usually the FFL's motive for entering the conspiracy and is one of the objects of the conspiracy. Demonstrating the amount of money the dealer made off the illegal transactions and how that fits into the dealer's broader financial activity can be useful evidence to rebut any claims that the dealer was "merely" violating his record-keeping requirements. In some cases, the profit the dealer makes from straw sales can be skewed because prohibited persons are willing to pay more than others for firearms. *See* First Amended Complaint, *United States v. 3,329 Firearms and Assorted Ammunition*, 2:07-cv-03319, 61-62 (C.D. Cal. Feb. 7, 2011), ECF No. 51 (In an action to forfeit FFL's firearms and ammunition inventory, amended complaint supplements undercover video evidence of illegal sales to a felon with evidence that the FFL charged more for firearms because purchasers were prohibited and were limited in where they could purchase firearms.). Note that adding financial investigations to trafficking cases involving FFLs can also reveal other criminal conduct such as tax evasion, structuring bank deposits to avoid cash reporting

requirements, or even the structuring of cash deposits of company receipts into personal accounts as part of broader *Klein* conspiracy to obstruct ATF.

Finally, although prosecutions to date have focused on using the *Klein* conspiracy with regard to corrupt dealers, the theory could also be applicable in other contexts. For example, a prosecution for a conspiracy to smuggle firearms and/or ammunition across the United States-Mexico border could also include a *Klein* theory where the participants entered an agreement to obstruct Customs and Border Protection and took overt acts to accomplish that obstruction, such as concealing the firearms and ammunition.

III. Conclusion

Both § 924(o) and a *Klein* conspiracy charge offer tools to engage conspiracy law to prosecute firearm crimes involving multiple defendants. Consideration of these charges may well enhance other firearm counts and allow for the introduction of evidence that would otherwise be limited by charging only substantive offenses. ❖

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A Capital of Conspiracies: Prosecuting Violent-Crime Conspiracies in District of Columbia Superior Court

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Executive Office for United States Attorneys

The United States Attorney's Office for the District of Columbia (USAO-DC) is singular within the United States Attorney community. With over 300 Assistant United States Attorneys (AUSAs) and over 300 paralegal, investigative, and administrative assistants, it is the largest of all 94 United States Attorneys' offices.

In addition to serving as the federal prosecutor for the District, USAO-DC prosecutes local crimes—numerous misdemeanors and all adult, non-traffic felonies—before the District of Columbia Superior Court. Nearly every day, AUSAs prosecute serious local offenses in Superior Court— from narcotics and weapons offenses to assaults, homicides, and criminal conspiracies. Indeed, USAO-DC's cases significantly impact the life and the lives of the Nation's Capital.

This article focuses on USAO-DC's prosecution of local violent-crime conspiracies in Superior Court. It outlines local practice and some aspects of criminal-conspiracy law within the District and discusses three recent conspiracies that USAO-DC successfully prosecuted.

I. Local practice and conspiracy law within the District of Columbia

From 1801 until 1971, Congress designated a variety of courts to exercise federal, local, or combined jurisdiction over legal matters in Washington, DC. In 1970, Congress passed the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473 (1970), which created the District of Columbia Superior Court to be the local trial court of general jurisdiction. The court assumed this jurisdiction in February 1971. JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 6-88, 234-35 (Chris Rohmann ed.) (2001).

Today, the Superior Court is one of the country's premiere local trial courts. Its judges are appointed by the President and confirmed by the Senate and serve 15-year terms. Several of its judges were former AUSAs or supervisors at USAO-DC. As of 2011, over 30 of the court's associate, magistrate, and senior judges—plus Chief Judge Lee F. Satterfield—were USAO-DC alumni. One noteworthy alumnus served as a Superior Court judge before becoming the United States Attorney. In 1988, Eric Holder, Jr., then a Department of Justice lawyer in the Criminal Division's Public Integrity Section, was appointed by President Reagan to be an associate judge of the Superior Court. Holder stepped down from the bench in 1993, when President Clinton appointed him to be the United States Attorney for the District of Columbia, a position Holder held until he became the Deputy Attorney General in 1997.

A. General provisions of local conspiracy law

The District's general conspiracy statute, codified at D.C. Code § 22-1805a, is substantially similar to the federal general conspiracy statute codified at 18 U.S.C. § 371. The local statute provides:

> If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.

D.C. Code § 22-1805a(a)(1) (2013).

Penalties may be greater for conspiring to commit a "crime of violence":

> If 2 or more persons conspire to commit a crime of violence as defined in [D.C. Code] § 23-1331(4), each shall be fined not more than $3000 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

Id. § 22-1805a(a)(2).

A "crime of violence," for purposes of the statute, is defined as an

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.

Id. § 23-1331(4). (Proposed legislative amendments would add "assault with significant bodily injury" and "solicitation . . . to commit any of the foregoing offenses" to this definition.)

The local statute also requires an overt act to be alleged and "proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose." *Id.* § 22-1805a(b). In sum, establishing the offense of conspiracy requires proof of (1) an agreement of two or more individuals to commit a criminal offense; (2) "knowing participation in th[e] agreement with intent to commit the criminal objective;" and (3) "during the life of the conspiracy, and in furtherance of its objective, the commission by at least one conspirator of at least one of the overt acts specified in the indictment." *Castillo-Campos v. United States*, 987 A.2d 476, 482 (D.C. 2010).

The District of Columbia Court of Appeals (DCCA), the District's highest court, has found sufficient evidence of conspiracy offenses in a variety of circumstances. *See, e.g.*, *Castillo-Campos*, 987 A.2d at 482-83 (defendants—members of the *Vatos Locos* street gang—joined in an agreement with fellow gang members to kill or otherwise "get" rival gang members of the *Mara R* and Street Thug Criminals gangs, and engaged in a series of assaults and murders against the rivals); *Hairston v. United States*, 905 A.2d 765, 769, 784 (D.C. 2006) (defendant and two others from one neighborhood

faction agreed to exact revenge against their "intense" rivals in another neighborhood faction because of the other faction's words and actions; defendant participated in this agreement by obtaining guns and ammunition, and joining efforts to "catch" members of the other faction); *(Edward) McCoy v. United States*, 890 A.2d 204, 214 (D.C. 2006) (defendant screamed instructions to driver of their Volvo to chase victims in another car, and defendant shot at the victims' car); *McCullough v. United States*, 827 A.2d 48, 54, 58 (D.C. 2003) (defendant participated in conversations with coconspirators about murdering the victim—whom they targeted as a "snitch"—and defendant and others took actions designed to implement, and eventually effected, the agreed-upon murder).

B. *Pinkerton* liability

Conspiracy can be charged as a substantive offense or operate as a theory of vicarious liability based on *Pinkerton v. United States*, 328 U.S. 640 (1946). *See Akins v. United States*, 679 A.2d 1017, 1028 (D.C. 1996) ("Conspiracy is a unique theory of liability that renders individual defendants guilty of any offense committed by coconspirators in furtherance of the conspiracy.") (citing *Pinkerton*, 328 U.S. at 647); *Erskines v. United States*, 696 A.2d 1077, 1080 (D.C. 1997) ("[U]nder *Pinkerton* a defendant is liable for a foreseeable criminal consequence of the conspiracy even though that crime was not intended as part of the original plan[.]") (citation and internal quotations omitted).

As a theory of liability, conspiracy need not be charged in the indictment. *See Thomas v. United States*, 748 A.2d 931, 934-36 (D.C. 2000) (explaining that the Government need not charge defendant with conspiracy to proceed under a *Pinkerton* theory of vicarious liability); *see also Baker v. United States*, 867 A.2d 988, 1005 (D.C. 2005) (reaffirming *Thomas* and noting that the Government's proceeding on *Pinkerton* theory "is not equal to an element of a crime that must be charged in the indictment" and the theory "does not increase the penalty for any charged crime beyond its statutory maximum, because *Pinkerton* liability is a basis for a conviction not a sentencing enhancement factor"). Where the Government argues *Pinkerton* liability for an uncharged conspiracy, the Government must still prove that the defendant was part of a conspiracy and that the offense for which the defendant is vicariously liable was committed in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiracy. *Baker*, 867 A.2d at 1005.

Where a conspiracy can be established in a multi-perpetrator case, *Pinkerton* may be a more viable theory for proving liability than the distinct accomplice theory of aiding-and-abetting. While noting that the doctrines resemble each other and "in a particular case, an accomplice may also be a co-conspirator," the DCCA has recognized "that dual role simply permits the government to proceed on alternative theories." *Wilson-Bey v. United States*, 903 A.2d 818, 840, 842 (D.C. 2006) (en banc). However, that "does not mean that the two legal doctrines have collapsed into one another." *Id.* at 842.

An accomplice can be liable for a crime committed by a principal perpetrator if the accomplice "in some sort associated himself with the [criminal] venture, that he participated in it as in something he wished to bring about, and that he sought by his action to make it succeed." *Wilson-Bey*, 903 A.2d at 840 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)) (internal brackets omitted). Aiding-and-abetting is in some respects broader than *Pinkerton* in that aiding-and-abetting imposes a principal's liability on an accomplice who "*consciously shares in any criminal act whether or not there is a conspiracy*." *Id.* (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 620 (1949)) (emphasis in original).

But in some regards, aiding-and-abetting is narrower than *Pinkerton* liability. Aiding-and-abetting requires the accomplice to possess the same mens rea required of a principal offender in committing the substantive offense. *See Wilson-Bey*, 903 A.2d at 838 (holding it "particularly inappropriate to permit the conviction of an aider or abettor upon a lesser showing of criminal intent than is required vis-à-vis a principal when the defendants are being prosecuted for" first-degree murder). By contrast, the Government is "not . . . required to establish that the co-conspirator actually aided the perpetrator in the

commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy." *Gatlin v. United States*, 925 A.2d 594, 599 (D.C. 2007) (quoting *Wilson-Bey*, 903 A.2d at 840) (internal brackets omitted). Therefore, to be vicariously guilty of a substantive crime committed by another coconspirator, a conspirator need not have the requisite mens rea for that substantive crime if it was committed in furtherance of, and was a reasonably foreseeable consequence of, the conspiracy. *See Wilson-Bey*, 903 A.2d at 840 (aiding-and-abetting differs from *Pinkerton* liability because, among other things, aiding-and-abetting requires proof that the defendant "*intentionally participated*" in the principal's crime (quoting *Erskines*, 696 A.2d at 1080-81) (emphasis in original)).

C. Admissibility of coconspirator statements

One of the cherished advantages of establishing a conspiracy at trial, charged or not, is that it permits the nonhearsay admissibility of out-of-court coconspirator statements made in furtherance of the conspiracy. Federal Rule of Evidence 801(d)(2)(E) provides that statements of coconspirators made in furtherance of a conspiracy are not hearsay. The District's local evidence law, which is based on common law rather than on a standard code of evidentiary rules, has adopted Rule 801(d)(2)(E) as a local rule. *Butler v. United States*, 481 A.2d 431, 439-42 (D.C. 1984). Coconspirator statements are admissible as a corollary to the rules on the nonhearsay admissibility of a defendant's admissions and statements by a party-opponent, on the theory that a conspirator is an agent of another coconspirator. *(Louis) McCoy v. United States*, 760 A.2d 164, 170-79 (D.C. 2000); *Akins*, 679 A.2d at 1028.

Admission of a statement under the coconspirator-statement rule requires proof, under a "more likely than not" standard, that "(1) a conspiracy existed, (2) the defendant had a connection with the conspiracy, and (3) the coconspirator made the statements during the course of and in furtherance of the conspiracy." *Butler*, 481 A.2d at 439, 441. While proof of an overt act is necessary to convict for the stand-alone crime of conspiracy under D.C. Code § 22-1805a, Rule 801(d)(2)(E) does not require proof of an overt act as a condition precedent for admitting a coconspirator's statement as nonhearsay. *Bellanger v. United States*, 548 A.2d 501, 502-03 (D.C. 1988).

Under *Butler*, admissibility of a coconspirator statement is predicated on the prosecution's independent, nonhearsay trial evidence showing it was more likely than not that a conspiracy existed. The trial court may not consider a coconspirator statement itself in assessing whether the prosecution's evidence has met the more-likely-than-not quantum of proof. *Butler*, 481 A.2d at 439-41. Three years after the DCCA decided *Butler*, the Supreme Court decided *Bourjaily v. United States*, 483 U.S. 171 (1987). *Bourjaily* more broadly interprets Rule 801(d)(2)(E) to allow consideration of the coconspirator statement in determining the existence of the conspiracy. *Id.* at 177-78. *Bourjaily* holds the quantum of proof necessary for establishing the conspiracy to a preponderance standard, *id.* at 176-77, which is procedurally but not substantively distinct from *Butler*'s more-likely-than-not standard. *See Butler*, 481 A.2d at 441 ("[T]he [more-likely-than-not] quantum of proof the prosecution must satisfy remains identical to that required by the preponderance of the evidence standard."). In *Bellanger*, the DCCA left *Bourjaily*'s effect on *Butler* an open question. *Bellanger*, 548 A.2d at 502 n.4.

