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Todd R. Russell

O. Carter Snead

Notre Dame Law School, snead.1@nd.edu

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FEDERAL CRIMINAL CONSPIRACY

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I. INTRODUCTION

Under 18 U.S.C. § 371, it is a crime for “two or more persons [to] conspire . . . 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.”¹ Conspiracy is distinct

1. 18 U.S.C. § 371 (1994). The statute states in full:

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.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Id.

from the substantive crime contemplated by the conspiracy and is charged as a separate offense.² Acquittal on a conspiracy charge does not bar prosecution of the substantive offense.³ Likewise, acquittal of the substantive offense does not bar conviction on the conspiracy count.⁴ Conspiracy, coined the prosecutor's "darling,"⁵ is one of the most commonly charged federal crimes. The offense of conspiracy has great breadth, and prosecutors have applied it to a variety of situations.⁶ Commentators have noted that "it is clear that a conspiracy charge gives the prosecution certain unique advantages and that one who must defend against such a charge bears a particularly heavy burden."⁷

The Supreme Court has described the gravity of the conspiracy offense:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.⁸

In addition to § 371, there are specific provisions proscribing conspiracy in more than twenty federal statutes.⁹ These provisions attach to the particular substantive

Two sections of the Code originally outlawed the illegal purposes. These sections were combined in 1948 to form the present statute. See H.R. REP. NO. 80-304, at 28 (1947) (discussing origin of 18 U.S.C. § 371).

2. See *Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946) (holding "conspiracy is a partnership in crime" distinct from substantive offense).

3. See, e.g., *United States v. Stevens*, 909 F.2d 431 (11th Cir. 1990) (reversing conspiracy conviction while affirming false claims and false statements convictions).

4. See, e.g., *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 980 (9th Cir. 1994) (affirming conviction of conspiracy to make false statements and acquittal of two counts of making false statements). However, where the government's theory of illegal conspiracy depends upon the defendant's knowledge of and assistance with the substantive count, acquittal on the substantive count mandates acquittal on the conspiracy count. See, e.g., *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995).

5. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Learned Hand, J., concurring).

6. See *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990) ("rare is the case omitting such a charge"). See generally *United States v. Stoner*, 98 F.3d 527, 533 (10th Cir. 1996) (describing conspiracy as "elastic, sprawling and pervasive offense") (quoting *Krulewicht v. United States*, 336 U.S. 440, 445-47 (1949)); *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959) (discussing development of crime of conspiracy) [hereinafter *Developments*].

7. *Stoner*, 98 F.3d at 533 (quoting Wayne R. LaFare and Austin W. Scott, Jr. CRIMINAL LAW § 6.4 (b), at 526 (2d ed. 1986)).

8. *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) (quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)). See also *Developments*, *supra* note 6, at 924-25 (holding that because of "antisocial potentialities" of conspiracy and likelihood that additional substantive offenses will result, state has strong interest in stamping out conspiracy).

9. See, e.g., the following sections of Title 18: § 224 (1994) (conspiracy to bribe in sporting events); § 241 (1994) (conspiracy to deprive civil rights); § 286 (1994) (conspiracy to defraud federal government with fraudulent claims); § 351(d) (1994) (conspiracy to kidnap, assault, or assassinate members of Congress and members-elect); § 372 (1994) (conspiracy to assault or impede federal officer); § 794(c) (1994) (conspiracy to

offenses of the statute in which they appear. Section 371, on the other hand, applies generally to any conspiracy where the goal is to “commit any offense against the United States, or to defraud the United States”¹⁰ and proscribes any agreement to violate a civil or criminal federal law.¹¹

The essential features of a conspiracy—secrecy and concealment¹²—make conspiracies difficult to prosecute, especially if they are successful. Consequently, the law lessens the government’s burden of proving the essential elements by only requiring a showing of the “essential nature of the plan” and “[the conspirators’] connections with it” to ensure that conspirators do not “go free by their very ingenuity.”¹³

This Article first outlines, in Section I, the basic elements of a conspiracy offense under § 371. Defenses available to challenge charges brought under the statute are discussed in Section III of the Article. Section IV presents the evidentiary and constitutional guidelines governing admissibility of co-conspirator hearsay testimony at trials involving conspiracy charges. Section V surveys various procedural and substantive rules regarding enforcement of the statute. Finally, the rules governing a conspiracy conviction under the Federal Sentencing Guidelines are reviewed in Section VI.

II. ELEMENTS OF THE OFFENSE

There are four elements of criminal conspiracy, each of which the prosecution must prove beyond a reasonable doubt.¹⁴ A conspiracy exists where there is: (1) an

provide defense information to foreign government); § 1201(c) (1994) (conspiracy to kidnap); § 1962(d) (1994) (conspiracy to violate any provision of Racketeer Influenced and Corrupt Organization Act (“RICO”)); § 2384 (1994) (seditious conspiracy); and other provisions of the U.S. Code: 15 U.S.C. § 1 (1994) (conspiracy to restrain trade); 21 U.S.C. § 846 (1994) (conspiracy to violate Controlled Substances Act); 21 U.S.C. § 963 (1994) (conspiracy to import or export controlled substance).

10. 18 U.S.C. § 371 (1994); *see supra* note 1 (quoting text of § 371).

11. *See* *United States v. Hutto*, 256 U.S. 524, 528-29 (1921) (holding that predecessor statute to § 371 made it crime to conspire to violate any civil or criminal federal law); *United States v. Tuohey*, 867 F.2d 534, 536 (9th Cir. 1989) (asserting that § 371 applies to both civil and criminal offenses); *United States v. Wiesner*, 216 F.2d 739, 741-42 (2d Cir. 1954) (stating that *Hutto* is still applicable to federal criminal code after 1948 revision).

12. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947); *United States v. Curry*, 977 F.2d 1042, 1053 (7th Cir. 1992) (holding that conspiracy is secretive by nature); *United States v. Morris*, 836 F.2d 1371, 1373 (D.C. Cir. 1988) (same).

13. *Blumenthal*, 332 U.S. at 557.

14. *United States v. Carr*, 25 F.3d 1194, 1202-1203 (3d Cir. 1994) (holding that government must prove each element of conspiracy beyond reasonable doubt); *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994) (same); *United States v. Agofsky*, 20 F.3d 866, 870 (8th Cir. 1994) (same); *United States v. Hinkle*, 37 F.3d 576, 578 (10th Cir. 1994) (same); *United States v. Cassiere*, 4 F.3d 1006, 1015 (1st Cir. 1993) (same); *United States v. Frink*, 912 F.2d 1413, 1416 (11th Cir. 1990) (same).

Circumstantial evidence alone can suffice to convict a defendant of conspiracy. *United States v. Sneed*, 63 F.3d 381, 386 (5th Cir. 1995); *United States v. Richardson*, 14 F.3d 666, 670 (1st Cir. 1994); *United States v. Baker*, 985 F.2d 1248, 1255 (4th Cir. 1994); *Agofsky*, 20 F.3d at 870; *United States v. Dimeck*, 24 F.3d 1239, 1242 (10th Cir. 1994); *United States v. Vargas*, 986 F.2d 35, 40 (2d Cir. 1993); *United States v. Scarbrough*, 990 F.2d 296, 299 (7th Cir. 1993); *United States v. Foster*, 985 F.2d 466, 469 (9th Cir. 1993); *United States v. McGlory*, 968 F.2d 309, 321

agreement between at least two parties; (2) to achieve an illegal goal; (3) with knowledge of the conspiracy and with actual participation in the conspiracy; and (4) at least one conspirator committed an overt act in furtherance of the conspiracy.¹⁵

A. Agreement

The first essential element that the government must prove to establish a conspiracy is the existence of an agreement between two or more persons¹⁶ to work together toward a common goal. The "essence" of a conspiracy "is an agreement to commit an unlawful act."¹⁷ However, it is not necessary for the government to prove a formal agreement.¹⁸ An understanding among conspirators is sufficient to constitute an agreement.¹⁹ However, "[m]ere association with conspirators" or "mere knowledge . . . without cooperation" is not enough.²⁰ An

(3d Cir. 1992); *United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir. 1990); *United States v. Morris*, 836 F.2d 1371, 1373 (D.C. Cir. 1988); *United States v. Bavers*, 787 F.2d 1022, 1026 (6th Cir. 1985).

15. 18 U.S.C. § 371 (1994) (setting forth elements of conspiracy); *see also* *United States v. Parks*, 68 F.3d 860, 866 (5th Cir. 1995) (holding that government must prove following elements: agreement to obstruct justice, knowing and voluntary participation by defendant, and at least one overt act committed in furtherance thereof); *United States v. Knox*, 68 F.3d 990 (7th Cir. 1995) (same); *United States v. Brandon*, 17 F.3d 409, 428 (1st Cir. 1994) (same); *United States v. Dolt*, 27 F.3d 235, 238 (6th Cir. 1994) (same); *Hinkle*, 37 F.3d at 578 (same); *United States v. Kammer*, 1 F.3d 1161, 1164 (11th Cir. 1993) (same); *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988) (same); *United States v. Indelicato*, 800 F.2d 1482, 1483 (9th Cir. 1986) (same).

16. The legal fiction that a husband and wife are one person in the eyes of the law has been abandoned for the purposes of § 371. Thus, a husband and wife are legally capable of conspiring with each other. *See e.g.*, *United States v. Dege*, 364 U.S. 51, 54-55 (1960).

17. *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Pinkerton v. United States*, 328 U.S. 640, 644 (1946); *see also* *United States v. Mittelstaedt*, 31 F.3d 1208, 1218 (2d Cir. 1994) (holding that the gist of conspiracy is agreement to commit at least one unlawful act); *Carr*, 25 F.3d at 1201 (asserting that conspiracy consists of agreement to achieve common goal); *United States v. Mackay*, 33 F.3d 489, 494 (5th Cir. 1994) (noting that essence of conspiracy is "agreement to engage in concerted unlawful activity"); *United States v. Milligan*, 17 F.3d 177, 182-83 (6th Cir. 1994) (stating that government must prove agreement between two or more people to commit offense); *Agofsky*, 20 F.3d at 870 (holding that government must prove "agreement to achieve an illegal purpose"); *United States v. Arutunoff*, 1 F.3d 1112, 1116 (10th Cir. 1993) ("essence of conspiracy is an agreement to commit an unlawful act"); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991) (same); *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir. 1988) (same); *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir. 1988) (requiring that government prove "meeting of the minds"); *United States v. Krasovich*, 819 F.2d 253, 255 (9th Cir. 1987) (asserting that government must prove agreement to pursue common objective).

18. *See* *United States v. Armstrong*, 16 F.3d 289, 293-94 (8th Cir. 1994) ("agreement need not be express or formal"); *Cassiere*, 4 F.3d at 1015 (holding that agreement need not be express); *United States v. Piche*, 981 F.2d 706, 717 (4th Cir. 1992) (holding that agreement may be inferred from facts and circumstances); *United States v. Hartsfield*, 976 F.2d 1349, 1354 (10th Cir. 1992) (concluding that formal or express agreement not required); *United States v. Restrepo*, 930 F.2d 705, 709 (9th Cir. 1991) (same); *United States v. Scanzello*, 832 F.2d 18, 20 (3d Cir. 1987) (same).

19. *See* *United States v. Acosta*, 17 F.3d 538, 544 (2d Cir. 1994) (finding that, despite incongruent goals, proof of general agreement on "essential nature of plan" is sufficient); *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994) (determining that agreement may be tacit); *Milligan*, 17 F.3d at 182-83 (holding that "tacit or mutual understanding" amongst conspirators will suffice).

20. *United States v. Mendez*, 496 F.2d 128, 130 (5th Cir. 1974); *see also* *United States v. Falcone*, 311 U.S. 205, 207 (1940) (finding that illicit distiller who lacked knowledge of conspiracy not guilty of conspiracy even though he furnished supplies).

agreement may be proven through circumstantial evidence²¹ or may be inferred from the defendant's actions.²² The existence of a conspiratorial agreement may also be proven by evidence of previous similar criminal activities.²³ Co-conspirators may enter the agreement at any time during the course of the

21. *Glasser v. United States*, 315 U.S. 60, 80 (1942) (holding that common purpose and plan may be inferred from "development and a collocation of circumstances") (quoting *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1938)); *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995) ("the jury may infer an agreement from concert of action"); *Milligan*, 17 F.3d at 182-83 ("acts done with a common purpose can establish an implicit agreement"); *Armstrong*, 16 F.3d at 294 (holding that agreement can be proved through circumstantial evidence); *Arutunoff*, 1 F.3d at 1116 (holding that conspiracy can be inferred from "circumstances, acts and conduct of the parties"); *United States v. Reveron Martinez*, 836 F.2d 684, 691 (1st Cir. 1988) (holding proof of conspiracy inferable from concert of activity); *Hooks*, 848 F.2d at 792 (holding that circumstantial evidence and reasonable inferences drawn therefrom concerning relationship of parties, overt acts, and totality of conduct may serve as proof); *United States v. Simon*, 839 F.2d 1461, 1469 (11th Cir. 1988) (same).

22. See *Hamling v. United States*, 418 U.S. 87, 124 (1974) ("The existence of an agreement may be shown by circumstances indicating that criminal defendants acted in concert to achieve a common goal"); *United States v. Lampkins*, 47 F.3d 175, 180 (7th Cir. 1995) ("[e]vidence of prior bad acts that occurred before the start of the conspiracy is admissible in this Circuit to establish specific intent, even if the defendant concedes intent, if the evidence satisfies other conditions of admissibility"); *Milligan*, 17 F.3d at 182-83 (holding that conspiracy can be inferred from defendant's actions); *Cassiere*, 4 F.3d at 1015 (holding that agreement can be inferred from "defendants' words and actions and the interdependence of activities and persons involved") (quoting *United States v. Boylan*, 898 F.2d 230, 241-42 (1st Cir. 1990)); *United States v. Melendez*, 995 F.2d 1068 (table), 1993 WL 173686, at *2 (6th Cir. May 24, 1993) ("evidence of prior bad acts on the part of the conspirators that predate the conspiracy is admissible to show the background and development of the conspiracy, the relationship between the conspirators, and the significance of later acts"); *United States v. Molinaro*, 11 F.3d 853, 862 (9th Cir. 1993) (holding that agreement between co-defendants to defraud bank board could be inferred from the way defendants structured transactions and prepared documentation); *Arutunoff*, 1 F.3d at 1116 (holding that agreement can be inferred if "defendant's conduct [is] interdependent with the conduct of other conspirators," requiring defendant's activities to "facilitate the endeavors of other conspirators or the venture as a whole"); *United States v. Rosa*, 11 F.3d 315, 334 (2d Cir. 1993) (noting that, "[w]e have held repeatedly that it is within the court's discretion to admit evidence of prior acts to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain how the mutual trust existed between conspirators"); *United States v. Record*, 873 F.2d 1363, 1375 (10th Cir. 1989) (recognizing "highly probative value of uncharged prior acts evidence to show motive, intent, knowledge, or plan in the context of a conspiracy prosecution"); *United States v. Pintar*, 630 F.2d 1270, 1276 (8th Cir. 1980) (holding that defendant need not have knowledge of every aspect of conspiracy to be convicted).

When the government seeks to establish a conspiracy by inference, it must prove each aspect of the alleged conspiracy. See *United States v. Stauffer*, 922 F.2d 508, 515 n.7 (9th Cir. 1990) ("[m]ere proximity to the scene of illicit activity is not sufficient to establish involvement in the conspiracy"); *United States v. Bell*, 833 F.2d 272, 274-75 (11th Cir. 1987) (holding that mere presence not sufficient to convict person of conspiracy); *United States v. Cardenas-Alvarado*, 806 F.2d 566, 569-70 (5th Cir. 1986) (holding that evidence which places defendant in "a climate of activity that reeks of something foul" is insufficient to prove conspiracy); *United States v. Percival*, 756 F.2d 600, 610 (7th Cir. 1985) (holding that at least there must be evidence to support inference that defendant in some way joined and participated in scheme of conspiracy).

23. See, e.g., *United States v. McPartlin*, 595 F.2d 1321, 1342-43 (7th Cir. 1979) (holding that prior bribery payments can be admitted to show intent); *United States v. Espinoza*, 578 F.2d 224, 227-28 (9th Cir. 1978) (holding that prior acts of transporting aliens can be admitted because similar to case at trial and relevant to show knowledge and intent); *United States v. Uriarte*, 575 F.2d 215, 217 (9th Cir. 1978) (holding that evidence of previous arrest for marijuana possession admissible in case of conspiracy to import and possess marijuana with intent to distribute). See generally FED. R. EVID. § 404 (b) (permitting introduction of other crimes, wrongs, and acts to show, among other things, intent and motive).

conspiracy.²⁴

Under § 371, an agreement between only two actors, one of whom is a government agent, cannot support a conspiracy conviction.²⁵ However, a government agent, often a government informant, can serve as a link between a true conspirator and a defendant.²⁶

In addition, an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy if the commission of the crime itself requires the participation of two persons.²⁷ This rule, called Wharton's Rule,²⁸ "applies only to offenses that require concerted criminal activity."²⁹ If, however, the number of actual conspirators exceeds the number required to commit the substantive offense, then the government may charge the conspiracy separately.³⁰

For the purposes of § 371, the intra-corporate conspiracy doctrine generally does not apply.³¹ Therefore, corporations, their officers, agents, or employees can

24. *Blumenthal v. United States*, 332 U.S. 539, 557-58 (1947).

25. *See United States v. Dimeck*, 24 F.3d 1239, 1242 n.6 (10th Cir. 1994) ("[c]onfidential informants and government agents cannot serve as the second party to a conspiracy"); *United States v. Barger*, 931 F.2d 359, 369 (6th Cir. 1991) (holding that conspiracy cannot be proven between defendant and government agent); *United States v. Vasquez*, 874 F.2d 1515, 1516-17 (11th Cir. 1989) (same); *United States v. Manotas-Mejia*, 824 F.2d 360, 364-65 (5th Cir. 1987) (same); *see also United States v. Ritter*, 989 F.2d 318, 321 (9th Cir. 1993) (finding no conspiracy to violate 18 U.S.C. § 1958 when only co-conspirators were government agents). Section 371 requires a bilateral conspiracy. An agreement between two or more bona fide conspirators is a necessary element of the crime. 18 U.S.C. § 371 (1994).