II. Conspiracy case studies

The District's AUSAs face myriad challenges in prosecuting violent-crime conspiracies. Often, these prosecutions target street gangs operating within the District—such as the *Sureño* gangs MS-13 and 18th Street—or notorious neighborhood crews. Some of these conspiracies involve the most serious, harrowing, and infamous violations of criminal law. Other cases may not be as notable, but still meaningfully affect victims and the community.

The following three cases illustrate recent examples of successful prosecutions of violent-crime conspiracies in Superior Court.

A. The robber who ran: *Kendall Snowden v. United States* and *Pinkerton* liability

Charging conspiracy is a natural consideration when prosecuting cases involving gangs or crews. Charging conspiracy also proved advantageous in one recent case that did not ostensibly involve a gang or crew and in which only one member of the conspiracy was ever identified.

On the night of May 2, 2008, a group of several family members was outside an apartment building in Northeast Washington celebrating one member's return home from prison. For a few moments, "L.R.," 14, briefly broke away from his family and observed a group of five young men around a corner. One of the five young men was Kendall Snowden, whom L.R. knew from the neighborhood. Snowden said to the others in his group, "Ya'll ready, let's go." Snowden concealed his face with a ski mask, and another cohort pulled a bandana over his face. L.R. sensed something bad would occur, so he returned to his family.

After L.R. rejoined his family, Snowden and his henchmen approached L.R.'s family with guns drawn. Snowden told one of the older family members—L.R.'s uncle Raymond Scales—to give up his money. Scales surrendered a $20 bill, but Snowden and the other robbers wanted more. Scales decided enough was enough. He grabbed Snowden's arm, attempting to wrest the gun from him. Scales told the other family members to run away, and L.R. and some of the family members started to escape. Scales and Snowden continued wrestling and Snowden's gun fired while it was pointed away from Scales. Snowden eventually broke away from Scales and ran.

At least one other armed, masked gunman stepped up and took aim at Scales after Snowden fled. Scales had his back against a courtyard fence and his hands up. Although Scales had fully submitted, the unidentified gunman shot Scales and all the robbers fled the scene. Police arrived, but did not apprehend any of the perpetrators that night.

During a photo-array procedure on May 6, 2008, L.R. identified Snowden as one of the robbers. None of the other conspirators who planned the robbery were ever identified. In March 2009, supervisory AUSA Michelle D. Jackson decided to proceed against Snowden by charging him not only with the armed robbery of Scales and related gun charges, but also with conspiracy to commit armed robbery. In addition, mindful that Snowden had run from Scales before another gunman approached and shot him, USAO-DC obtained an indictment against Snowden for assault with intent to kill while armed (AWIKWA) and armed aggravated assault of Scales, based on a theory of *Pinkerton* liability.

AUSA Bryan Seeley tried the case in August 2009. At trial, L.R. was the only witness who could identify Snowden as one of the individuals involved in the robbery. L.R. testified about Snowden's and his partners' preparatory words and actions leading up to the robbery and shooting. L.R. identified Snowden as the robber who tussled with Scales. L.R., who had begun to escape before the shooting, also testified that he did not see who fired the gun. But the shots were fired within 15 seconds of Snowden freeing himself from Scales. Scales and L.R.'s mother—neither of whom could identify any of the perpetrators—testified about the circumstances of the robbery and Scales' grisly injuries. There was no dispute at trial that Snowden ran from the scene before the other gunman shot Scales.

Without a cooperator, droves of witnesses, or any fingerprint, DNA, or additional forensic evidence often needed to convince a jury beyond a reasonable doubt, Seeley nevertheless wove a compelling case of a conspiracy at work. During his closing argument, Seeley likened the actions of Snowden and his cohorts before the robbery to a basketball team that huddles together before a game. The team purposefully agrees to go out on the court, score points, and try to win, even though the teammates do not expressly state those goals. Even the defense counsel later admitted that this simple analogy was quite effective.

The jury found Snowden guilty of conspiracy to commit robbery, armed robbery, and armed aggravated assault of Scales, four counts of armed assault with intent to rob L.R. and three of his other

relatives, and several associated firearms felonies. Snowden was acquitted of AWIKWA. On November 9, 2009, the court sentenced Snowden to a total of 120 months' incarceration.

Snowden timely filed an appeal. One of the issues on appeal—an issue of first impression for the DCCA—was whether a shooting by one coconspirator that takes place after another coconspirator has fled may be deemed "in furtherance of" the conspiracy for purposes of coconspirator liability. AUSA Jonathan P. Hooks briefed and argued the case. Hooks convinced the three-judge panel to hold that such a shooting *could* be deemed to be in furtherance of a conspiracy, and that Snowden was vicariously liable for his unidentified coconspirator's armed aggravated assault of Scales. Applying agency principles, the DCCA recognized:

> [C]onspirators do not necessarily achieve their chief aim at the precise moment when every element of a substantive offense has occurred. . . . Before the conspirators can be said to have successfully attained their main object, they often must take additional steps, *e.g.*, fleeing, or disposing of the fruits and instrumentalities of crime. Such acts further the conspiracy by assisting the conspirators in realizing the benefits from the offense which they agreed to commit.

Snowden, 52 A.3d at 865 (quoting *State v. Rivenbark*, 533 A.2d 271, 276 (Md. 1987)). Here, "[i]nsofar as the objective of [Snowden] and his coconspirators was to rob Scales, their goal was not completed until they had successfully made off with the fruits of their criminal endeavor." *Id.* (citing *Castillo-Campos*, 987 A.2d at 491).

The DCCA also drew from its felony-murder case law, which holds that an accomplice can be guilty for a killing committed by another during the commission of a felony, where that killing could be said to be part of the perpetration of the felony or part of a continuous chain of events. *Id*. at 865-66.

> What is important is not simply that the killing occurred *during* the actual commission of the predicate crime, but that it aided in the completion of the crime. A shooting by a co-conspirator that is similarly causally linked to completion of the object of the conspiracy is properly charged against other co-conspirators under a theory of conspiracy liability.

Id. at 866 (emphasis in original) (citations omitted). Here, the other gunman's shooting of Scales aided Snowden's asportation of Scales' money, which Snowden had personally taken soon before the shooting. Thus, the shooting "aided in the successful completion of their criminal endeavor" and was part of an "unbroken chain of events." *Id.* (internal quotes and citations omitted).

Snowden also claimed that the shooting of Scales was not a "reasonably foreseeable consequence" of the conspiracy to rob. The DCCA disagreed. "A defendant who conspires to commit an armed robbery should anticipate that a shooting may occur during the commission of the robbery and is held accountable if a shooting does, in fact, occur." *Id*. at 866-67 (citing *Castillo-Campos*, 987 A.2d at 482, 488). Because Snowden and at least one of his coconspirators brought weapons to the robbery scene, and both "employed those weapons to effectuate the robbery, the jury could properly conclude that the shooting of Scales so soon after [Snowden] fled was a reasonably foreseeable consequence of their conspiracy to commit armed robbery." *Id.* at 867.

Ultimately, the DCCA rejected all of Snowden's claims on appeal, and affirmed his convictions.

B. A PCP ring punishes disloyalty: *United States v. Jamaal Hale* and litigating the admissibility of coconspirator statements

In early 2010, Jamaal Hale, Ramona Watson, Patrick Waldrop, Devin Burgess, and others—the "Hale Ring"—were involved in distributing PCP, a common, volatile street drug in the District. Hale would purchase the PCP from a wholesale distributor and redistribute it to street-level dealers. Watson

provided a residence for Hale to stash and package the PCP. Hale, Watson, Waldrop, and Burgess sold the drug to street users, often in the form of cigarettes dipped in liquid PCP, known as "dippers." The Hale Ring zealously protected its operation.

"B.W." was an associate of the Hale Ring. In March 2010, he was riding in a car with Watson, who had a two-ounce bottle of PCP in her purse. As they rode to suburban Maryland, local police initiated a traffic stop. To avoid detection and arrest, Watson gave B.W. the bottle to conceal. When officers searched B.W., they discovered the bottle on him. B.W. was arrested for possessing the drugs, while Watson walked away free. A few days after his arrest, B.W. was assaulted while Hale stood by and watched. Because of these incidents, B.W. felt betrayed by the Hale Ring.

Seeking some retribution, on March 25, 2010, B.W. and two other individuals broke into Watson's apartment and stole a gun and PCP from her stash house. The scheme backfired. The Hale Ring soon learned B.W. was responsible for the theft and sought to punish him.

Later on March 25, Hale, Watson, Waldrop, and Burgess saw B.W. outside a barbershop. Hale forced B.W. into their car at gunpoint. Hale, Watson, Waldrop, and Burgess drove B.W. to Waldrop's apartment in Southeast Washington. The three male kidnappers struck and stomped B.W., and Hale pistol-whipped him. The kidnappers questioned B.W. about the stolen firearm and PCP. They then brought B.W. back into a car, and drove to Watson's apartment.

After forcing B.W. into Watson's apartment at gunpoint, Hale ordered B.W. to sit on Watson's couch. The three male kidnappers struck, stomped, and pistol-whipped B.W. some more. The male kidnappers wrapped duct tape around B.W.'s arms, torso, legs, and mouth. Watson then struck B.W. with her hands and feet, and taunted B.W. about snitching. Waldrop heated a spoon and brought it to Hale, who used it burn B.W.'s hands and feet. B.W. ultimately confessed to his theft of the drugs and gun from Watson's apartment and identified the other two theft culprits. The kidnappers then forced B.W. back into a car, and confined him in the backseat.

With B.W. still in the car, the kidnappers drove a while and found the other two culprits. They forced the other culprits into the car at gunpoint, and also intended to punish them. The kidnappers then rode with their three captives to a recreation center in Southeast Washington.

At the recreation center, Waldrop and Burgess struck the other culprits with their hands and feet. During this time, B.W. managed to escape. USAO-DC was unable to identify the other two culprits who were also seized and assaulted.

AUSA J.P. Cooney—now a trial attorney with the Public Integrity Section—investigated the case and secured an indictment charging the Hale Ring with two conspiracies: a conspiracy to distribute PCP; and a conspiracy to kidnap and assault B.W., in order to promote the PCP conspiracy. In addition, the indictment charged the ring members with armed kidnapping, two armed-assault offenses, obstructing justice, and related firearms offenses.

Before trial, the parties litigated several motions, including a defense motion for a pretrial hearing to determine the existence of a conspiracy. The defense claimed such a hearing was necessary to determine the admissibility of coconspirator statements and to decide other defense motions to sever counts and defendants. Cooney, who filed the Government's vigorous opposition, argued that the local jurisdiction neither requires nor promotes the holding of such a hearing.

Citing the DCCA's decision in *Butler*, 481 A.2d at 439-42, Cooney maintained that judges should determine the Rule 801(d)(2)(E) admissibility of coconspirator statements during the prosecution's case at trial, under a "more likely than not" standard. This local standard limits the court's inquiry to the prosecution's evidence alone, permitting a court ruling on admissibility during the prosecution's case. This is designed to "avoid[] the conceptual difficulty of determining the admissibility of part of the government's case based on the content of the defense case." *Butler*, 481 A.2d at 441.

A primary benefit of this "one-step admissibility determination" is to "avoid[] the impracticality of the mini-trial necessary to unconditional admission under the preponderance standard." *Id.* Notwithstanding the open question whether *Bourjaily* has any effect on *Butler*'s evidentiary standard, *Butler* directs Superior Court judges to rule on admissibility during the prosecution's case, considering "only the independent nonhearsay evidence in the admissibility determination." *Id*. at 439-40. Under the *Butler* approach, the trial judge still "retains discretion to conditionally admit hearsay evidence subject to eventual establishment of a conspiracy by independent evidence," *id.*, particularly where witness availability prevents the prosecution from ordering its nonhearsay evidence before presenting testimony as to coconspirator statements. In any event, Cooney argued admissibility is determined during, not before, trial.

The defense cited no controlling authority requiring a pretrial determination of coconspirator-statement admissibility. While the defense argued that the Fifth Circuit's decision in *United States v. James*, 590 F.2d 575 (5th Cir. 1972), supported the requirement of a pretrial hearing, Cooney noted that *James* endorsed—but did not require—a pretrial evidentiary presentation or detailed proffer. *Id.* at 582. Moreover, the majority of federal circuits, including the D.C. Circuit, had rejected the approach in *James*.

At any rate, the prosecution—through its speaking indictment identifying over 40 overt acts for both charged conspiracies, its provision of discovery, and its pretrial pleadings—had already effectively provided the detailed proffer that *James* contemplates. Cooney maintained that no pretrial hearing to ascertain the conspiracies was necessary. The court agreed and denied the defense motion for a pretrial hearing.

Trial began in early March 2011. AUSA Adam B. Schwartz—now an AUSA for the Eastern District of Virginia—joined Cooney as trial counsel. The case had few eyewitnesses, and B.W. was rather compromised because of his own legal entanglements. After the extensive and skillful pretrial litigation over coconspirator statements, the statements were admitted at trial without fuss or defense objection.

The jury ultimately acquitted the Hale Ring of the PCP conspiracy and did not convict all the ring members for felony-conspiracy offenses arising from the plot to kidnap B.W. The jury did, however, find Hale, Waldrop, and Watson guilty of armed kidnapping and of possessing a firearm during a crime of violence, and found Burgess guilty of unarmed kidnapping.

At the sentencing on August 26, 2011, Hale, the ring leader, received 17 years' imprisonment. Waldrop received 11 years, Watson received 8 years, and Burgess received 7 years.

C. The South Capitol Street Massacre: *United States v. Sanquan Carter*

One of the District's most breathtaking incidents of urban carnage since the late 1980s and early 1990s began with a senseless dispute over a piece of cheap jewelry.

On the night of Sunday, March 21, 2010, Sanquan Carter, 19, met a 15-year-old girl inside an apartment at the 1300 block of Alabama Avenue, SE, Washington, DC. Sanquan took off a gold-colored, fake-diamond-encrusted costume bracelet he was wearing, and had sex with the girl. Afterwards, Sanquan discovered that his bracelet was missing and became enraged. He called his brother, Orlando Carter, and claimed he had been robbed. The Carter brothers were determined to avenge the theft of the bracelet which, ironically, Sanquan had stolen himself two days earlier.

Orlando began directing associates to meet him. Orlando obtained his AK-47 and joined Nathaniel Simms, who was driving a borrowed Kia. Jeffrey Best joined Orlando and Simms in the car, and they drove to Lamar Williams' residence to get more guns. At Williams' home, Orlando, Simms, Best, and Williams devised a plan to retaliate against whoever had robbed Sanquan. The conspirators obtained a .380 semiautomatic pistol and a 12-gauge shotgun at Williams' home and drove to Alabama Avenue.

The Kia arrived at Alabama Avenue after midnight. Jordan Howe, 20—who had grown up as one of Sanquan's close friends, and whose family the Carters knew and respected—was in a car outside the building where Sanquan had sex with the girl. Several other individuals were standing outside the building. Sanquan walked to the Kia and told Orlando, Simms, Best, and Williams that he believed the individuals responsible for stealing his bracelet were standing right there. Sanquan took the semiautomatic pistol from Simms and confronted the individuals gathered in front of the apartment building. Orlando armed himself with the AK-47, Best armed himself with the shotgun, and they followed behind Sanquan. Orlando ordered Simms to switch to the driver's seat. Simms positioned the Kia toward an efficient escape route from that block.

As Sanquan continued confronting the gathered individuals, Orlando and Best stood back a short distance. Sanquan began searching the individuals for the bracelet and randomly took items from the individuals. Increasingly agitated, Sanquan told Orlando and Best that they should "hammer"—that is, shoot—those individuals. Orlando indicated that they would follow Sanquan's lead. Sanquan fired five rounds from his pistol. Orlando fired 28 rounds from his AK-47, and shot at the car in which Howe was seated. Best attempted to activate his pump-action shotgun, and ejected three unfired rounds. Best later claimed he had fired the shotgun at least once. The gunfire killed Howe and struck and wounded two other individuals.

The violence was just beginning. On Tuesday, March 23, 2010, Sanquan was arrested and charged with Howe's murder. Later that day, friends and associates of Howe sought out and shot Orlando, striking his shoulder and grazing his head. Orlando vowed retaliation. He again recruited Best, Simms, and Williams, and enlisted an additional conspirator, Robert Bost. This time, they planned to identify the date, time, and location of Howe's funeral service, and to shoot and kill as many of Howe's friends and associates as possible, plus any other funeral attendees. The coconspirators discovered the details for the service, which was scheduled for the late morning of Tuesday, March 30, 2010.

In the meantime, the conspirators needed firepower. Simms and Best delivered the AK-47 and shotgun used during the Alabama Avenue shooting to Williams, who stashed the weapons. Orlando obtained a Glock .9-mm. semiautomatic pistol. Bost acquired a .45 caliber semiautomatic pistol. The conspirators also decided to rent a minivan to carry out the shooting. Despite attempts to secure a rental before Howe's funeral service on the morning of March 30, they were unsuccessful.

While disappointed they could not ambush the funeral service, they proceeded with a revised plan to retaliate against Howe's friends and associates. On the evening of March 30, they were finally able to rent a minivan. Later that night, Orlando drove the minivan to pick up Best, Bost, Williams, and Simms. Williams obtained the AK-47 from his residence and equipped it with a high-capacity magazine. Before executing their plan, Orlando, Best, Bost, and Simms dropped off Williams, who wished the four other conspirators success.

At this point, the remaining four conspirators possessed an AK-47 with a high-capacity magazine, a .9-mm. Glock semiautomatic pistol, and a .45 semiautomatic pistol. Still, Orlando believed they needed one more firearm. Orlando and the others devised a plan to rob another known neighborhood heavy, Tavon Nelson, 17, whom they learned was "strapped"—that is, armed—at that hour.

At approximately 7:20 p.m., Orlando drove near 78 Galveston Street, SW, and saw Nelson outside. Best and Bost, armed with the two pistols, got out of the minivan and approached Nelson. Sensing he was about to be robbed, Nelson reached for his own gun. Best and Bost repeatedly shot Nelson and killed him in front of several witnesses. Best and Bost fled so fast that they forgot to retrieve Nelson's gun. They got back into the minivan, which Orlando was still driving. Orlando, Best, Bost, and Simms drove about a mile to South Capitol Street, where Orlando had heard some of Howe's friends and associates were gathered.

Indeed, a group of Howe's friends congregated outside a dwelling at 4022 South Capitol Street. Some of the friends were still wearing "RIP" t-shirts memorializing Howe. As the minivan approached the crowd of mourners, Orlando electronically lowered the minivan's windows. He told Best, Bost, and Simms to have their guns ready. The minivan stopped in front of 4022 South Capitol. Best and Bost fired their pistols toward the crowd. Orlando ordered Simms to grab the AK-47 assault rifle, and Simms sprayed the crowd with bullets.

Nine individuals were shot. Three of them—Brishell Jones, 16, Davaughn Boyd, 18, and William Jones, 19—were killed. The six other shooting victims ranged in age between 15 and 29. One of the surviving victims, shot in the head and the hip, suffered a partially collapsed skull, and would struggle for the next two years to relearn how to walk and talk. Keith L. Alexander, *Healing after the horror*, WASH. POST, Sept. 11, 2012, at B8.

Orlando and the other conspirators attempted to flee in the minivan. A nearby police officer in a marked car pursued them. Orlando told Best, Bost, and Simms to throw their guns out of the minivan. Simms threw the AK-47 out of the car. Other police cars joined the pursuit. Orlando intentionally struck the front of one police car, and the minivan halted. Orlando, Best, Bost, and Simms fled the minivan, and police chased them on foot. The police apprehended Orlando and Simms that night. Best and Bost ditched some of their clothes, and got away. The police recovered the clothing items, tested them for DNA, and eventually identified Best and Bost through DNA evidence and eyewitness accounts. Best and Bost were later arrested, and Williams was also later identified and arrested.

This gripping case presented a host of challenges for the prosecution team, which included three trial AUSAs—Michael Brittin, Bruce Hegyi, and Adam Schwartz—and a slew of supervisory and appellate AUSAs, investigators, and litigation-support staff. Ultimately, USAO-DC obtained an indictment charging two conspiracies: (1) the conspiracy to murder Jordan Howe on March 21-22, 2010, involving Sanquan, Orlando, Best, and Simms; and (2) the conspiracy to murder Howe's friends and associates on March 30, 2010, involving Orlando, Best, Bost, Williams, and Simms. The grand jury also indicted Sanquan, Orlando, Best, and Williams for armed first-degree murder of Howe; Orlando, Best, and Bost for felony murder and armed first-degree murder of Tavon Nelson; and Orlando, Best, Bost, and Williams for three counts of armed first-degree murder and five counts of AWIKWA during the South Capitol shooting.

Before trial, and similar to the *Hale* case, the AUSAs extensively litigated the admissibility of coconspirator statements. Schwartz recounts that this litigation was "extremely tedious." "The judge ordered the government to come up with a pretrial document listing *every* statement made by a defendant which we sought to offer at trial and our basis for admissibility," Schwartz states. "In a trial of this scope, that was a painful undertaking which resulted in a 70-page filing listing hundreds of statements. The court ruled on each individual statement as needed prior to opening statements." The court largely decided these issues in the Government's favor.

Opening statements began on February 21, 2012. During the trial's course, over 100 witnesses testified, and over 1,000 pieces of Government evidence were admitted.

According to Hegyi—now a trial attorney with the Criminal Division's Capital Case Unit—there were "huge advantages, almost beyond measure" to charging conspiracy and proceeding on a theory of coconspirator liability for the shootings. The *Pinkerton* theory was particularly useful in prosecuting the conspirators for the felony murder and first-degree murder of Tavon Nelson, and for the homicides that occurred on South Capitol Street. Because of *Pinkerton* liability, Hegyi says, the trial AUSAs were "not limited to convicting only the actual person who shot Tavon, and didn't have to worry about whose gun actually fired the fatal shot." Similarly, due to the chaos at South Capitol, it would have been virtually impossible to prove "beyond a reasonable doubt whose gun killed which victim. Almost all of the bullets passed through the victim's bodies and were never recovered."

Schwartz adds that with respect to Lamar Williams—who provided guns before the shooting on South Capitol Street and knew what would occur, but was not present at that shooting—"[a]iding-and-abetting liability alone could have conceivably provided a basis for finding him guilty. But conspiracy liability seemed easier for the jury to understand and for us to argue." The AUSAs' arguments that the coconspirators were "in for a penny, in for a pound" appealed to the jury, which embraced the concept of *Pinkerton* liability.

After two months of trial and eight days of deliberations, the jury returned verdicts of guilty against coconspirators Sanquan, Orlando, Best, Bost, and Williams. Sanquan was found guilty of 15 felony charges, including conspiracy to commit murder and the first-degree murder of Howe on March 22, 2010. Orlando, Best, and Bost were each convicted of at least 34 counts, including 2 counts of conspiracy to commit murder and at least 4 counts of premeditated murder for the shootings. Williams was convicted of 28 counts, including 1 count of conspiracy and 3 counts of second-degree murder.

On September 11, 2012, five of the conspirators were sentenced for their crimes. Sanquan was sentenced to 54 years in prison. Orlando, Best, and Bost were sentenced to life without the possibility of release. Williams received 30 years. On October 19, 2012, Simms, who had pleaded guilty to lesser charges soon after his arrest and testified against the other conspirators at trial, was sentenced to 25 years for his role in the violence.

At last, justice was served, and the citizens of Washington exhaled with relief.

III. Conclusion

AUSAs battle mightily in District of Columbia Superior Court to crack violent-crime conspiracies, vindicate victims, and protect the Washington, DC community. In the court's unique legal milieu, these often-unsung prosecutors achieve outstanding results with frequently limited resources and with considerable craft and talent. ❖

ABOUT THE AUTHOR

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Conspiracy and Internet Technology: Using the Child Exploitation Enterprise Statute to Prosecute Online Child Exploitation

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I. Introduction

The Child Exploitation Enterprise (CEE) statute, 18 U.S.C. § 2252A(g), is a powerful tool that facilitates the prosecution of a group of offenders who work in concert to exploit children. Enacted as part of the Adam Walsh Act of 2006, the statute has supported several successful prosecutions over the past few years. For example, 14 American members of a highly-organized online group of international child sex offenders, who utilized Internet newsgroups, were convicted of enterprise and related offenses in the Northern District of Florida, in conjunction with "Operation Achilles." Fifteen members of the "Lost Boy" Internet bulletin board were convicted of enterprise and related offenses in the Central District of California. Most recently, 48 members of the Internet forum "Dreamboard" were convicted of enterprise and related offenses in the Western District of Louisiana. The statute's recent use and evaluation by some United States courts of appeals has highlighted issues that prosecutors and investigators who wish to utilize this statute should consider, from the investigative stage through charging and trial.

The CEE statute states:

> A person engages in a child exploitation enterprise for the purpose of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

18 U.S.C. § 2252A(g) (2013). A violation of the statute carries a mandatory-minimum penalty of 20 years and a maximum of life imprisonment.

II. Case law construing the CEE statute

Thus far, three United States courts of appeals cases have examined the CEE statute. In *United States v. Wayerski*, 624 F.3d 1342 (11th Cir. 2010) and *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012), the Eleventh Circuit heard the appeals of several "Operation Achilles" defendants who had been convicted both of Engaging in a Child Exploitation Enterprise and of conspiracy to commit

child pornography offenses underlying the enterprise. In *United States v. Daniels*, 653 F.3d 399 (6th Cir. 2011), the Sixth Circuit heard the appeal of Robert Daniels, also known as "Motor City Mink," following his conviction for enterprise and related offenses in connection with a prostitution business he ran in and around Detroit, Michigan.

In light of the relatively recent passage of the CEE statute, courts examining the CEE statute have looked to the similar Continuing Criminal Enterprise statute, 21 U.S.C. § 848, and case law interpreting that statute, to help construe the CEE statute. It is therefore advisable for any prosecutor or investigator looking to use the CEE statute to have at least a basic understanding of the Continuing Criminal Enterprise statute.