26. *See United States v. Fincher*, 723 F.2d 862, 863 (11th Cir. 1984) (holding that agent may "link" genuine conspirators) (citing *Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965)).

27. *Iannelli v. United States*, 420 U.S. 770, 773-74 n.5. (1975). Wharton's Rule is "an exception to the general principle that a conspiracy and the substantive offense that is its immediate end do not merge upon proof of the latter." *Id.* at 781-82. It was designed to eliminate the danger of defendants receiving dual punishment for the same crime. *Id.* at 786 n.18.

28. Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law recognized the doctrine and its essential rationale. F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 110, 491 (1846). The current formulation of Wharton's concept is stated more directly in CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 684 (1996).

29. *Iannelli*, 420 U.S. at 785; *see United States v. McCord*, 33 F.3d 1434, 1439-40 (5th Cir. 1994) (holding that Wharton's rule applies when it is impossible under any circumstances to commit substantive offense without cooperative action); *United States v. Brown*, 7 F.3d 1155, 1162-63 (5th Cir. 1993) (holding that conspiracy conviction not prohibited by Wharton's rule because a single individual is capable of mail fraud); *see also United States v. Castro*, 887 F.2d 988, 996 (9th Cir. 1989) (listing examples of concerted criminal activity: adultery, incest, bigamy, and dueling).

30. *Iannelli*, 420 U.S. at 775, 789 (rejecting argument that, by requiring "five or more persons" be involved to prove violation of Organized Crime Control Act § 1955, Congress intended to merge conspiracy and substantive offense into one crime); *United States v. Phillips*, 959 F.2d 1187, 1190 (3d Cir. 1992) (holding that Wharton's Rule does not apply where more people than necessary for substantive offense are involved in conspiracy).

31. *See United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1993) ("a corporation may be liable under § 371 for conspiracies entered into by its agents and employees"); *Alamo Fence Co. v. United States*, 240 F.2d 179, 181 (5th Cir. 1957) ("no contention . . . can reasonably be made, that the federal statute[] involved [is] not directed against corporate misconduct"). In the antitrust context, the "intra-corporate conspiracy doctrine" expressly provides that a parent corporation and its wholly owned subsidiary are not legally capable of conspiring with each other under § 1 of the Sherman Act, because there is a complete unity of interest between the two entities. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (holding corporation and

conspire with one another in violation of § 371.³²

Application of the intra-corporate conspiracy doctrine in a civil rights context, however, varies among the circuits. Commentators note that five circuits have extended the doctrine to actions brought pursuant to 42 U.S.C. § 1983 and held that a corporation and its employees cannot conspire, while five others “have severely limited or questioned the applicability of the doctrine in the civil rights context.”³³

B. Illegal Goal

The second essential element in a federal conspiracy charge is that the conspiracy have an illegal goal.³⁴ The government must establish that the aim of the conspiracy was to defraud or hinder a lawful federal government objective (the defraud clause) or to violate a federal law (the offense clause).³⁵ Section 371’s “defraud” clause broadly applies to “any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of [the Federal] Government.”³⁶ The language of the defraud clause is “not confined to fraud as

its wholly owned subsidiary incapable of conspiring for purposes of Sherman Act); JOSEPH MCSORLEY, *A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW—DEVELOPING STRATEGIES FOR CRIMINAL AND CIVIL CASES 14-15* (1996).

32. *Hughes Aircraft Co.*, 20 F.3d at 979 (declining to “insulate all corporations” by extending the intra-corporate conspiracy doctrine to § 371 conspiracies); *United States v. Stevens*, 909 F.2d 431, 432-33 (11th Cir. 1990) (declining to expand “fiction” that corporation cannot conspire with itself in criminal context but holding that where sole stockholder completely controls corporation, stockholder cannot conspire with corporation); *United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984) (“[a]ctions of two or more agents of a corporation, conspiring together on behalf of the corporation, may lead to conspiracy convictions of the agents (because the corporate veil does not shield them from criminal liability) and of the corporation (because its agents conspired on its behalf).”); *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir. 1983) (“in the criminal context a corporation may be convicted of conspiring with its officers”).

33. McSorley, *supra* note 31 at 15 (collecting cases regarding whether corporation may conspire in civil rights context).

34. 18 U.S.C. § 371 (1994).

35. *See, e.g.*, *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988) (unlawful use of electronic listening device); *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir. 1988) (aiding in estate tax fraud); *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988) (bank robbery); *United States v. Pinto*, 838 F.2d 426, 430 (10th Cir. 1988) (tax evasion); *United States v. Joseph*, 835 F.2d 1149, 1152 (6th Cir. 1987) (rigged gambling); *United States v. Bruun*, 809 F.2d 397, 410 (7th Cir. 1987) (bank and securities fraud); *United States v. Krasovich*, 819 F.2d 253, 255 (9th Cir. 1987) (tax evasion); *United States v. Giancola*, 783 F.2d 1549, 1553 (11th Cir. 1986) (failure to report bank transactions over \$10,000 as required by federal law).

36. *Tanner v. United States*, 483 U.S. 107, 128 (1987) (quoting *Dennis v. United States*, 384 U.S. 855, 861 (1966)); *see Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (holding that conspiracy under § 371 means to “interfere with or obstruct one of . . . lawful governmental functions”); *see also United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992) (holding that bank fraud statute requires attempt to deceive federally chartered or insured financial institution); *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) (holding that § 371 “criminalizes any willful impairment of a legitimate function of government”); *Hooks*, 848 F.2d at 792 (holding that tax fraud constitutes violation of defraud clause); *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957) (ruling it is conspiracy to defraud United States by impeding and obstructing the functions of Department of the Treasury; subsequently known as “*Klein*” conspiracy).

18 U.S.C. § 6 (1994) defines the term “agency.” Courts have given “agency” an expansive definition. *See, e.g.*, *Dennis*, 384 U.S. at 861-62 (National Labor Relations Board is agency); *United States v. Browning*, 723 F.2d

that term has been defined in the common law."³⁷ Furthermore, the Supreme Court's language in *Hammerschmidt v. United States*³⁸ seemed to require that the means to defraud be dishonest.³⁹ That being said, Supreme Court cases both prior and subsequent to *Hammerschmidt* have upheld conspiracy convictions which did not charge dishonest or deceptive means.⁴⁰ Some circuits have affirmed convictions on conspiracy counts absent allegations of fraud or dishonesty,⁴¹ while other circuits require such a showing.⁴² It is not necessary that the conspiracy subject the government to property or pecuniary loss.⁴³

Similarly, the "offense" clause of § 371 is not limited to offenses committed against the United States or its agents, but it rather applies to any conspiracy to violate federal law.⁴⁴ To fall within the offense clause, the object of the conspiracy

1544, 1549 (11th Cir. 1984) (Internal Revenue Service is agency); *United States v. Turkish*, 623 F.2d 769, 771 (2d Cir. 1980) (Department of the Treasury is agency); *United States v. Mitchell*, 372 F. Supp. 1239, 1254 (S.D.N.Y. 1973) (Securities and Exchange Commission is agency). Virtually any method used to defraud the United States will suffice for the purposes of the statute. See, e.g., *Tanner*, 483 U.S. at 129 ("conspiracy to defraud the United States may be effected by the use of third parties"); *Dennis*, 384 U.S. at 862 (holding that filing of false affidavits with NLRB is fraud against United States); *Tramp v. United States*, 978 F.2d 1055 (8th Cir. 1992) (holding that mail and wire fraud against United States supported conspiracy conviction).

37. *Dennis*, 384 U.S. at 861 (discussing how "defraud" clause of § 371 applies to federal government); *Tuohey*, 867 F.2d at 536-37 (discussing scope of defraud clause).

38. *Hammerschmidt*, 265 U.S. at 188 (holding that interfering with official action by misrepresentation, overreaching, or chicanery constitutes conspiracy).

39. *Id.* (holding that fraud is something done by means of "deceit, craft or trickery, or at least by means that are dishonest").

40. See, e.g., *Dennis*, 384 U.S. at 861 (stating that submitting false affidavits to National Labor Relations Board constitutes conspiracy to defraud United States); *Haas v. Henkel*, 216 U.S. 462, 480 (1910) (holding that bribery constitutes conspiracy).

41. See, e.g., *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir. 1988) (finding that purpose of conspiracy was to impair, obstruct, or defeat "lawful function of any department of Government"); *United States v. Shoup*, 608 F.2d 950, 963-64 (3d Cir. 1979) (upholding conviction for § 371 conspiracy without proof of dishonesty or trickery).

42. See, e.g., *United States v. Licciardi*, 30 F.3d 1127, 1131 (9th Cir. 1994) (holding that conspiracy to defraud entails interference with government function by means of "deceit, craft or treachery or at least by means that are dishonest") (quoting *Hammerschmidt*, 265 U.S. at 188); *United States v. Pintar*, 630 F.2d 1270, 1277-79 (8th Cir. 1980) (same); *United States v. Peltz*, 433 F.2d 48, 51-52 (2d Cir. 1970) (stating *Hammerschmidt* only narrowed *Haas* holding and requiring demonstration of trickery and deceit).

43. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (holding that it is not necessary to prove Government was "subjected to property or pecuniary loss by the fraud"); *Haas*, 216 U.S. at 479 (holding that it is not necessary to allege pecuniary loss in conspiracy to defeat or impair promulgation of crop information); *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) (holding that it is not necessary to prove government suffered pecuniary loss); *United States v. Puerto*, 730 F.2d 627, 630-31 (11th Cir. 1984) (concluding that it is sufficient to show interference with IRS without showing pecuniary loss to government); *United States v. Burgin*, 621 F.2d 1352, 1356-57 (5th Cir. 1980) (holding that scheme by public official to exert political influence constitutes conspiracy even when government suffers no pecuniary loss); *United States v. Hicks*, 619 F.2d 752, 757 (8th Cir. 1980) (holding that it is unnecessary to show proof of government's pecuniary or property loss).

44. *United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994) (holding that offense clause applies generally to federal offenses and conspiracy need not be aimed at United States or its agents); *United States v. Falcone*, 960 F.2d 988, 990 (11th Cir. 1992) (en banc) (holding that offense against United States encompasses all offenses against laws of United States, not just offenses targeted at United States); *United States v. Gibson*, 881 F.2d 318, 321 (6th Cir. 1989) (same).

must be the violation of a specific federal statute.⁴⁵ It is not necessary that the conspirators intend or know that the conspiracy will violate federal law; a concert of action is sufficient to prove this element.⁴⁶ In cases where the offense and defraud clauses overlap, the indictment may charge conspiracy to defraud even when the object of the conspiracy also violates the offense clause so long as the indictment provides sufficient notice of the charges.⁴⁷

C. Knowledge, Intent, and Participation

The third element that the government must prove is that the defendant knew of the conspiratorial agreement and voluntarily participated in it.⁴⁸ The government

45. See *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993) (holding that "offense" for purposes of § 371 includes violations of executive orders where Congress has provided criminal sanctions for such violations).

46. See *United States v. Gonzalez*, 121 F.3d 928, 935 (5th Cir. 1997) ("a defendant's guilty knowledge and participation in the conspiracy all may be inferred from the 'development and collocation of circumstances' . . . the jury may infer the existence of a conspiracy from the presence, association, and concerted action of the defendant with others"), *cert. denied*, 118 S. Ct. 726 (1998); *United States v. Cyprian*, 23 F.3d 1189, 1201-02 (7th Cir. 1994) (holding that government need only prove that defendant knew he was interfering with IRS's ability to collect taxes, not that defendant knew he was violating actual tax law); *United States v. Hern*, 926 F.2d 764, 768 (8th Cir. 1991) (holding that government need only show that objective and agreement were unlawful); *United States v. Blackmon*, 839 F.2d 900, 908 (2d Cir. 1988) (holding that conviction for conspiracy to commit wire fraud does not require foreseeability of interstate nature of the wire communication); *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir. 1988) (holding that to convict for conspiracy government must prove "at least the degree of criminal intent necessary for the substantive offense") (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959)); *United States v. Townsley*, 843 F.2d 1070, 1080 (8th Cir. 1988) (holding that, although objective of conspiracy was to influence local election, misuse of absentee ballot constituted offense against United States because it included candidates for federal office); *United States v. Gilley*, 836 F.2d 1206, 1210 (9th Cir. 1988) (requiring proof of agreement to commit acts which "if consummated, would constitute an offense against the United States") (citing *Ingram*, 360 U.S. at 677-78); *United States v. Petit*, 841 F.2d 1546, 1551 (11th Cir. 1988) (ruling that government not required to prove defendants had knowledge that goods were moving in interstate commerce in order to prove conspiracy to steal goods moving in interstate commerce).

47. *Dennis v. United States*, 384 U.S. 855, 859 (1966); see *Arch Trading*, 987 F.2d at 1092 ("when both prongs of § 371 apply . . . the government enjoys considerable latitude in deciding how to proceed"); *United States v. Mohney*, 949 F.2d 899, 902 (6th Cir. 1991) ("existence of a specific statutory provision encompassing the charged conduct does not prevent prosecutors from bringing charges under the defraud clause"); see also *United States v. Sturman*, 951 F.2d 1466, 1473-74 (6th Cir. 1991) (holding that where conduct violates more than one statute, broader "defraud" clause is appropriate); *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990) (allowing prosecution under defraud clause where conduct violated specific statutes because an "alteration in the phraseology of the conspiracy charge [to charge conspiracy under offense clause] could not have assisted . . . defense"); *United States v. Little*, 753 F.2d 1420, 1434 (9th Cir. 1984) (holding that notice sufficient for a prosecution under defraud clause even where internal revenue law was retroactively applied); *United States v. Sans*, 731 F.2d 1521, 1533-34 (11th Cir. 1984) (holding that indictment under defraud clause was sufficient where one object of conspiracy was misdemeanor offense); *United States v. Shermetaro*, 625 F.2d 104, 111 (6th Cir. 1980) (allowing an indictment under defraud clause where conduct proscribed by internal revenue laws). *But see* *United States v. Minarik*, 875 F.2d 1186, 1194-95 (6th Cir. 1989) (holding that if illegal activity is specifically prohibited by statute, conspiracy must be prosecuted under "offense" clause rather than "defraud" clause in order to provide clear notice).

48. *United States v. Falcone*, 311 U.S. 205, 210-11 (1940) (holding that, in order to prove participation in conspiracy, government must prove defendant was aware his actions would further conspiracy); *United States v.*

need not prove that the defendant knew all the details⁴⁹ or objectives⁵⁰ of the conspiracy or that the defendant knew the identity of all the participants in the conspiracy.⁵¹ Thus, the existence of a conspiracy and a defendant's participation in it can be inferred from the circumstances and "need not be proved by direct evidence."⁵² Acts committed by the defendant which furthered the objectives of

Brown, 31 F.3d 484, 490 (7th Cir. 1994) (holding that government must prove defendant had knowledge of conspiracy and intended to participate); *United States v. Agofsky*, 20 F.3d 866, 870 (8th Cir. 1994) (same); *United States v. Dimeck*, 24 F.3d 1239, 1242 (10th Cir. 1994) (same); *United States v. Chambers*, 985 F.2d 1263, 1270 (4th Cir. 1993) (requiring government to prove knowledge and participation); *United States v. Johnson*, 952 F.2d 565, 581 (1st Cir. 1991) (same); *United States v. Hodges*, 935 F.2d 766, 772 (6th Cir. 1991) (same); *United States v. Casamento*, 887 F.2d 1141, 1167 (2d Cir. 1989) (same); *United States v. Wexler*, 838 F.2d 88, 90-91 (3d Cir. 1988) (same); *United States v. Toro*, 840 F.2d 1221, 1233 (5th Cir. 1988) (same); *United States v. Gonzalez*, 810 F.2d 1538, 1542 (11th Cir. 1987) (same); *United States v. Guerrero*, 756 F.2d 1342, 1349 (9th Cir. 1984) (same).

49. *See Blumenthal v. United States*, 332 U.S. 539, 557 (1947) (holding that it is only necessary to show conspirators knew of conspiracy's general scope); *United States v. Sneed*, 63 F.3d 381 (5th Cir. 1995) (holding that, in prosecution for conspiracy to commit mail fraud, "no element need be proved by direct evidence") (quoting *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir. 1988)); *United States v. Brandon*, 17 F.3d 409, 428 (1st Cir. 1994) (holding that government need only prove that defendant had "knowledge of the basic agreement" of conspiracy to commit bank fraud); *United States v. Rosa*, 17 F.3d 1531, 1546 (2d Cir. 1994) (holding that government need only prove that defendant knew "general nature and extent" of conspiracy to receive stolen goods); *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir. 1994) (holding that defendant need not be privy to all details of conspiracy involving fraudulent real estate loans); *United States v. Milligan*, 17 F.3d 177, 183 (6th Cir. 1994) (holding that government need not prove that defendant knew all details of conspiracy to commit mail fraud); *United States v. Marshall*, 985 F.2d 901, 905 (7th Cir. 1993) (holding the same, for money laundering and drug distribution conspiracy).

50. *Dimeck*, 24 F.3d at 1242 (holding that defendant need only know essential objectives to constitute knowledge of money laundering conspiracy); *United States v. Cassiere*, 4 F.3d 1006, 1015 (1st Cir. 1993) (holding that defendant need not know all objectives of wire fraud conspiracy); *United States v. Wiley*, 846 F.2d 150, 153 (2d Cir. 1988) (holding that knowledge of all objectives in conspiracy to defraud not required); *United States v. Adams*, 759 F.2d 1099, 1114 (3d Cir. 1985) (holding that knowledge of all goals of conspiracy not required) (citing *Blumenthal*, 332 U.S. at 558).