Wayerski and *McGarity* upheld the CEE statute and the defendants' convictions pursuant to it against various constitutional challenges. Both decisions vacated defendants' convictions for underlying conspiracy charges, however, finding them to have been lesser-included offenses of the enterprise counts and therefore violative of the Double Jeopardy Clause. The courts' reasoning followed similar holdings in the Continuing Criminal Enterprise context: the requirement that a CEE offense be committed "in concert with" three or more other persons requires proof of a conspiracy; therefore a conviction for conspiracy and enterprise based upon the same conduct amounts to a double jeopardy violation. To prevent multiple punishments for the same crime, both courts vacated the judgment for the conspiracy counts and remanded for re-sentencing on the CEE counts. *Wayerski*, 624 F.3d at 1350-51; *McGarity*, 669 F.3d at 1254.

In the context of a child prostitution CEE case, the Sixth Circuit in *Daniels* overturned the defendant's conviction for enterprise because of insufficient evidence that he committed his crimes "in concert with" three or more other persons. 653 F.3d at 413-14. Relying on *Wayerski* and analogizing to the Continuing Criminal Enterprise statute, the Sixth Circuit found that the CEE statute's requirement that the offenses be committed "in concert with" three or more other persons required proof of a conspiracy. *Id*. at 413. Because the victims of the various sex trafficking of children and transportation crimes—the child prostitutes themselves—could not be counted as coconspirators, there were not enough other persons involved in the conspiracy to establish that Daniels had acted in concert with three or more other persons, as required for an enterprise violation. *Id*. at 413-14.

III. Is there an enterprise?

In light of the case law interpreting the CEE statute and its requirements, prosecutors and investigators considering the use of the CEE statute should first consider whether there is sufficient evidence to demonstrate that an enterprise exists. As noted above, *Wayerski*, *McGarity*, and *Daniels* hold that proving a CEE requires evidence of a conspiracy between a defendant and three or more other persons. Accordingly, whether a cognizable enterprise exists will hinge on whether there is a conspiracy involving at least four participants, three or more felony predicate acts, and more than one minor victim.

Such a conspiracy may take many forms. In "Operation Achilles," the enterprise utilized Internet newsgroups—large file-sharing networks where text, software, pictures, and videos can be traded and shared—to traffic in illegal images and videos depicting children, as young as infants, engaged in various sexual and sadistic acts. Group members were very tightly-knit and highly-organized, and each member had very specific responsibilities, such as administering the group, overseeing security of the group (including issuing a security manual for all members), pulling together postings into an updated compilation for all members, establishing an online payment account and soliciting money from other members to pay overseas producers to create new child pornography images for the group, and administering a detailed test for potential members to determine their knowledge of child pornography images and series. In other words, the group ran as a highly-organized business with the express purpose of making hard-core child pornography images available to its members.

The "Lost Boy" enterprise operated through an online bulletin board. It had a thorough vetting process for new members, who were required to post child pornography to join the organization. Once accepted, members were required to continue posting child pornography to remain in good standing and to avoid removal from the board. Lost Boy members also advised each other on techniques to evade detection by law enforcement, which included using screen names to mask identities and encrypting computer data.

The "Dreamboard" enterprise was a similarly organized group that also operated through an online bulletin board. Membership was tightly controlled by the administrators of the bulletin board, who required prospective members to upload child pornography portraying children 12 years of age or younger when applying for membership. Once they were given access, members were required to continually upload images of child sexual abuse in order to maintain membership. Members who failed to follow this rule would be expelled from the group. Dreamboard members were divided into groups based on status and ranking. The higher the rank, the more material was available to the member. The highest level of membership was reserved for individuals who created new images of child pornography by molesting children and shared those images with the board administrators. Individuals advanced to higher levels of membership by providing child abuse images that the individual had produced, providing a large number of images, or providing images that had never been seen before. The bulletin board also included specific rules of conduct, which were printed in English, Russian, Japanese, and Spanish.

Whether less-formalized networks of offenders might suffice for an enterprise charge will depend upon the specific facts of the case. There must be sufficient evidence to demonstrate that a conspiracy exists (that is, that the defendant and three or more other persons made an agreement to commit the crime charged), that the defendant knew the unlawful purpose of the agreement, and that the defendant engaged in it willfully, with the intent to further the unlawful purpose.

Proof of a conspiracy can take many forms and need not involve formal agreements. Yet, in the online context, even an informal or tacit agreement may be difficult to prove in certain factual circumstances. Consider a common child pornography trading scheme, involving offenders who trade child pornography images via email. Such offenders sometimes create a formal or informal network of contacts who trade and share images with each other. While such groups may have some degree of organization and structure, prosecuting them as an enterprise may present problems. For example, there may be side-trading and communication going on between individual members that is not, and perhaps cannot be, attributed to the conspiracy itself. Where the members are all part of a distribution list, the members receiving emails of child pornography may be acting as passive recipients, much like a commercial purchaser, whose only active participation was signing up to receive child pornography. Moreover, the potential among such a group for multiple conspiracy issues is strong. Accordingly, the closer the group of offenders is to a distribution list or an informal group of like-minded individuals who trade child pornography where its members do not have formal responsibilities or requirements, the more difficult it will be to prove that a conspiracy exists, and therefore to charge the group as an enterprise.

IV. Who to charge and what to charge them with

If sufficient evidence exists to prove the existence of an enterprise, the next important question faced by investigators and prosecutors is who to charge with being a member of the enterprise, and what to charge the participants with. Each member charged with enterprise must be legally liable for three or more felony child exploitation violations involving one or more victims. In the context of an online child pornography group, the conservative charging option is relatively clear: where sufficient evidence of a conspiracy exists, look to charge members who have themselves committed three or more child exploitation crimes. In bulletin board cases such as Dreamboard or Lost Boy, that meant charging members who themselves made three or more postings or advertisements of child pornography to the board, and those postings or advertisements involved more than one victim.

That does not mean, however, that members of such a board who have less documented participation cannot be charged at all. In the Dreamboard and Lost Boy cases, board members who had made less than three documented postings or advertisements of child pornography were nonetheless charged with conspiracy to advertise and/or distribute child pornography. Because of the detailed rules of the sites, including that members must post child pornography to gain and maintain membership, and the access to child pornography gained by obtaining membership, proof of their having joined the organization and made postings to the board was strong evidence of their participation in the conspiracy. In fact, simply joining organizations like Dreamboard or Lost Boy may justify charging conspiracy to advertise and distribute child pornography, because an applicant cannot help but be aware that being accepted would mean becoming part of a group dedicated to that purpose. Furthermore, because the conspiracies to advertise and distribute child pornography are specifically criminalized within the pertinent statutes, *see* 18 U.S.C. § 2251(d)(1)(A) and (e)(1) (2013) (conspiracy to advertise child pornography); 18 U.S.C. § 2252A(a)(2)(A) and (b)(1) (2013) (conspiracy to distribute child pornography), there is no requirement that overt acts be alleged.

Looking for three qualifying predicate felonies committed by an individual defendant represents a conservative charging strategy, but it is not the only strategy. In any conspiracy, liability for criminal acts by the conspiracy may be proven on a *Pinkerton* theory. That is,

> [c]o-conspirators are liable for the reasonably foreseeable acts of another co-conspirator taken in the course of and in furtherance of the unlawful agreement, regardless of whether they had actual knowledge of those acts, so long as they played more than a minor role in the conspiracy or had actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable event.

United States v. Baker, 432 F.3d 1189, 1235 (11th Cir. 2005); *see also United States v. Broadwell*, 870 F.2d 594, 603-04 (11th Cir. 1989); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203 (9th Cir. 2000). The limits of such a *Pinkerton* theory of liability in the online child exploitation enterprise group context, however, are undefined. If courts look to the similar Continuing Criminal Enterprise statute, as the Eleventh and Sixth Circuits have in interpreting the CEE statute, then support can be found for criminal liability on such a theory. Whether and when a particular defendant can be tied to a CEE through a *Pinkerton* theory will be fact-intensive and involve the offender's degree of involvement in the enterprise, its formality and structure, the responsibilities of different members, and their relative degrees of knowledge of the organization's purpose. The lead administrator of an online child pornography forum, for example, who sets up the structure and rules of the board, but who may not actually post illicit material, would be a prime candidate for liability for CEE on a *Pinkerton* theory. On the other hand, using *Pinkerton* liability to charge members with CEE who posted few images of child pornography or were only members of the forum for a short period of time makes little sense.

A related question arises regarding whether each predicate act needs to be committed along with three or more other persons. The only court to consider such a question said "no." *Daniels*, 653 F.3d at 412. Daniels argued that the Government needed to prove that each of the predicate acts—in his case, acts of prostitution of minors—was committed along with three or more other persons. The Sixth Circuit rejected that argument, finding that "in concert with three or more other persons" refers to the "series of felony violations" rather than to each separate predicate count. *Id*.

V. Enterprise, conspiracy, and double jeopardy

Even in light of the holdings in *Wayerski* and *McGarity*, it is advisable to have a separate conspiracy count in a CEE indictment, even where that conspiracy is the same as the enterprise itself. Such a charge can account for any proof issues that may emerge with the greater requirements of enterprise (that is, three or more predicate acts and three or more other persons in enterprise, as opposed to an agreement by two or more persons to commit a criminal offense). A separate conspiracy count may

also facilitate arguments about venue, *Pinkerton* liability (as discussed above), coconspirator statements, severance, or other issues. A separate conspiracy charge may also allow for charging members with lesser involvement—who might not qualify for the enterprise charge—in the same indictment.

While no double jeopardy issue arises from *charging* defendants with both enterprise and conspiracy for the same conduct, such an issue does arise if a defendant is *convicted* and *sentenced* on both counts, as in the *Wayerski* and *McGarity* cases. Accordingly, after the jury's verdict, but before or at the time of sentencing, the trial court should take some action to avoid sentencing the defendant in violation of double jeopardy principles. This can be handled in a number of ways: the Government may move to dismiss a lesser-included offense, or the court may vacate the count prior to sentencing.

What if an appellate court were to reverse the conviction on the enterprise charge, after a jury verdict on the underlying conspiracy charge was vacated or dismissed? Where the reasons for overturning the enterprise charge would not impact the conviction on the underlying conspiracy, a jury verdict on the lesser conspiracy charge may be reinstated by the district court, or even by the court of appeals. *See United States v. Cabaccang*, 481 F.3d 1176, 1183 n.4 (9th Cir. 2007); *Rutledge v. United States*, 230 F.3d 1041, 1049 (7th Cir. 2000); *United States v. Silvers*, 888 F. Supp. 1289, 1306-09, *aff'd in relevant part*, 90 F.3d 95 (4th Cir. 1996) (reinstating vacated conspiracy conviction after granting new trial on CCE conviction); *United States v. West*, 201 F.3d 1312 (11th Cir. 2000); *United States v. Ward*, 37 F.3d 243, 251 (6th Cir. 1994) (directing reinstatement of vacated conspiracy conviction); *United States v. Niver*, 689 F.2d 520, 531 (5th Cir. 1982). The Supreme Court approved such a practice in *Rutledge v. United States*, 517 U.S. 292, 305 (1996).

In light of this case law, it is advisable to encourage the trial court to make it explicitly clear on the record that it is vacating or dismissing the lesser-included charge after a jury verdict because of double jeopardy implications, and that its intent would be that such a conviction be reinstated should the conviction on the greater offense be overturned for a reason that would not affect the conviction on the lesser-included charge.

VI. Managing evidence and discovery

Undertaking a CEE prosecution can present significant logistical challenges in terms of gathering evidence and coordinating discovery. Unlike most other types of conspiracies, members of an online CEE are located all around the world. The core investigation and prosecution team will accordingly be required to enlist the assistance of other investigators and prosecutors to seek, obtain, and execute search warrants, gather evidence for the case, coordinate arrests, and deliver evidence to the jurisdiction of prosecution.

Having sound protocols in place is key. Whereas assisting agents might be familiar with searching and processing evidence for individual child pornography cases, they may be less familiar with the sort of evidence required to prove participation in a CEE. Consequently, the lead prosecutors and case agents may wish to set up and distribute a search and interview protocol for agents conducting searches so that the collection of evidence and interrogation of subjects of the investigation will be done consistently and in a manner that maximizes usable evidence. In the case of a CEE involving an online forum, such protocols might include instructions regarding computer forensic examinations that will be crucial to quickly identifying suspects and evidence. For example, although searching for child pornography images on a subject's computer is significant, evidence of their participation on the bulletin board is more important, which might mean looking for online aliases or "screen names" tied to the board, or for communications with other board members, as opposed to child pornography images.

Depending upon the site of the CEE and the number of defendants charged, the amount of computer data seized in a CEE case can be staggering. The prosecution team will need to coordinate with forensic agents to determine who will conduct forensic examinations and to determine the substance and timing of those examinations. Furthermore, in child pornography cases, 18 U.S.C. § 3509(m) requires that

"property or material constituting child pornography remain in the care, custody, and control of the [g]overnment or the court," though it must be made "reasonably available to the defendant." Accordingly, agents will need to parse through that data not only to find usable evidence, but also to determine what data can be turned over in discovery and what must be otherwise made available to the defense.