51. *Blumenthal*, 332 U.S. at 557. The Supreme Court stated:

Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Id.; *see also Brandon*, 17 F.3d at 428 (holding that defendant need not know identity of all members of conspiracy); *Milligan*, 17 F.3d at 183 (same); *Agofsky*, 20 F.3d at 870 (holding that government can convict despite "fact that identity of some or all other member of the conspiracy remains unknown"); *United States v. Hernandez*, 986 F.2d 234, 236 (8th Cir. 1993) (holding that knowledge of identity of all participants not required); *United States v. Reed*, 980 F.2d 1568, 1582 (11th Cir. 1993) (same); *United States v. Young*, 954 F.2d 614, 619 (10th Cir. 1992) (same); *United States v. Miranda-Ortiz*, 926 F.2d 172, 175-76 (2d Cir. 1991) (same); *United States v. Donsky*, 825 F.2d 746, 753-54 (3d Cir. 1987) (holding that conspiracy can be found even where government could not prove each co-conspirator knew of details or participation of others); *United States v. Shermetaro*, 625 F.2d 104, 108 (6th Cir. 1980) (holding that defendant need not know "the full scope . . . , the detailed plans, operation, membership, or even the purpose of other members in the conspiracy").

52. *United States v. Glasser*, 315 U.S. 60, 80 (1942); *accord United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995) (holding that defendant's knowing involvement in conspiracy can be established through circumstan-

the conspiracy are often sufficient to show that the defendant was a knowing participant.⁵³ Once the government proves the existence of a conspiracy, only "slight connection" evidence may be needed to show that the defendant was a member of the conspiracy.⁵⁴ Deliberate avoidance of knowledge does not preclude

tial evidence); *Brandon*, 17 F.3d at 428 (holding that knowledge and intent can be proven through inferences from circumstantial evidence); *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1994) (same); *United States v. Whittington*, 26 F.3d 456, 465 (4th Cir. 1994) (holding that proof of knowing participation in conspiracy can be shown by "circumstantial evidence, such as [defendant's] relationship with other members of the conspiracy, the length of this association, [defendant's] attitude, conduct and the nature of the conspiracy"); *United States v. Mullins*, 22 F.3d 1365, 1368 (6th Cir. 1994) (holding that defendant's participation in conspiracy can be reasonably inferred from circumstantial evidence); *United States v. Thomas*, 8 F.3d 1552, 1556 (11th Cir. 1993) (holding that close association with co-conspirator is "factor that can be considered as evidence of defendant's participation in a conspiracy"); *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir. 1988) (observing that "existence and common purpose must often be proved by circumstantial evidence" because of the secretive nature of conspiracies); *United States v. Simon*, 839 F.2d 1461, 1469 (11th Cir. 1988) (holding that participation need not be proven by direct evidence).

53. *United States v. Gonzalez*, 121 F.3d 928 (5th Cir. 1997) ("The essential elements of conspiracy may be established by circumstantial evidence"), *cert. denied*, 118 S. Ct. 726 (1998); *Cassiere*, 4 F.3d at 1015 (holding that defendant's participation in conspiracy can be inferred from defendant's actions); *United States v. Locascio*, 6 F.3d 924, 944-45 (2d Cir. 1993) (holding that defendant-underboss's presence in head of crime family's apartment during criminal activity planning meetings was functional part of conspiracy and was, therefore, sufficient circumstantial evidence of defendant's knowing participation); *United States v. Investment Enter., Inc.*, 10 F.3d 263, 267 (5th Cir. 1993) (holding that close relationship between defendant and co-conspirator was sufficient circumstantial evidence to prove defendant knew of conspiracy); *United States v. Sykes*, 977 F.2d 1242, 1247 (8th Cir. 1992) (holding that defendant's participation in conspiracy can be inferred from defendant's actions); *United States v. Ashworth*, 836 F.2d 260, 265 (6th Cir. 1988) (same); *United States v. Alvarez*, 837 F.2d 1024, 1027 (11th Cir. 1988) (holding that proof of acts committed in furtherance of conspiracy may be sufficient to show knowing participation in conspiracy). *But see* *United States v. Collins*, 966 F.2d 1214, 1219-20 (7th Cir. 1992) ("[A] person who is indifferent to the goals of an ongoing conspiracy does not become a party to this conspiracy merely because that person knows that his or her actions might somehow be furthering that conspiracy."); *United States v. Veksler*, 862 F. Supp. 1337, 1339 (E.D. Pa. 1994) (holding that evidence that defendant knew or suspected that something illegal was occurring and was willing to participate in that activity is insufficient to support a conspiracy conviction), *aff'd* 62 F.3d 544 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 780 (1996).

54. *United States v. Leahy*, 82 F.3d 624, 633 (5th Cir. 1996) (holding that once government proves existence of conspiracy and defendant's intent to further it, slight connection between defendant and conspiracy suffices to prove knowing participation); *Brandon*, 17 F.3d at 428 (same); *Whittington*, 26 F.3d at 465 (same); *Milligan*, 17 F.3d at 183 (same); *Agofsky*, 20 F.3d at 870 (same); *United States v. Pinkney*, 15 F.3d 825, 827 (9th Cir. 1994) (same); *United States v. Sturman*, 951 F.2d 1466, 1474 (6th Cir. 1991) (same); *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir. 1990) (holding that only slight connection required to convict defendant); *United States v. Muehlbauer*, 892 F.2d 664, 667 (7th Cir. 1990) (same); *cf.* *United States v. Villegas*, 911 F.2d 623, 629 (11th Cir. 1990) (holding that mere presence or association with conspirators insufficient); *United States v. Morris*, 836 F.2d 1371, 1374 (D.C. Cir. 1988) (holding that buyer-seller relationship does not make out conspiracy even if item sold is one to be used illegally); *United States v. Wexler*, 838 F.2d 88, 91 (3d Cir. 1988) (holding that inferences arising from "keeping bad company" not enough for conspiracy conviction); *United States v. Pupo*, 841 F.2d 1235, 1238 (4th Cir. 1988) (holding that mere knowledge, acquiescence, or approval of crime not enough to establish that individual is part of conspiracy, nor is mere presence at scene of drug distribution sufficient); *United States v. Ascarrunz*, 838 F.2d 759, 763 (5th Cir. 1988) (holding that mere close association with co-conspirator not enough to support inference of participation in conspiracy, but jury may rely on association along with other evidence to find conspiracy); *United States v. Bascaro*, 742 F.2d 1335, 1359 (11th Cir. 1984) (holding that unless buyer knowingly assumes role instrumental to conspiracy's success, buyer-seller relationship not indicative of conspiracy).

a finding of involvement in the conspiracy.⁵⁵

D. Overt Act

The fourth and final element of a federal conspiracy charge is the performance of an overt act in furtherance of the conspiracy.⁵⁶ The function of the overt act requirement is to demonstrate that the conspiracy was actually operative, rather than a mere scheme in the minds of the actors.⁵⁷ The overt act need not be unlawful,⁵⁸ nor need it be the substantive offense charged in the indictment.⁵⁹ Furthermore, the defendant need not have committed an overt act: he is chargeable so long as a co-conspirator has committed such an act.⁶⁰

Under the theory of vicarious liability, the reasonably foreseeable overt acts of one co-conspirator, committed in furtherance of the conspiracy, are attributable to the other conspirators.⁶¹ In establishing liability for the conspiracy charge, the

55. *United States v. Richardson*, 14 F.3d 666, 671-72 (1st Cir. 1994) (holding willful blindness instruction appropriate when defendant intentionally avoids gaining knowledge of the obvious); *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994) (holding that knowledge of fact may be inferred from willful blindness to existence of fact); *Whittington*, 26 F.3d at 463 (holding willful blindness instruction appropriate when defendants go to "great lengths to insulate [themselves] from the fraud perpetrated"); *United States v. Faulkner*, 17 F.3d 745, 767-68 (5th Cir. 1994) (holding deliberate ignorance instruction appropriate when defendant claims lack of guilty knowledge but evidence supports inference of deliberate indifference); *United States v. Gonzalez*, 933 F.2d 417, 433 (7th Cir. 1991) (same); *Alvarez*, 837 F.2d at 1028 (holding that deliberate ignorance instruction warranted); *United States v. Lanza*, 790 F.2d 1015, 1021-22 (2d Cir. 1986) (same).

56. 18 U.S.C. § 371 (1994). *See Blumenthal v. United States*, 332 U.S. 539, 560 n.18 (1947) (holding that "commission of an overt act" required by the predecessor to today's § 371).

57. *Yates v. United States*, 354 U.S. 298, 334 (1957); *see also United States v. Hurley*, 957 F.2d 1, 3 (1st Cir. 1992) (holding that lawful activity may furnish basis for conviction for conspiracy).

58. *Yates*, 354 U.S. at 334; *United States v. Crabtree*, 979 F.2d 1261, 1267 (7th Cir. 1992); *United States v. Montour*, 944 F.2d 1019, 1026 (2d Cir. 1991); *United States v. Hern*, 926 F.2d 764, 768 (8th Cir. 1991); *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988); *United States v. Tarvers*, 833 F.2d 1068, 1075 (1st Cir. 1987).

59. *See Yates*, 354 U.S. at 334 ("[it is] not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy"); *United States v. Sarault*, 840 F.2d 1479, 1487 (9th Cir. 1988) (holding that overt act need only be concrete step toward carrying out agreement, nor one that actually accomplishes goal of conspiracy); *United States v. Medina*, 761 F.2d 12, 15 (1st Cir. 1985) (holding that act need not be substantive crime that is object of conspiracy or even be criminal in character).