Centralizing the process as much as possible has proven to be productive. For example, in the Dreamboard case, documents pertinent to all charged defendants were digitally copied, bate-stamped, and provided to all defendants. Documentation particular to individual defendants and searches/seizure of evidence from their residences/premises were provided to individual defendants and made available to coconspirators. Perhaps most significantly, a computer laboratory was set up where defense attorneys could view data from the Web site, including child pornography, as well as data particular to their own client. Agents were available to assist defense attorneys in terms of explaining the site and its functionality and directing them to charged or pertinent activity of their clients.

VII. Conclusion

The CEE statute can be a productive tool for the prosecution of organized groups of offenders for child exploitation offenses. ❖

ABOUT THE AUTHORS

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❑ **John "Luke" Walker** has been as an Assistant United States Attorney for 24 years. He has served as lead counsel in the prosecution of the Dreamboard online child pornography forum. He was previously an Assistant District Attorney in New Orleans, Louisiana, where he prosecuted a variety of cases including murder, rape, and child exploitation offenses. ✠

Intra-Corporate Conspiracies: The Limits to Conspiring With Your Own Corporation

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Prosecutors are well aware that a conspiracy under 18 U.S.C. § 371 requires an agreement between two or more people. But corporations are people too, at least for purposes of criminal and civil liability, and are personified through the actions of their agents. So, can a corporation conspire with its own agents (that is, an "intra-corporate" conspiracy), consistent with the principle that a private individual cannot conspire with himself? The short answer: Yes, provided the intra-corporate conspiracy involves at least two human actors.

This answer was not always clear-cut. When the question first arose in the context of antitrust litigation, courts routinely rejected the concept of intra-corporate conspiracies and instead embraced the "single-entity" theory—the theory that all agents of a corporation form a single, collective legal person. Given the statutory framework of the Sherman Antitrust Act, this conclusion is understandable. Section one of the Sherman Act, which prohibits any "conspiracy . . . in restraint of trade," 15 U.S.C. § 1 (2012), was intended to prevent unreasonable trade restraints achieved by the collaboration of two or more economic entities. Section two, by contrast, was directed against a single conglomerate engaged in or attempting to engage in monopolistic practices. Courts reasoned that if intra-corporate conspiracies were actionable under section one, then section two was superfluous—and basic principles of statutory construction suggest that Congress would not enact something superfluous. *See, e.g., Morton Buildings of Neb., Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 918-20 (8th Cir. 1976); *Nelson Radio & Supply Co. v. Motorola Inc.*, 200 F.2d 911, 917-18 (5th Cir. 1952). This reasoning makes sense insofar as it is difficult to imagine any intra-corporate conspiracy which could actually restrain trade under section one without the participation of other entities.

As corporate criminal law became more developed and prosecutors began charging more cases involving corporate conspiracies, defense counsel latched onto the single-entity theory as a basis for challenging any intra-corporate conspiracies charged under 18 U.S.C. § 371. The courts, however, were unwilling to take the single-entity theory that far. As the Eleventh Circuit explained in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982):

> By personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial responsibility for them. The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other. We decline to expand the fiction only to limit corporate responsibility in the context of the criminal conspiracy now before us.

Id. at 970. Every circuit addressing this issue has followed suit.

There is at least one exception to the general rule recognizing intra-corporate conspiracies under § 371: where only one human agent acted on behalf of the corporation. In *United States v. Stevens*, 909 F.2d 431 (11th Cir. 1990), the defendant—the sole shareholder and only human agent for four

corporations organized for the purpose of performing government contract work—challenged his conviction for conspiring with those same corporations. The district court ruled that a person could conspire with his wholly-owned corporation, but the Eleventh Circuit disagreed:

> The threat posed to society by these combinations [conspiracies] arises from the creative interaction of two autonomous minds. It is for this reason that the essence of a conspiracy is an *agreement*. The societal threat is of a different quality when one human simply uses the corporate mechanism to carry out his crime. The danger from agreement does not arise.
>
> Even if it can be said that Stevens made up his mind as an individual to pursue fraudulent ends and at the same time made up the "minds" of his corporations to pursue these same ends, this case lacks any interaction between multiple autonomous actors. The basis for punishing Stevens for the separate offense of conspiracy, in addition to the substantive offenses he committed, is not present in this case.

Id. at 433-34 (emphasis in original). *See also United States v. Peters*, 732 F.2d 1004, 1008 n.6 (1st Cir. 1984) ("A corporate officer, acting alone on behalf of the corporation, could not be convicted of conspiring with the corporation.") (dicta).

While you need at least two human actors to bring an intra-corporate conspiracy charge, an aiding and abetting charge may be a different story, at least in the Third Circuit. In *United States v. Sain*, 141 F.3d 463 (3d Cir. 1998), the defendant—relying specifically on the *Stevens* decision—argued that he could not be convicted under the theory that he aided and abetted a corporation because he was the sole owner and controlling shareholder. He argued that he could not aid and abet himself any more than he could conspire with himself. The Third Circuit assumed for purposes of argument that it was impossible for the defendant to conspire with his own corporation, but nevertheless held that this conclusion "does not preclude imposition of aiding and abetting responsibility." *Id.* at 474. The court reasoned that although there must be at least two human actors for an intra-corporate conspiracy because two entities must have the required mental state to form an agreement, the aiding and abetting statute "allows for broader liability and does not require proof that an unwitting entity being used to commit the crime possessed any mental state." *Id.* at 475. Furthermore, in the view of the *Sain* court, an "unwitting entity" would also include a wholly-owned corporation of the defendant:

> Therefore, an individual who causes a corporation to commit a crime is criminally liable for the corporation's criminal conduct as an aider and abettor even if the corporation does not act with a knowing mental state. For that reason, conviction of Sain was proper even assuming arguendo that Sain caused AEC [his wholly owned corporation] to unwittingly commit the crime.

Id. This is a novel—and arguably defensible—position, yet one has to wonder whether it is worth pushing this envelope in any other forum.

It bears emphasizing that just because you can bring conspiracy charges against a corporation—or any other federal charge for that matter—it does not necessarily mean you should. In determining whether to bring charges or negotiate a plea or other agreement with a corporate target, prosecutors must consider the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, the corporation's timely and voluntary disclosure of wrongdoing, the existence and effectiveness of the corporation's pre-existing compliance program, the adequacy of remedies such as civil or regulatory enforcement actions, and the collateral consequences of prosecution to investors, pension holders, employees, and others who were not personally culpable. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-28.300, 9-28.900 (2008). Moreover, if a corporation is truly a shell or "fly-by-night" organization, little is to be gained by charging it in addition to the human actors responsible for the crime.

The essence of a conspiracy is an agreement—the meeting of two or more minds to commit or further an illegal act. Corporations can only do their "thinking" through the actions of their agents. So, for an intra-corporate conspiracy to exist, there must be at least two agents involved. ❖

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Conspiracies in Indian Country

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I. Introduction

For prosecutors who do not regularly prosecute crimes committed in Indian Country, the prospect of navigating the Indian Country jurisdictional maze ranks only slightly above solving a Rubik's cube while blindfolded and underwater. Indian Country jurisdiction can be daunting. Before a prosecution or investigation proceeds, the following assessments are routinely made: (1) whether the defendant is Indian or non-Indian, (2) whether the victim is Indian or non-Indian, (3) whether the crime is a felony or misdemeanor, and (4) whether the crime was committed in Indian Country. *See generally* 18 U.S.C. §§ 1152 and 1153 (2013). And these complex jurisdictional determinations are in addition to establishing the elements of the substantive crime!

Furthermore, Indian Country itself comprises a unique cultural, historical, and juridical mixture in modern-day America. Native Americans, collectively and individually, still practice traditional religions, ceremonies, and other cultural customs that have been passed from generation to generation, in many cases, over thousands of years. Traveling to Indian Country can seem like stepping back in time, as visitors may discover traditional communities or sadly impoverished third-world-like conditions. For investigators or prosecutors unfamiliar with these cultural circumstances, developing an investigative strategy and prosecutorial plan for an Indian Country matter may be more difficult as one seeks to avoid a cultural faux pas that hinders prosecutorial efforts.

These factors can combine to create an atmosphere in which Indian Country prosecutions end up the opposite of user-friendly and effective. However, not all Indian Country matters are perceived as convoluted, nor do they all require complex jurisdictional analysis.

This article briefly discusses unique aspects and successful strategies when prosecuting or investigating a conspiracy that touches upon Indian Country. It provides common sense considerations that have proved useful to agents and prosecutors working in Indian Country.

II. Conspiracy law generally

The general federal conspiracy statute, 18 U.S.C. § 371, requires the Government to prove four

elements (or five, if you practice in the Tenth Circuit):

(1) The defendant agreed with at least one other person to violate the law

(2) One of the conspirators engaged in at least one overt act furthering the conspiracy's objective

(3) The defendant knew the essential objective of the conspiracy

(4) The defendant knowingly and voluntarily participated, and

(5) There was interdependence among the members of the conspiracy—that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

United States v. Quarrell, 310 F.3d 664, 678 (10th Cir. 2002).

Congress ensured that Indian Country would not be a safe haven for crime by providing that the generally applicable laws of the United States shall also apply in Indian Country. Prosecutors should look to the federal firearms and narcotics statutes for the most commonly violated generally applicable laws in Indian Country. Likewise, federal conspiracy statutes are applicable throughout the United States, including in Indian Country, and do not necessarily require an intimate knowledge of federal Indian law to be utilized effectively.

Simply put, a conspiracy is a conspiracy is a conspiracy, no matter where it occurs within the territorial jurisdiction of the United States. Legally speaking, therefore, an Indian Country conspiracy is the same as any other.

That said, an Indian Country conspiracy can present unique challenges to federal investigators and lawyers. As with any conspiracy prosecution, the need for and use of an insider is great. Cooperators are essential to breaking down the inner workings of the conspiracy and to provide prosecutors with the details surrounding the nature of the agreement and its inception. Of course, an agreement among conspirators need not be written, oral, or even explicit, but can be inferred from the facts of the specific case. And the coconspirator cooperator is almost always the best source for facts surrounding the agreement. But developing the coconspirator cooperator or, for that matter, forthcoming witnesses, in an Indian Country matter can be difficult, as the next section of this article will explain.

III. Piercing the cultural veil—a common sense approach to Indian Country conspiracies

Historical mistrust toward federal authorities, cultural nuances, and the fact that many tribal communities are small and insular, can all combine to present prosecutors and investigators with significant challenges when seeking out witnesses or cooperators for a federal conspiracy trial that originated in Indian Country. In Oklahoma, where there are no reservations but rather a bevy of Indian lands that checkerboard the state, federal law enforcement authorities have found that the best way to "pierce the cultural veil" is through collaborative law enforcement.

The Northern District of Oklahoma is home to 14 federally recognized tribes. The majority of those tribes have their own tribal police departments with varying levels of manpower, resources, and experience. They patrol areas of tribal land that are not contiguous and, in one tribe's case, span 14 counties in northeast Oklahoma. Smaller tribes often supplement their forces with the help of the Bureau of Indian Affairs, Office of Justice Services. Other tribes work regularly with the FBI. But no matter the case, Indian Country investigations in the Northern District of Oklahoma are joint investigations.

Federal-tribal collaboration is essential to successfully prosecuting conspiracies in Indian Country. To an even greater extent, tribal cross-deputation agreements with state, local, and county law

enforcement authorities further enhance the ability to effectively investigate Indian Country conspiracies that often cross over multiple jurisdictions. These conspiracies may manifest themselves through drug trafficking, white collar crimes, and even violent crimes.

Like many rural communities, the business of any one person is often known by all in Indian Country. This is the result of small populations, residential proximity to one another, longstanding landholdings, settlement, and large numbers of extended families in one area. Therefore, flipping a potential cooperator may prove particularly challenging when the coconspirators are family members or because of a fear of retribution from the community when they discover the individual is a cooperator. Another cultural challenge arises when a potential witness is an elderly tribal citizen. Often, these citizens may speak limited English (preferring their native language) and are distrustful of the Federal Government, having experienced eras of failed and even hostile federal Indian policies. The resulting scenario does not bode well for a non-Indian federal agent seeking to build rapport and obtain information critical to the investigation.

To address these challenges, the Northern District of Oklahoma regularly pairs federal agents with tribal officers. These pairings provide the federal agent with a knowing partner who is conscious of cultural practices, who may speak a Native American language, or who has intimate knowledge of the Indian community. Likewise, the pairing provides the tribal officer with an experienced federal agent who is familiar with the federal system and who may have more extensive investigative resources.

Prior to interviewing Indian witnesses or subjects of a conspiracy investigation, it may be advisable to have an "Indian Culture 101" briefing for non-Indian agents who are unfamiliar with tribal culture. Address basic subjects that may be encountered during an interview, for example:

Handshakes—You may not receive a strong handshake when meeting a tribal member, as a "handshake" is a Western tradition. Do not consider a soft handshake a lesser sign of greeting.