60. *United States v. Comeaux*, 955 F.2d 586, 591 (8th Cir. 1992); *United States v. Castro*, 972 F.2d 1107, 1110 (9th Cir. 1992); *United States v. Gresser*, 935 F.2d 96, 101 (6th Cir. 1991); *United States v. Baña*, 949 F.2d 1465, 1477 (7th Cir. 1991); *United States v. Sanchez*, 917 F.2d 607, 612 (1st Cir. 1990).

61. *Fiswick v. United States*, 329 U.S. 211, 217 (1946) (holding that act of one partner in crime is admissible against another where act was done in furtherance of criminal undertaking and was reasonably foreseeable) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)); *United States v. Castaneda*, 16 F.3d 1504, 1511 (9th Cir. 1994) (affirming "*Pinkerton*" instruction on vicarious liability); *United States v. Williams*, 986 F.2d 86, 90 (4th Cir. 1993) (holding defendant liable not only for his conduct but also for reasonably foreseeable actions of co-conspirators); *United States v. Brewer*, 983 F.2d 181, 185 (10th Cir. 1993) (same); *United States v. Eyster*, 948 F.2d 1196, 1206 n.13 (11th Cir. 1991) (same); *United States v. Labat*, 905 F.2d 18, 22 (2d Cir. 1990) (same); *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990) (same); *United States v. Thorn*, 917 F.2d 170, 175 (5th Cir. 1990) (same). *But see United States v. Betancourt*, 838 F.2d 168, 174 (6th Cir. 1988) (holding defendant liable only for acts of co-conspirator of which defendant "should reasonably have known").

circuit courts generally find a defendant liable for acts committed by her co-conspirators both prior to, as well as during the defendant's participation.⁶² However, a defendant cannot be held criminally liable for substantive offenses committed by others involved in the conspiracy before she joined it⁶³ or after she withdrew from the conspiracy.⁶⁴

III. DEFENSES

Defendants can challenge conspiracy charges by claiming a failure to prove the specific elements of the offense⁶⁵ or by contesting the charge on more general grounds. Such defenses include: statute of limitations, insufficiency of indictment, variance, multiplicitous indictment, insufficient evidence, withdrawal, and a number of other defenses. These defenses will be discussed in turn.

A. Statute of Limitations

Since no provision of § 371 provides an express statute of limitations for conspiracy, the general five year limitation for non-capital offenses applies.⁶⁶ The five year limitation period also applies to the conspiracy provisions of other federal statutes unless they expressly provide otherwise.⁶⁷ The statute of limitations runs from the date of the last overt act committed in furtherance of the conspiracy.⁶⁸ A

62. See, e.g., *United States v. O'Campo*, 973 F.2d 1015, 1021-22 (1st Cir. 1992) (holding defendant responsible for overt acts of co-conspirators prior to involvement in conspiracy); *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992) (same); *United States v. Barksdale-Contreras*, 972 F.2d 111, 114 (5th Cir. 1992) (same); *United States v. Adamo*, 882 F.2d 1218, 1230 (7th Cir. 1989) (holding that defendant who joins conspiracy "[takes] the conspiracy as he found it" and is responsible for overt acts committed before he joined) (quoting *United States v. Coe*, 718 F.2d 830, 839 (7th Cir. 1983)); *United States v. Blackmon*, 839 F.2d 900, 908 (2d Cir. 1988) ("[conspiracy] defendant may be legally responsible for acts of co-conspirators prior to that defendant's entry into the conspiracy").

63. See *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992) (holding that there is no retroactive liability for substantive offense); accord *O'Campo*, 973 F.2d at 1022-23 (same); *Blackmon*, 839 F.2d at 909 (same).

64. See *infra* Section III.F of this Article (discussing requirements for effective withdrawal from conspiracy and defendant's liability for acts of co-conspirators after defendant's withdrawal); see also *Lothian*, 976 F.2d at 1262 (holding that there is no liability for substantive offenses after withdrawal); *United States v. Richardson*, 939 F.2d 135, 141 (4th Cir. 1991) (same).

65. See *supra* Sections II.A to II.D (discussing four essential elements of conspiracy).

66. 18 U.S.C. § 3282 (1994); see *United States v. Gormto*, 792 F.2d 1028, 1033 n.3 (11th Cir. 1986) (holding that government must prove that each crime charged in indictment occurred within previous five years); *United States v. Davis*, 533 F.2d 921, 926 (5th Cir. 1976) (holding that for § 371 prosecution, indictment must contain proof of commission of overt act within statute of limitations); *United States v. Lowder*, 492 F.2d 953, 955-56 (4th Cir. 1974) (holding that statute of limitation is supplied by particular statute; where it is not, 18 U.S.C. § 3282 applies unless otherwise specified by law).

67. See *supra* note 9 (listing other federal statutes containing conspiracy provisions). A conspiracy to commit an offense cannot have a longer statute of limitations than that of the substantive offense. *Bridges v. United States*, 346 U.S. 209, 223 (1953).

68. *Fiswick v. United States*, 329 U.S. 211, 216 (1946). The Court stated, "[t]he statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy. The overt acts averred and proved

conspiracy ends when the central criminal purpose of the conspiracy has been attained.⁶⁹ Continued concealment of prior acts in furtherance of the conspiracy after the objective has been attained does not extend the statute of limitations⁷⁰ or satisfy the requirements of co-conspirator hearsay admissibility under Rule 801 of the Federal Rules of Evidence.⁷¹

B. Insufficiency of the Indictment

An indictment must contain the elements of the offense charged,⁷² and will be deemed insufficient unless it sets forth the offense using the words of the statute itself.⁷³ If the indictment is not specific enough to apprise the defendant of the charges he or she must defend against at trial, the Fifth Amendment may be violated.⁷⁴ However, if a defendant's objection to an indictment is untimely, courts will view the indictment as valid.⁷⁵

may thus mark the duration, as well as the scope, of the conspiracy." *Id.* (citations omitted). Although the effects of the conspiracy may be continuing, the conspiracy itself is not viewed as continuing unless the co-conspirators are cooperating to keep it going. *Id.* See also *Flintkote v. United States*, 7 F.3d 870, 873 (9th Cir. 1993) (finding that running of statute of limitations commences from end of conspiracy).

69. *United States v. Roshko*, 969 F.2d 9, 12 (2d Cir. 1992) (holding conspiracy to defraud government ended when Immigration and Naturalization Service approved defendant's application for a green card, object of conspiracy); *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992) (holding conspiracy not complete until every element of crime has occurred); *United States v. Ammar*, 714 F.2d 238, 253 (3d Cir. 1983) (holding criminal purpose of conspiracy still continuing when distribution of money not completed).

70. See *Grunewald v. United States*, 353 U.S. 391, 402 (1957) (holding that concealment of conspiracy whose objective has been attained does not constitute separate conspiracy to conceal); *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949) (holding that concealment is incident to any conspiracy and does not constitute a conspiracy in and of itself); *United States v. Lash*, 937 F.2d 1077, 1082 (6th Cir. 1991) (holding that concealing a conspiracy does not extend its length for statute of limitations purposes).

However, a new, separate agreement to cover up a conspiracy after its completion may extend the running of the statute of limitations. See *Grunewald*, 353 U.S. at 404, 414 (holding that conspiracy was not continuing for statute of limitations purposes because conspirators made no express agreement to conceal conspiracy after completion); see also *United States v. Rabinowitz*, 56 F.3d 932, 934 (8th Cir. 1995) (holding that acts of concealment further conspiracy when concealment is central purpose of conspiratorial agreement).

71. See *Grunewald*, 353 U.S. at 401-2 (holding that co-conspirator's declarations made to foil detection were inadmissible under narrow co-conspirator exception to hearsay rule); *United States v. Vowiell*, 869 F.2d 1264, 1267 (9th Cir. 1989) (holding that hearsay statements made four days after escape were inadmissible because objectives of conspiracy accomplished).

72. See *Hamling v. United States*, 418 U.S. 87, 117 (1974) (stating that purpose of this requirement is two-fold: (1) to ensure that defendant has sufficient notice of offense charged to enable him to put on defense and (2) to protect him from double jeopardy).

73. See *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993); *United States v. Paulino*, 935 F.2d 739, 750 (6th Cir. 1991).

74. See *Russell v. United States*, 369 U.S. 749, 770 (1962) ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.").

75. FED. R. CRIM. P. 12(b)(2); See *United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1996) ("[a]n indictment that is challenged after jeopardy has attached is liberally construed in favor of sufficiency"); *United States v. Ruelas*, 106 F.3d 1416, 1419 (9th Cir. 1996) ("[a]lthough Ruelas may raise a defective indictment claim at any time, we liberally construe the indictment in this case because he did not object to it before he pleaded

C. Variance

An indictment violates the Sixth Amendment requirement of adequate notice⁷⁶ when the conspiracy charged in the indictment varies from the conspiracy proven at trial.⁷⁷ However, a court will reverse a conviction for variance only if the variance is material and the defendant's substantial rights⁷⁸ were prejudiced.⁷⁹ The

guilty"); *Lemons v. O'Sullivan*, 54 F.3d 357, 363 (7th Cir. 1995) ("defendant must raise any objection to the indictment prior to trial . . . [otherwise] 'the indictment must be upheld unless it is so defective that it does not . . . charge any offense for which the defendant is convicted' ") (quoting *United States v. James*, 923 F.2d 1261, 1266 (7th Cir. 1991)); *United States v. Ospina*, 18 F.3d 1332, 1336 (6th Cir. 1994) ("defects arising out of the institution of the prosecution must be raised prior to trial"); *United States v. Rodriguez*, 738 F.2d 13, 15 (5th Cir. 1984) ("[o]bjections that are not raised in a timely fashion are deemed to be waived, unless the court chooses to grant relief . . . based on a showing of good cause"); *United States v. Paolicelli*, 505 F.2d 971, 973 (4th Cir. 1974) ("[t]he failure to raise the issue (defect in indictment) at or prior to trial . . . constituted a waiver"). Some courts require that objections be raised prior to the trial. *See, e.g., United States v. Trujillo*, 714 F.2d 102, 105 n.1 (11th Cir. 1983) (holding that failure to raise objections based on defects in indictment prior to trial waives those objections); *United States v. Visconti*, 261 F.2d 215, 218 (2d Cir. 1958) ("[s]ince the alleged defect in the indictment was not raised before trial, it was waived").

Other courts allow objections to be raised up to the end of the trial. *See, e.g., United States v. Pelletier*, 898 F.2d 297, 301 (2d Cir. 1990) (holding that challenge to indictment is timely under Rule 12(b) if presented either by pretrial motion or at trial); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988) (holding that, to be timely, objection must be raised prior to verdict).

76. The Sixth Amendment states in pertinent part that the accused shall "be informed of the nature and cause of the accusation." U.S. CONST. amend. VI.

77. *See Kotteakos v. United States*, 328 U.S. 750, 758 (1946) (holding that when only one conspiracy is charged and eight are proven, conviction is improper); *United States v. Carr*, 5 F.3d 986, 990 (6th Cir. 1993) (finding that if indictment alleges one conspiracy and evidence supports multiple ones, variance results); *United States v. Maldonado-Rivera*, 922 F.2d 934, 960 (2d Cir. 1990) (stating that in order to find defendant guilty, jury must find defendant was member of conspiracy charged in indictment, not some other conspiracy); *cf. United States v. Santa-Manzano*, 842 F.2d 1, 2 (1st Cir. 1988) (reading Sixth Amendment as assurance that government will prosecute defendant on charges voted by grand jury, not on charges not included in indictment); *United States v. Pinto*, 838 F.2d 426, 433 (10th Cir. 1988) (same).

Some courts have held that variance may be cured by jury instruction. *See United States v. Mack*, 837 F.2d 254, 258 (6th Cir. 1988) (concluding that variance can be cured by cautionary jury instruction); *United States v. Townsley*, 843 F.2d 1070, 1082 (8th Cir. 1988) (determining that if indictment alleges single conspiracy but proof at trial reveals more than one, then the court should give multiple conspiracy instruction with cautionary instruction that evidence relating to other conspirators may not be used against defendant).

78. The substantial rights of the defendant can be violated in a number of ways. First, if the defendant is not apprised of the charges he would have to defend against at trial, prejudice may occur. *Berger v. United States*, 295 U.S. 78, 82 (1935); *see United States v. Santiago*, 83 F.3d 20 (1st Cir. 1996) (holding that defendant's stipulated misstatement confirming seized drugs as marijuana was not variance affecting defendant's substantial rights because defendant was not misled or surprised by variance); *United States v. Thomas*, 12 F.3d 1350, 1359 (5th Cir. 1994) (finding no variance if defendant informed of charges so as not to be surprised); *Pinto*, 838 F.2d at 433-34 (same); *see generally United States v. Reed*, 980 F.2d 1568, 1581 (11th Cir. 1993).

Second, substantial rights may be violated if guilt will be transferred to the defendant when evidence of a conspiracy to which the defendant is not a party is introduced at trial. *Kotteakos*, 328 U.S. at 774. *Compare United States v. Moran*, 984 F.2d 1299, 1304 (1st Cir. 1993) (finding no substantial prejudice when evidence incriminating to other defendants is distinct) with *United States v. Harris*, 8 F.3d 943, 947 (2d Cir. 1993) (stating that substantial prejudice occurs if testimony of one conspirator prejudices jury mind against one who is not part of conspiracy). Third, if the defendant will be exposed to double jeopardy, substantial prejudice occurs. *Berger*, 295 U.S. at 82. *See infra* note 84 (discussing Fifth Amendment guarantee against double jeopardy).

79. *See, e.g., Kotteakos*, 328 U.S. at 773-74 (holding that substantial prejudice occurs when the number of

jury determines whether there is a variance between the number of conspiracies charged in the indictment and the number proven at trial.⁸⁰ Unless the change is a matter of form rather than substance,⁸¹ an indictment may not be amended to correct the variance except by resubmission to the grand jury.⁸²

D. Multiplicitous Indictment

A multiplicitous indictment arises when a single conspiracy offense is charged in more than one count.⁸³ Such a defect violates the double jeopardy clause of the Fifth Amendment.⁸⁴

conspiracies and conspirators are so great that jury transfers guilt among them); *Thomas*, 12 F.3d at 1358 (stating that if all conspirators are not charged, no substantial prejudice occurs because defendant still knows what to defend against at trial); *United States v. Guerra-Marez*, 928 F.2d 665, 672 (5th Cir. 1991) (deciding that separate jury instructions and separate character of conspiracies suffice to prevent transference of guilt); *United States v. Townsend*, 924 F.2d 1385, 1411 (7th Cir. 1991) (finding no transference of guilt between large number of defendants when their voices are on tape); *United States v. Caporale*, 806 F.2d 1487, 1499 (11th Cir. 1986) (concluding that vague phrasing of indictment is not substantially prejudicial when defendant knows what to defend against).

80. See *United States v. Adams*, 1 F.3d 1566, 1584 (11th Cir. 1993) (holding that the existence of a single conspiracy is a question for the jury); *Maldonado-Rivera*, 922 F.2d at 962 (determining that whether conspiracy is multiple or single is question for jury); *United States v. Tarantino*, 846 F.2d 1384, 1391 (D.C. Cir. 1988) (same); *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988) (same); *United States v. Toro*, 840 F.2d 1221, 1236 (5th Cir. 1988) (same).

A single conspiracy exists where there is one overall agreement to perform various functions to achieve the objectives of the conspiracy. A single conspiracy may involve subgroups or sub-agreements as part of the overall conspiracy. *United States v. Patterson*, 819 F.2d 1495, 1502 (9th Cir. 1987).

If a single conspiracy is charged and multiple ones are proven, the defendant can be found guilty if there is evidence that the defendant participated in the charged conspiracy. See *United States v. Faulkner*, 17 F.3d 745, 762 (5th Cir. 1994) (stating that if a single conspiracy is charged and multiple conspiracies are proven, there is no variance if defendant is involved in one); *United States v. Durman*, 30 F.3d 803, 809 (7th Cir. 1994) (holding variance is not fatal error if jury could have found defendant participated in single, charged conspiracy); *Adams*, 1 F.3d at 1584 (finding no variance if jury could have found the existence of single conspiracy).

81. See *United States v. Bledsoe*, 898 F.2d 430, 432 (4th Cir. 1990) (holding that amendment deleting word "public" from indictment was substantial enough to require resubmission to grand jury); cf. *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (stating that constructive amendments of federal indictments are erroneous per se and must be corrected on appeal); *Floresca* limited the *Bledsoe* decision to its facts and overruled it to the extent necessary to reconcile it with *Floresca's* holding. See also *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1035 (9th Cir. 1997) (holding that variance as to starting date does not constitute reversible error unless time is material element of charged offense); *United States v. Calderon*, 77 F.3d 6, 10 (1st Cir. 1996) (finding that defendant cannot complain of improper constructive amendment if indictment is actually amended by resubmission to grand jury); *United States v. Jaynes*, 75 F.3d 1493, 1506 (10th Cir. 1996) (concluding that evidence sufficed to convict defendants on conspiracy charge even if dates of conspiracy were not precisely as alleged in indictment). But see *United States v. Fletcher*, 121 F.3d 187, 193 (5th Cir. 1997) (determining on appeal that amendment did not impair "substantial rights" of appellants because it would not have affected outcome of trial).

82. See *United States v. McAnderson*, 914 F.2d 934, 944 (7th Cir. 1990) (considering constructive amendment to indictment prejudicial per se because denies defendant right to grand jury and hampers defendant's ability to prepare adequately for trial); *United States v. Zingaro*, 858 F.2d 94, 97 (2d Cir. 1988) (finding constructive amendment of indictment per se violation of grand jury clause of Fifth Amendment).

83. See *United States v. Holmes*, 44 F.3d 1150, 1153-54 (2d Cir. 1995) (determining indictment to be multiplicitous if same conspiracy charged in more than one count); *United States v. Haddock*, 956 F.2d 1534, 1546 (10th Cir. 1992) (same); *United States v. Busacca*, 936 F.2d 232, 239 (6th Cir. 1991) (same); *United States v. Howard*, 918 F.2d 1529, 1532 (11th Cir. 1990) (same).