Eye contact—Native Americans may not look you in the eye when you are conversing with them. This is often a sign of respect, not a sign of deception. Still, it is not considered disrespectful when a non-Indian makes eye contact with an Indian during conversation, as that is a standard Western tradition.

Using "Indian" vs. "Native American" vs. "Native"—All are acceptable and commonly used. You should use the term with which you are most comfortable unless the speaker demonstrates otherwise by their use. Most tribal members will make a specific reference to their tribe or another tribe rather than use the general term "Indian."

Speech patterns—Some Native Americans' first language may be their traditional, tribal language. As a result, when communicating with you in English, a Native American speaker may appear shy, laconic, or even reticent.

Attention to basic details such as these may be crucial in securing the cooperation of a coconspirator who was working with fellow tribal members or family members.

Bottom line, prosecutors and agents should take a common sense approach to conspiracy investigations in Indian Country and maintain a keen awareness of cultural practices.

IV. Piercing the corporate veil—conspiracies affecting gaming establishments

Since the approval of tribal gaming in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Indian gaming establishments have exponentially increased in number and in industry-wide profits. Like any cash-based business, the gaming industry is a prime target for embezzlers, cheats, and thieves. White collar criminals exploit Indian gaming establishments for their financial benefit at the expense of the tribe and tribal citizens. As such, prosecutors are likely to find fertile ground for federal conspiracy prosecutions at Indian gaming establishments.

Today, there are approximately 460 Indian gaming operations owned by 240 tribes throughout the United States. NATIONAL INDIAN GAMING COMMISSION, GAMING TRIBE REPORT 1 (2011), *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=VfZfhOoHuMc%3d&tabid=943. In 2011, the National Indian Gaming Commission (NIGC) reported revenue of $27.2 billion among all gaming operations under its jurisdiction. NATIONAL INDIAN GAMING COMMISSION, GROWTH IN GAMING REVENUES IN PAST 10 YEARS (2011), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20 Data/GrowthinIndianGamingGraph20022011.pdf. As such, the implementation of careful accounting practices and strict gaming supervision are integral to the effective prevention of crime in Indian gaming casinos. Still, it is estimated that Indian gaming establishments annually lose approximately six percent of their revenue to theft and embezzlement. Based on the 2011 revenue estimations from the NIGC, six percent would amount to a $1.632 billion loss to the Indian gaming industry as the result of theft and embezzlement.

With perceived notions of the lack of jurisdiction or interest—including prosecution thresholds, complacency by justice-related officials, or the belief that a high-ranking tribal official who is a relative or friend will protect them—white collar criminals seek to exploit perceived vulnerabilities at Indian gaming establishments. White collar threats are generally separated into two broad categories: internal threats and external threats. Internal threats include fraud, embezzlement, and theft by officers and employees of the Indian gaming establishment. External threats may include counterfeiting, cheats (cards or gaming machines), theft, and trespass. It is when the internal and external threats confederate with one another that conspiracies are hatched and, ultimately, tribal gaming monies are embezzled and stolen.

And yet, many casino crimes go unreported to federal, state, or tribal authorities for prosecution, and the $1.632 billion loss is too commonly accepted as "a cost of doing business" by tribal gaming authorities. These authorities, whether individual gaming commissioners, boards/commissions, or security officials, are making business decisions to handle potential criminal matters internally and administratively, rather than through a United States Attorney's office or even a tribal prosecution. All too often, gaming employees who have embezzled and stolen from the casino will be fired and have their final paycheck garnished, with no further documentation. Casinos may not even advise another casino that subsequently hires the offender of the offender's history. Such handling of theft and embezzlement is the equivalent of kicking the can down the road, because the fired employee will retain his or her gaming license and likely seek employment at another Indian gaming establishment.

In the Northern District of Oklahoma, federal prosecutors and agents have sought to increase the reporting of casino crimes by appealing to the business interests of tribal gaming authorities. The tribal liaison and fellow prosecutors routinely provide training and workshops to highlight the benefits of reporting crimes and supporting a prosecution through their United States Attorney's office. Of particular interest to tribal gaming authorities is a discussion of the Financial Litigation Unit and Asset Forfeiture Unit. Showing how a federal prosecution can facilitate not only holding lawbreakers accountable, but also recovering lost monies (for example, 6 percent of $27.2 billion) can help persuade even the most reticent gaming authorities.

The United States Attorneys' offices in Oklahoma's three districts have prosecuted several white collar conspiracies in Indian Country. While some conspiracies involved corrupt tribal officials, the majority of Oklahoma Indian Country conspiracies pertained to the embezzlement, theft, or conversion of gaming-related monies. Conspiracies prosecuted in Oklahoma include tribal gaming employees who conspired with customers to manipulate a casino's Player's Club database by giving the coconspirator customers more than $180,000 of "free-play," casino card dealers who conspired with players to cheat at poker and blackjack games, gaming vendors who conspired with employees to manipulate gaming servers, counterfeit currency conspirators who exchanged counterfeit bills for chips and later cashed in those chips for real money, and gamblers who made $500 counterfeit poker chips and conspired to and did introduce them into play during card games. Given the growth of gaming in Indian Country, the frequency of external and internal conspiracies is only expected to increase.

V. Conclusion

Conspiracies in Indian Country are, legally speaking, no different from conspiracies elsewhere. Practically speaking, they demand and deserve ardent effort. Investigators and prosecutors should coordinate and communicate with tribal law enforcement and gaming authorities, as appropriate. Pairing federal and tribal law enforcement officials will enhance the investigation by ensuring that cultural nuances are respected and interviews of potential witnesses or coconspirator cooperators are productive. Furthermore, prosecutors should highlight the ability of the United States Attorney's office to recover restitution and money judgments from white collar conspirators, as well as ensure gaming employee defendants do not retain a gaming license to work at and defraud another tribal gaming facility. Though the prosecution of an Indian Country conspiracy case may call for an extra measure of dedication and patience from investigators and prosecutors alike, the rewards of vindicating the laws of the United States on behalf of Native American citizens are equally special. ❖

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Jury Instructions in Conspiracy Cases

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I. Introduction

Conspiracies are some of the most complicated cases in the federal criminal justice system, as evidenced by the often lengthy and cumbersome jury instructions. When beginning to draft a conspiracy indictment, the initial decisions a prosecutor must make include:

- Defining the object(s) of the conspiracy
- Determining the duration of the conspiracy
- Deciding which defendants to include in the conspiracy

The purpose of this article is to assist prosecutors in drafting concise conspiracy indictments. Because there are many federal conspiracy statutes, the general conspiracy statute, 18 U.S.C. § 371, will be used here. This statute provides for two types of conspiracies: (1) a conspiracy to commit a substantive offense, and (2) a conspiracy to defraud. A conspiracy is proved:

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . . .

18 U.S.C. § 371 (2013).

Generally, as set forth in *United States v. Feola*, 420 U.S. 671, 686 (1975), the Government must prove the intent required to commit the underlying offense when charging the first type of conspiracy. This article will focus on the defraud clause, which has been interpreted broadly for many years. In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Supreme Court said:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.

Id. at 188.

The basic elements of a conspiracy to defraud the United States are:

- Agreement by two or more persons to defraud the United States
- Each defendant became a member of the conspiracy with the intention to help accomplish its object
- An overt act committed by one conspirator during and in furtherance of the conspiracy

Selected pattern instructions and brief summaries of case law will be used to highlight potential issues that prosecutors should consider when drafting a conspiracy count. The tables at the end of this article serve as a reference guide to find pattern instructions in each circuit and other helpful materials regarding federal jury instructions. The jury instruction topic page with links to the pattern instructions listed in the tables is available at http://dojnet.doj.gov/usao/eousa/ole/tables/subject/jury.htm. The Third, Sixth, and Eighth Circuits have the most comprehensive pattern instructions for conspiracies charged in violation of § 371. Prosecutors practicing in other circuits should consider reviewing those instructions for potential arguments during jury instruction conferences.

A review of the pattern instructions for § 371 conspiracy shows the most challenging issues are in three areas: (1) the mens rea needed to prove the defendant was a participant in the conspiracy, (2) single conspiracy with multiple objects, and (3) what steps are taken when the evidence suggests the existence of multiple conspiracies. Each of these areas will be discussed in turn.

II. The mens rea needed to prove the defendant was a participant in the conspiracy

In most circuits there are two prongs to the intent requirement, with slight variations in terminology. First, did the defendant intentionally join the conspiracy? Second, did the defendant become a member of the conspiracy with the intention to help accomplish its object? The Sixth Circuit goes one step further and specifically recommends no separate instruction be given regarding any bad purpose or corrupt motive. *See* Instruction 3.05 Bad Purpose Or Corrupt Motive.

Only two circuits have additional instructions regarding proof of mens rea with respect to participation in a conspiracy. The Third Circuit has two pattern instructions, similar to the language of other circuits, that require the Government to prove a defendant knowingly and intentionally joined the conspiracy. *See* Instruction 6.18.371C, Existence of an Agreement; Instruction 6.18.371D, Membership in the Agreement. Unique to the Third Circuit, there is a separate third instruction that repeats the knowing

and intentional standard, discusses what type of evidence the jury may consider, and lists an example of "derived some benefit" to provide further explanation to the jury of what evidence may be relevant to this inquiry. Instruction 6.18.371E, Mental States.

The other circuit with additional mens rea language is the Ninth Circuit, which requires a finding the defendant acted "by deceitful and dishonest means." Instruction 8.21 Conspiracy to Defraud the United States. This language was derived from *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993), where the Ninth Circuit reversed a conviction in which the Government proved there was an attempt to defraud the IRS, but failed to prove it was done with deceit or trickery. The Ninth Circuit held that defrauding the Government under § 371 "means obstructing the operation of any government agency by any 'deceit, craft or trickery, or at least by means that are dishonest.' " *Id.* at 1058 (quoting *Hammerschmidt*, 265 U.S. at 188).

Instruction 8.21 contains optional language regarding a defendant's good faith:

> An agreement to defraud is an agreement to deceive or to cheat, but one who acts on an honest and good faith misunderstanding as to the requirements of the law does not act with an intent to defraud simply because [his or her] understanding of the law is wrong or even irrational. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it.

Instruction 8.21.

One final comment about Ninth Circuit Instruction 8.21 is that it contains the following language that may be problematic in a conspiracy to defraud case:

> [Y]ou must find that there was a plan to commit at least one of the *crimes* alleged in the indictment as an object of the conspiracy with all of you agreeing as to the *particular crime* which the conspirators agreed to commit.

Id. (emphasis added). There is no separate "crime" or "particular crime" in a conspiracy to defraud. Instead, the object is the language in the indictment after "to defraud the United States by . . . ." For example, in *Caldwell*, the crime charged was "to defraud the United States by impeding, impairing, obstructing and defeating the Internal Revenue Service in ascertaining, computing, assessing and collecting taxes." 989 F.2d at 1060. Prosecutors in the Ninth Circuit may want to suggest additional language to clarify the nature of a conspiracy to defraud the United States.

III. Single conspiracy with multiple objects

In *Griffin v. United States*, 502 U.S. 46 (1991), the Supreme Court held that a general guilty verdict in a multiple object conspiracy did not violate the Due Process Clause as long as the evidence was sufficient to support the guilt of the defendant on one of the objects. In *Griffin*, the defendant was charged in two distinct conspiracies: a conspiracy to defraud the IRS and a conspiracy to defraud the DEA. The Court reasoned that because it was a factual issue to be determined by the jury and did not rest on an unconstitutional ground, the controlling precedent was *Turner v. United States*, 396 U.S. 398 (1970), not *Yates v. United States*, 354 U.S. 298 (1957) (*overruled on other grounds*). The *Griffin* Court acknowledged that "it would generally be preferable for the court to give an instruction removing [an unsupported] theory from the jury's consideration," but that the failure to do so did not warrant reversal of an otherwise valid conviction. 502 U.S. at 60.

Some appellate circuits require the jury to unanimously decide which object of the conspiracy was proved when multiple objects are alleged. Eighth Circuit Instruction 5.06F, Eleventh Circuit Instruction 13.2; District of Columbia Instruction 7.102 (in commentary to pattern instruction, as required by *United States v. Treadwell*, 760 F.2d 327 (D.C. Cir. 1985)).

IV. Single versus multiple conspiracies

The primary factor in determining if a jury should be instructed about the possibility of multiple conspiracies is whether the evidence proved at trial constitutes a material variance from the conspiracy charged in the indictment. In *Berger v. United States*, 295 U.S. 78 (1935), the Supreme Court held that a variance between the indictment and the proof at trial is not material unless it substantially prejudices the rights of the defendant. *Id.* at 81. This conclusion recognizes the fact that conspiracies can be fluid, with new members coming and going over a period of time.

In *United States v. Zemek*, 634 F.2d 1159, 1168 (9th Cir. 1980), the Ninth Circuit held that unless there was a variance between the indictment and the evidence proved at trial, there was no need to instruct the jury regarding potential multiple conspiracies. The next year, the court set forth the factors a jury should consider in *United States v. Mayo*, 646 F.2d 369 (9th Cir. 1981), including the period of time, places, persons, overt acts alleged, and crimes charged. *Id.* at 372.

The Tenth Circuit and the D.C. Circuit have similarly held that only a variance that is shown to substantially prejudice the defendant will warrant reversal of a conviction. *See United States v. Mathis*, 216 F.3d 18, 25 (D.C. Cir. 2000); *United States v. Ailsworth*, 138 F.3d 843, 849 (10th Cir. 1998).

When charging a conspiracy spanning several years and involving many individuals, there is always a risk the defense will argue that the evidence at trial was different than the conspiracy charged in the indictment. If the judge agrees, then the jury will be instructed that they must determine whether the evidence proved a single conspiracy or multiple conspiracies. The seminal case on this issue is *Kotteakos v. United States*, 328 U.S. 750 (1946). The case used the "wheel" metaphor for a conspiracy, with the hub being the central defendant and the spokes being different individuals interacting with the central defendant to commit the crime(s). It is essential to prove some interaction or interdependence between the individual spokes, because failure to do so may result in a finding that the activity between the hub and each spoke is a separate conspiracy. In *Kotteakos*, the Supreme Court concluded the Government had not proved a single conspiracy existed because there were separate groups acting independently with the central defendant "without the rim of the wheel to enclose the spokes." *Id.* at 755.

The consensus among appellate courts is that whether a single conspiracy or a multiple conspiracy exists is a question of fact for the jury. The factors to be considered in determining whether there is a single conspiracy or multiple conspiracies usually track the language of the elements of the charged conspiracy, although the Third, Sixth, and Eighth Circuits provide more detailed guidance for the jury. The crucial factor is that one common goal or overall objective ties all of the conspirators together. The First Circuit's Instruction 4.03 anticipates the possibility of more than one conspiracy in the beginning of the instruction: "that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to [commit the crime]." Instruction 4.03 Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846. In *United States v. LiCausi*, the First Circuit listed factors relevant to reviewing a jury's determination that a single conspiracy existed, including "commonality . . . of the nature, motive, design, implementation, and logistics of the illegal activities as well as the scope of coconspirator involvement." 167 F.3d 36, 45 (1st Cir. 1999). The court further explained that the totality of the evidence should be reviewed when determining if there was a common goal or overall plan.

In a Second Circuit case, *United States v. Berger*, the appellate court approved the use of the following supplemental jury instruction on this issue:

> First, you should consider whether the conspiracy charged in Count 1 existed. In doing so, you must consider whether two or more conspirators agreed to accomplish at least one of the illegal objects of the conspiracy. If you determine that two or more conspirators agreed to accomplish one of the illegal objects, then you may find that the conspiracy charged in Count 1 existed. If you determine that two or more conspirators agreed to accomplish more than one object of the conspiracy, then you must consider whether

single or multiple conspiracies exist[ ].

224 F.3d 107, 113 (2d Cir. 2000). The Third Circuit used a similar three-step inquiry in *United States v. Russell* "to determine whether a series of events constitutes a single conspiracy": (1) is there "a common goal among the conspirators[?]", (2) does "the nature of the scheme . . . and the agreement [seek] to bring about a continuous result which could not be sustained without the continued cooperation of the conspirators[?]", and (3) to what extent do the "various dealings" of the participants overlap? 134 F.3d 171, 182 (3d Cir. 1998).

The Fifth Circuit's treatment mirrors that of the Third Circuit, with additional analysis about the nature of the scheme provided in *United States v. Richerson*: "If (an) agreement contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, then such agreement constitutes a single conspiracy." 833 F.2d 1147, 1153 (5th Cir. 1987) (quoting *United States v. Perez*, 489 F.2d 51, 62 (5th Cir. 1973)). "Where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture, . . . the existence of a single conspiracy will be inferred." *Id.* at 1154 (quoting *United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982)).

The Sixth Circuit has two pattern instructions that should be given "when there is some evidence that multiple conspiracies may have existed *and* a finding that multiple conspiracies existed would constitute a material variance from the indictment." Use Note, Instruction 3.08 Multiple Conspiracies—Material Variance from the Indictment (emphasis added).

> (1) The indictment charges that the defendants were all members of one single conspiracy to commit the crime of _____.
>
> (2) Some of the defendants have argued that there were really two separate conspiracies—one between _____ to commit the crime of _____; and another one between _____ to commit the crime of _____.
>
> (3) To convict any one of the defendants of the conspiracy charge, the government must convince you beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment. . . .

Id.

Instruction 3.09 sets forth factors the jury should consider when deciding if more than one conspiracy existed, including the nature of the agreement and proof of an overall objective. The instruction states that it is permissible for members of a single conspiracy to not know each other, to not know the role of each member, and allows for the membership of the conspiracy to change over time. It emphasized that "what is controlling is whether the government has proved that there was an overall agreement on a common goal. That is the key." Instruction 3.09(4) Multiple Conspiracies—Factors in Determining. *See United States v. Warner*, 690 F.2d 545 (6th Cir. 1982).

The Eighth Circuit's Instruction 5.06G similarly requires a defendant to particularly identify the participants and the scope of the multiple conspiracies he alleges the evidence at trial proved. *See United States v. Thomas*, 759 F.2d 659, 666-67 (8th Cir. 1985). For prosecutors located in circuits outside of the Sixth and Eighth Circuits, the text of the instructions can be used to argue to the court that if the defendant cannot state with specificity what separate conspiracies have been proved by naming specific defendants and objects, then no instruction regarding multiple conspiracies should be given.

One last consideration when drafting the indictment: Are there any coconspirator statements necessary to help prove the existence of the conspiracy? Consider the impact on your case if the court finds that a multiple conspiracy instruction is necessary and gives a limiting instruction restricting the jury's use of the statement.

V. Conclusion

Having a thorough knowledge of the jury instructions will allow a prosecutor to draft a more precise indictment, ensuring that the objects, defendants, and overt acts alleged are all part of a single conspiracy. ❖

ABOUT THE AUTHOR

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Table 1. Model/Pattern Criminal Jury Instructions for 18 U.S.C. § 371

Circuit	Number	Description
1st	4.03	Conspiracy 18 U.S.C. § 371
2nd	31-7(e)	Conspiracies With Multiple Objectives
2nd	31-7(f)	Conspiracy-Single vs. Multiple
3rd	6.18.371A	Conspiracy To Commit an Offense Against the United States-Basic Elements
3rd	6.18.371B	Conspiracy To Defraud the United States-Basic Elements
3rd	6.18.371C	Conspiracy-Existence of an Agreement
3rd	6.18.371D	Conspiracy-Membership in the Agreement
3rd	6.18.371E	Conspiracy-Mental States
3rd	6.18.371F	Conspiracy-Overt Acts
3rd	6.18.371G	Conspiracy-Success Immaterial
3rd	6.18.371H	Conspiracy-Single or Multiple Conspiracies
3rd	6.18.371I	Conspiracy-Duration
3rd	6.18.371J	Conspiracy-Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy
3rd	6.18.371K	Conspiracy-Withdrawal as Defense to Conspiracy Based on Statute of Limitations
3rd	6.18.371L	Conspiracy-Acts and Statements of Coconspirators
4th	None	[District of South Carolina has some pattern instructions]
5th	2.20	Conspiracy to Commit Offense
5th	2.20A	Conspiracy to Defraud
5th	2.21	Multiple Conspiracies
5th	2.22	Conspirator's Liability for Substantive Count
5th	2.23	Conspiracy-Withdrawal
6th	3.01A	Conspiracy to Commit an Offense-Basic Elements
6th	3.01B	Conspiracy to Defraud the United States-Basic Elements
6th	3.02	Agreement
6th	3.03	Defendant's Connection to the Conspiracy
6th	3.04	Overt Acts
6th	3.05	Bad Purpose or Corrupt Motive (No Instruction Recommended)
6th	3.06	Unindicted, Unnamed, or Separately Tried Coconspirators

Circuit	Number	Description
6th	3.07	Venue
6th	3.08	Multiple Conspiracies--Material Variance from the Indictment
6th	3.09	Multiple Conspiracies--Factors in Determining
6th	3.10	Pinkerton Liability for Substantive Offenses Committed by Others
6th	3.11A	Withdrawal as a Defense to Conspiracy
6th	3.11B	Withdrawal as a Defense to Substantive Offenses Committed by Others
6th	3.11C	Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations
6th	3.12	Duration of a Conspiracy
6th	3.13	Impossibility of Success
6th	3.14	Statements by Coconspirators
7th	5.08A	Conspiracy-Overt Act Required
7th	5.09	Conspiracy-Definition of Conspiracy
7th	5.10	Conspiracy-Membership in Conspiracy
7th	5.10A	Buyer-Seller Relationship
7th	5.10B	Single Conspiracy vs. Multiple Conspiracies
7th	5.11	Conspirator's Liability for Substantive Crimes by Coconspirators-Conspiracy Charged
7th	5.12	Conspirator's Liability for Substantive Crimes Committed by Coconspirators-Consp. Not Charged
7th	5.13	Conspiracy-Withdrawal
7th	5.14(A)	Conspiracy-Withdrawal-Statute of Limitations-Elements
7th	5.14(B)	Conspiracy-Withdrawal-Statute of Limitations-Definition
8th	5.06A	Conspiracy: Elements (18 U.S.C. § 371)
8th	5.06B	Conspiracy: "Agreement" Explained
8th	5.06C	Conspiracy: Substantive Offense: Elements
8th	5.06D	Conspiracy: "Overt Act" Explained
8th	5.06E	Conspiracy: Success Immaterial
8th	5.06F	Single Conspiracy: Multiple Crimes
8th	5.06G	Conspiracy: Single/Multiple Conspiracies
8th	5.06H	Conspiracy: Withdrawal
8th	5.06I	Conspiracy: Coconspirator Acts and Statements

Circuit	Number	Description
8th	5.06J	Conspiracy: "Coconspirator Liability" (Pinkerton Charge)
9th	8.20	Conspiracy-Elements
9th	8.21	Conspiracy to Defraud the United States (18 U.S.C. § 371 "Defraud Clause")
9th	8.22	Multiple Conspiracies
9th	8.23	Conspiracy-Knowing of and Association With Other Conspirators
9th	8.24	Withdrawal From Conspiracy
9th	8.25	Conspiracy-Liability for Substantive Offense Committed by Coconspirator (Pinkerton Charge)
9th	8.26	Conspiracy-Sears Charge
10th	2.19	Conspiracy-18 U.S.C. § 371
10th	2.20	Conspiracy: Evidence of Multiple Conspiracies
10th	2.21	Conspirator's Liability for Substantive Count
10th	2.22	Withdrawal Instruction
11th	13.1	General Conspiracy Charge—18 U.S.C. § 371
11th	13.2	Multiple Objects of a Conspiracy--for use with General Conspiracy Charge 13.1-18 U.S.C. § 371
11th	13.3	Multiple Conspiracies-for use with General Conspiracy Charge 13.1-18 U.S.C. § 371
11th	13.4	Withdrawal from a Conspiracy-for use with General Conspiracy Charge 13.1-18 U.S.C. § 371
11th	13.5	Pinkerton Instruction-[*Pinkerton v. U.S.*, 328 U.S. 640 (1946)]
11th	13.6	Conspiracy to Defraud the United States-18 U.S.C. § 371 (Second Clause)
D.C.	7.102	Conspiracy: Basic Instruction
D.C.	7.103	Coconspirator Liability

Table 2. Modern Federal Jury Instructions—Criminal, Substantive Instructions, Conspiracy

19.01	**Conspiracy To Violate Federal Law (18 U.S.C. § 371)**
19-1	The Indictment and the Statute
19-2	Purpose of the Statute
19-3	Elements of Conspiracy
19-3S	Short-Form Conspiracy Instruction
19-4	Existence of Agreement
19-5	Multiple Conspiracies
19-6	Membership in the Conspiracy
19-7	Commission of Overt Act
19-8	Commission of Overt Act in Furtherance of the Conspiracy
19-9	Acts and Declarations of Coconspirators
19-10	Withdrawal From the Conspiracy
19-10.1	Impossibility of Success
19.02	**Conspiracy To Defraud the United States (18 U.S.C. § 371)**
19-11	The Indictment and the Statute
19-12	Conspiracy To Defraud the United States
19.03	**Pinkerton Charge**
19.13	Guilt of Substantive Offense

Table 3. Kevin F. O'Malley, Jay E. Grenig, William C. Lee, Federal Jury Practice and Instructions

Chapter 31	**Conspiracy to Commit an Offense or to Defraud the United States (18 U.S.C. § 371)**
31:01	The Nature of the Offense Charged
31:02	The Statute Defining the Offense Charged
31:03	The Essential Elements of the Offense Charged
31:04	Conspiracy-Existence of an Agreement
31:05	Conspiracy-Membership in an Agreement
31:06	Acts and Declarations of Coconspirators
31:07	"Overt Act"-defined
31:08	Success of Conspiracy Immaterial
31:09	Single or Multiple Conspiracies
31:10	Responsibility for Substantive Offense
31:11	The Withdrawal Defense

The Conundrum of Victims' Rights in Conspiracy Cases

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Victims of federal criminal offenses were provided court-enforceable rights in 2004 with the passage of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The CVRA grants victims eight enumerated rights, including the right to notice of all public court proceedings; the right to be heard at public proceedings involving release, plea, sentencing, or parole; the right to confer with the attorney for the Government; and the right to full and timely restitution, among others. *See id.* § 3771(a) (2013). In many cases, determining who meets the statutory definition of "victim" under the CVRA presents a significant challenge. Perhaps no instance demonstrates this challenge more clearly than the applicability of CVRA rights in the context of conspiracy cases. This article describes the analysis used for determining CVRA victim status in conspiracy cases and the responsibilities prosecutors have to those individuals affected by a conspiracy.

The CVRA defines a victim as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." *Id.* § 3771(e). Most cases analyzing the definition of victim under the CVRA focus on the question of the foreseeability of "harm"—in essence, who has suffered direct and proximate harm as result of the charged conduct. One of the first cases to consider this question involved a charge of conspiracy to possess with the intent to distribute marijuana. *See United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006). The putative victim in *Sharp* argued that she was entitled to exercise CVRA rights in the prosecution of her ex-boyfriend's drug dealer because her former boyfriend abused her when under the influence of the marijuana he purchased from the defendant. The court found that the question was whether the harm alleged—that is, the abuse—was directly and proximately caused by conduct underlying an element of the offense charged, drug distribution. *Id.* at 564. The court held that "[t]he specific conduct underlying the elements of conspiracy to possess with intent to distribute marijuana that were the basis for the Defendant's offense of conviction does not include assault and battery, or any other violent conduct." *Id.* As a result, the court denied the putative victim's motion for CVRA rights.

The analysis the court applied in *Sharp* has been used in subsequent cases in determining victim status under the CVRA. For instance, in *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), the court employed the same analysis to resolve whether the parents of a woman shot and killed by a gunman could receive CVRA rights in the prosecution of the man who sold the gun to the shooter. The court analyzed whether the harm alleged—the murder—was a reasonably foreseeable result of the charged conduct—the illegal sale of a firearm to a minor, the shooter. In a decision upheld by the Tenth Circuit, the district court determined that the gun sale and the subsequent shooting rampage were too attenuated to be "reasonably foreseeable," and that the gunman was an intervening actor who broke the chain of causation. *Id.* at 1125. Because the harm alleged—the death of their daughter—was not contemplated by the offense of selling a gun to a minor, the parents were not entitled to claim CVRA rights in the case.

Whether CVRA rights attach in conspiracy cases requires a careful factual analysis of the conduct

underlying the conspiracy in order to determine whether the putative victim has suffered direct and proximate harm. In *In re Local #46 Metallic Lathers Union*, 568 F.3d 81 (2d Cir. 2009), for example, a company president conspired to launder money so that he could pay some of his employees in cash and thereby enable them to avoid paying taxes. *Id.* at 82-83. An employee union that was supposed to receive union dues from the employee paychecks claimed that it was a victim of the conspiracy to launder money because the money laundering scheme deprived the union of funds to which it was entitled. The defendant pleaded guilty to one charge of conspiracy to launder money. As set forth in the information, the conspiracy consisted of three unlawful activities: (1) uttering false checks (the defendant would present fake vendor checks to the company's cashier to receive cash in return), (2) theft involving federal programs, and (3) mail fraud (involving the keeping of false books). *Id.* The Second Circuit ultimately held that the union was not a victim under the CVRA because the conspiracy to launder money was complete when the false checks were exchanged for cash. What the defendant subsequently did with that cash (that is, paying his employees) was not foreseeable harm for purposes of CVRA victim status. In other words, the union was not harmed by the charged conduct, but rather by acts ancillary to the conspiracy.

In re Rendón Galvis, 564 F.3d 170 (2d Cir. 2009), also involved the question of CVRA victim status in the context of a conspiracy. In that case, a mother, whose son was killed by paramilitary terrorists in Colombia, claimed she was a victim in the federal prosecution against a Colombian drug trafficker because she suffered harm due to her son's murder. The indictment charged a conspiracy to import cocaine and conspiracy to launder money. As noted by the Second Circuit, "[n]either the federal indictment charging [the defendant], nor his plea agreement, aside from a stipulation that he possessed a firearm in connection with the count-one conspiracy offense, nor [the defendant's] colloquy at the change-of-plea proceedings makes reference to his engaging in any violent conduct." *Id.* at 172. Therefore, because the drug trafficking-related charges and the underlying facts were not sufficiently connected to the mother's harm, the court denied the motion for victim status under the CVRA.

As the foregoing cases illustrate, in conspiracy cases, courts must first ascertain the central object of the conspiracy and then determine whether the harm alleged to the victim was proximately caused by the express purpose of the conspiracy. This analysis was further refined by the decision in *In re McNulty*, 597 F.3d 344 (6th Cir. 2010). The *McNulty* court noted that to find victim status in the course of a conspiracy under the CVRA, the question hinges on whether the purported victim "was directly and proximately harmed by criminal conduct in the course of the conspiracy or if the actions taken by defendants in the underlying case which allegedly harmed [the purported victim] were merely ancillary to the conspiracy." *Id.* at 351. *McNulty* involved a price-fixing scheme in the ice industry. A whistleblower who worked for an ice company claimed that he was fired and blackballed from the industry for refusing to engage in price-fixing. The Sixth Circuit found that the central aim of the conspiracy was to fix the price of ice. What harmed the whistleblower was not the price-fixing, but his refusal to engage in price-fixing and in the subsequent cover-up of that conspiracy. *Id.* at 352.

While the CVRA is the only statute that confers court-enforceable rights to victims of federal offenses, two statutes provide protections for victims in the context of restitution for certain offenses. The Victim Witness Protection Act (VWPA), 18 U.S.C. § 3663, provides for discretionary restitution for certain qualifying offenses. In 1996, Congress enacted the Mandatory Victims' Restitution Act (MVRA), 18 U.S.C. § 3663A, which mandates that restitution be ordered for most federal criminal offenses. Cases addressing statutory victim status in the context of conspiracy charges have most often engaged in the inquiry in order to ascertain the obligations to putative victims' under the VWPA and MVRA, rather than to ascertain a victim's rights accorded by virtue of the CVRA. *See United States v. Brock-Davis*, 504 F. 3d 991 (9th Cir. 2007) (owner of hotel where defendants engaged in acts in furtherance of meth manufacturing conspiracy was MVRA victim for purposes of clean-up costs); *United States v. Johnson*, 440 F. 3d 832 (6th Cir. 2006) (victims of predicate criminal acts were victims in RICO conspiracy and were MVRA victims); *United States v. Rand*, 403 F. 3d 489 (7th Cir. 2005) (individuals who sustained

losses as a result of acts performed in furtherance of an identity theft conspiracy were MVRA victims). Perhaps victims primarily sought victim status in conspiracy cases under the restitution statutes because they were focused on securing restitution rather than ensuring they were accorded the rights to which they were entitled under the CVRA, or perhaps, in the context of conspiracy cases, the restitution statutes provided a clearer path to obtaining justice.

A significant impediment to finding CVRA victim status in a conspiracy case comes by way of the limiting definition of "victim" provided in that statute: "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (2013). The VWPA contained a definition of "victim" that was substantially similar to that in the CVRA, until an amendment in 1990 modified the definition following the decision of the United States Supreme Court in *Hughey v. United States*, 495 U.S. 411 (1990). In *Hughey*, after being charged with three counts of theft and three counts of unauthorized use of credit cards, the defendant pleaded guilty to using one unauthorized bank card only. Under the VWPA, the district court ordered the defendant to pay over $90,000 related to his theft and use of 21 cards from various cardholders. On appeal, the Fifth Circuit affirmed, finding that the VWPA permitted a federal court to order restitution for conduct beyond the offense of conviction "when there is a significant connection between the crime of conviction and similar actions justifying restitution." *United States v. Hughey*, 877 F.2d 1256, 1264 (5th Cir. 1989). However, relying on the plain language of the VWPA's definition of "victim," the Supreme Court reversed. The Court found that the defendant pleaded guilty only to the charge regarding one victim's bank card. Because the restitution order included losses sustained by other cardholders, the restitution order was invalid. *Hughey* stands for the proposition that restitution may only be ordered to a victim of the specific conduct that forms the basis of the offense of which a defendant has been convicted. 495 U.S. at 422.

The ruling in *Hughey* was superseded in part by an amendment to the VWPA definition of "victim" contained within the Crime Control Act of 1990. As a result, the VWPA, and later the MVRA, both define a "victim" as

> a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered *including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern*.

18 U.S.C. § 3663(a)(2); 18 U.S.C. § 3663A(a)(2) (2013) (emphasis added). As a result of this change, in addition to being responsible for losses sustained by those directly and proximately harmed by the conduct underlying the offense of conviction, a defendant is also responsible for restitution for losses sustained as a direct consequence of any act in furtherance of the conspiracy.

A seminal case illustrating this point is *United States v. Gutierrez-Avascal*, 542 F.3d 495 (5th Cir. 2008). In *Gutierrez-Ascaval*, the victim sought restitution for injuries sustained as a result of a car accident in which the defendant's car collided with a car occupied by a married couple, while the defendant was fleeing from the pursuit of law enforcement officers. The Fifth Circuit found that because the defendant pleaded guilty to conspiring to possess marijuana with the intent to distribute, and the defendant was engaged in furtherance of the conspiracy when fleeing law enforcement in a car containing over 135 kilos of marijuana, the victims were therefore directly harmed by the defendant's criminal conduct in the course of the conspiracy, and thus were victims under the VWPA entitled to restitution. *Id.* at 498. Whether the couple were statutory victims under the CVRA was not at issue in this case, but applying the definition of "victim" under the CVRA to these facts, it seems unlikely that the couple would have been found to have been directly and proximately harmed as a result of the commission of the offense of conviction—conspiring to possess marijuana with the intent to distribute.

The broader definition of victim provided in the restitution statutes was added before the passage of the CVRA in 2004. Rules of statutory construction dictate the presumption that Congress intended to act intentionally and purposefully when it omitted this language from the definition of victim in the

CVRA. Congress' decision not to similarly expand the definition of victim in the CVRA seems to demonstrate an affirmative choice to not provide court-enforceable rights to those harmed by acts in furtherance of a conspiracy. At least one case, however, has reached a contrary conclusion. *See United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 460 (D.N.J. 2009) (reviewing the legislative history of the restitution statutes and the CVRA, and concluding that the CVRA definition of victim should be interpreted to include the broader provision). *See also McNulty*, 597 F.3d at 350 n.6 (declining to determine whether the broader language should be read into the CVRA, but finding that "in cases involving a conspiracy, it appears logical that those directly and proximately harmed by criminal conduct in the course of the conspiracy beyond the overt act required to prove the conspiracy would be victims under CVRA, just as they would be under the VWPA and the MVRA"). Whether the restitution statutes' broader language can be interpreted to extend to the definition of "victim" under the CVRA, it seems clear that in conspiracy cases there may be victims cognizable under the VWPA or MVRA who may not be able to assert court-enforceable rights afforded by the CVRA. Therefore, a victim may be entitled to restitution in a case, but left with no legal recourse with which to enforce his or her right to receive full restitution.

However, whether an individual meets the statutory definition of victim does not necessarily limit what Department of Justice employees can do to assist those affected by a conspiracy. As set forth in the 2011 Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines), Department of Justice personnel involved in the investigation, prosecution, correction, and parole phases of the federal criminal justice system are encouraged to venture beyond the statutory requirements accorded to victims of federal offenses. *See* AG Guidelines, Article II.A; Article III.E. In plea negotiations, prosecutors should consider requesting restitution for "victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually plead[s]." *Id*. Article V.H.1.d. (quoting DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-16.320 (2000)). Furthermore, while a victim harmed by the defendant's criminal conduct in the course of a conspiracy may not be a statutory victim under the CVRA entitled to exercise the "right to be heard," the person affected by the conspiracy may still be heard in the discretion of the sentencing court pursuant to 18 U.S.C. § 3661, as he or she may have information on the background, character, and conduct of the defendant that the court may consider for the purposes of imposing an appropriate sentence. *See United States v. Duffy*, 315 F. App'x. 216, 218-19 (11th Cir. 2009). Finally, under the Victims' Rights and Restitution Act, 42 U.S.C. § 10607, all federal agencies engaged in the detection, investigation, and prosecution of crime are required to provide notice of the outcome of the investigation, the arrest of the offender, and all subsequent case events to victims of all crimes and conduct under investigation. As such, even if victims may not be entitled to exercise the court-enforceable right to receive notice as the CVRA dictates, they still may be entitled to receive notice of case events from the Department of Justice.

Prosecutors charging a conspiracy should engage in careful analysis of the aim and elements of the conspiracy in order to determine whether statutory victims entitled to rights under the CVRA are present in the case. Prosecutors should also be cognizant that dismissal of counts or charges may affect a victim's ability to exercise CVRA rights in the prosecution. When charging conspiracies, prosecutors should be aware that the way in which the conspiracy is alleged may ultimately impact a victim's status and rights. Only those who were harmed by conduct central to the conspiracy will be entitled to the CVRA's full panoply of rights. ❖

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