84. See *Haddock*, 956 F.2d at 1546 (finding Double Jeopardy Clause violated since multiplicitous indictment

E. Insufficient Evidence

The accused may also defend against conspiracy charges by alleging that the government has failed to establish a conspiracy⁸⁵ or has failed to establish the requisite elements of the conspiracy.⁸⁶

F. Withdrawal

Withdrawal from a conspiracy requires more than the cessation of participation: the conspirator must commit "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators."⁸⁷ To escape liability, an actor must unequivocally withdraw before any overt act in furtherance of the conspiracy is committed.⁸⁸ However, if an act

may lead to multiple sentences for same conduct); *United States v. Dixon*, 921 F.2d 194, 196 (8th Cir. 1990) (same); *United States v. Nakashian*, 820 F.2d 549, 552 (2d Cir. 1987) (same).

85. See *United States v. Hudgins*, 131 F.3d 137, 140 (4th Cir. 1997) (holding that evidence is sufficient to support conviction if rational trier of fact could have found essential elements of crime beyond reasonable doubt); *United States v. Thomas*, 120 F.3d 564, 569 (5th Cir. 1997) (same); *United States v. Bass*, 121 F.3d 1218, 1220 (8th Cir. 1997) (same); see also *United States v. Alonso*, 48 F.3d 1536, 1543 (9th Cir. 1995) (finding sufficient evidence to support conspiracy conviction where defendant spoke of others who engaged in fraud, engaged in countersurveillance activities, and negotiated specifics of intended actions); *United States v. Young*, 954 F.2d 614, 618 (10th Cir. 1992) (concluding that conspiracy may be found based solely on circumstantial evidence); *United States v. Mack*, 837 F.2d 254, 257 (6th Cir. 1988) (stating that in appeal challenging sufficiency of evidence in conspiracy trial, critical inquiry is whether record evidence can reasonably support finding of guilt beyond reasonable doubt).

Where defendant alleges insufficient evidence on appeal, the court will view evidence in the light most favorable to the government. *United States v. Cooper*, 121 F.3d 130, 133 (3d Cir. 1997); *United States v. Valenti*, 121 F.3d 327, 331 (7th Cir. 1997); *United States v. Alejandro*, 118 F.3d 1518, 1521 (11th Cir. 1997); *United States v. Barrett*, 933 F.2d 355, 359 (6th Cir. 1991); *United States v. Staggs*, 881 F.2d 1546, 1550 (10th Cir. 1989); *United States v. Sarault*, 840 F.2d 1479, 1487 (9th Cir. 1988).

86. See discussion of elements of conspiracies under § 371, *supra* Section II.A. to II.D.; see also *United States v. McKinney*, 53 F.3d 664, 672 (5th Cir. 1995) (holding that evidence of defendant's role in conspiracy is enough once defendant's voluntary participation is shown); *United States v. Morgano*, 39 F.3d 1358, 1377 (7th Cir. 1994) (finding that to prove conspiracy, government must demonstrate participatory link between conspiracy and defendant).

87. *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978); see *Pinkerton v. United States*, 328 U.S. 640, 644-46 (1946) (stating that non-participation in subsequent acts of conspiracy was not sufficient to disavow self from conspiracy); *United States v. Greenfield*, 44 F.3d 1141, 1150 (2d Cir. 1995) (holding that unless conspirator produces affirmative evidence of withdrawal, his participation is presumed to continue until the last overt act by any of the co-conspirators); *United States v. Nason*, 9 F.3d 155, 161-62 (1st Cir. 1993) (finding no withdrawal when defendant refuses to take part in planned robbery); *United States v. Nava-Salazar*, 30 F.3d 788, 799 (7th Cir. 1993) (determining there was no withdrawal when defendant stopped participating in conspiracy due to arrest); *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991) (holding that cessation of active participation in conspiracy is not enough for withdrawal without act to disavow or defeat conspiracy); *United States v. MMR Corp.*, 907 F.2d 489, 500 (5th Cir. 1990) (stating defendant must show affirmative acts inconsistent with subject of conspiracy and communicated in manner reasonably calculated to reach co-conspirator(s) to prove withdrawal).

The participant does not need to notify every other co-conspirator to make his withdrawal valid. *United States Gypsum Co.*, 438 U.S. at 463-65.

88. See *United States v. Bullis*, 77 F.3d 1553, 1562 (7th Cir. 1996) (finding that conduct by defendant after withdrawal is relevant to whether withdrawal is complete and in good faith); *United States v. Lash*, 937 F.2d 1077,

has been committed, the statute of limitations begins to run from the time of the withdrawal.⁸⁹ Most circuits place the burden of proof of withdrawal on the defendant.⁹⁰

G. Other Defenses

Failure of the conspiracy to achieve its illegal goal,⁹¹ factual impossibility,⁹² and entrapment⁹³ are not effective defenses to charges of conspiracy. Incompetence⁹⁴

1084 (6th Cir. 1991) (determining that once overt act occurs, defendant is liable despite withdrawal); *United States v. Herron*, 825 F.2d 50, 54 (5th Cir. 1987) (stating that withdrawal after agreement and commission of one or more acts will not defeat conviction).

89. *See Nava-Salazar*, 30 F.3d at 799 (holding that after commission of overt act, withdrawal is relevant only when coupled with statute of limitations); *United States v. LeQuire*, 943 F.2d 1554, 1563 (11th Cir. 1991) (finding that participation in conspiracy lasts until conspiracy ends or until defendant withdraws, at which point statute of limitations begins to run).

90. *See United States v. Thomas*, 114 F.3d 228, 267 (D.C. Cir. 1997) (declaring that defendant has burden of proving he affirmatively withdrew from conspiracy); *United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995) (holding that if defendant completely severs his relationship with enterprise, he has established prima facie showing of withdrawal); *United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (concluding that defendant has substantial burden of proving that he has taken affirmative steps and made reasonable effort to communicate withdrawal); *United States v. Rossy*, 953 F.2d 321, 325 (7th Cir. 1992) (stating that defendant has burden of presenting sufficient evidence of withdrawal to raise issue); *United States v. Granados*, 962 F.2d 767, 772 (8th Cir. 1992) (placing burden on defendant to prove withdrawal); *United States v. Powell*, 982 F.2d 1422, 1435 (10th Cir. 1992) (same); *Barsanti*, 943 F.2d at 437 (holding that defendant must provide evidence he acted to defeat or to disavow conspiracy); *United States v. Chambers*, 944 F.2d 1253, 1265 (6th Cir. 1991) (stating that defendant must present evidence of affirmative act for withdrawal); *United States v. Martino*, 648 F.2d 367, 404 (5th Cir. 1981) (finding that individual claiming withdrawal has burden of proof); *United States v. James*, 609 F.2d 36, 41 (2d Cir. 1979) (same).

91. *See United States v. Feola*, 420 U.S. 671, 694 (1975) (concluding that law of conspiracy permits imposition of criminal sanction for agreement plus overt act, whether or not crime agreed upon is actually committed); *United States v. Warshawsky*, 20 F.3d 204, 208 (6th Cir. 1994) (stating that it is not necessary for conspirator to successfully complete all of the elements of underlying offense to be guilty of conspiracy); *United States v. Davis*, 960 F.2d 820, 828 (9th Cir. 1992) (holding that illegal conspiracy is complete regardless of whether agreed-upon crime is consummated); *United States v. Jones*, 839 F.2d 1041, 1048 (5th Cir. 1988) (same); *United States v. Petit*, 841 F.2d 1546, 1550 (11th Cir. 1988) (stating that failure to carry out conspiracy does not preclude finding that conspiracy existed).

92. *See United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir. 1994) (determining that factual impossibility is no defense to conspiracy charge); *United States v. Medina-Garcia*, 918 F.2d 4 (1st Cir. 1990) (finding conspiracy offense complete even though factually impossible because certain acts were to be carried out by government agents); *United States v. Bosch*, 914 F.2d 1239, 1244 (9th Cir. 1990) (holding that factual impossibility is no defense to conspiracy charge).

93. *See United States v. Anderson*, 76 F.3d 685 (6th Cir. 1996) (finding that defendant charged with conspiracy to possess and distribute cocaine was predisposed to commit charged crime and thus not entitled to entrapment defense); *United States v. Scott*, 26 F.3d 1458, 1468 (8th Cir. 1994) (determining no entrapment existed where defendant originated idea and no inducements were offered by government); *United States v. Toro*, 840 F.2d 1221, 1231 (5th Cir. 1988) (concluding that defendant charged with conspiracy to import cocaine was predisposed to commit charged crime and thus not entitled to entrapment defense).

94. Under the Insanity Defense Act of 1984, 18 U.S.C. § 17 (1994), in a conspiracy to kidnap, defendant has the burden of establishing by clear and convincing evidence that he was insane and must meet the statute's two-prong test that (1) he suffered from severe mental disease or defect at time of the crime and (2) that such defect prevented him from appreciating the nature and quality of his acts. *United States v. Knott*, 894 F.2d 1119,

and coercion,⁹⁵ however, are potentially successful defenses.

IV. CO-CONSPIRATOR HEARSAY RULE

Given the nature of the crime, most conspiracy trials will necessarily include testimony by co-conspirators.⁹⁶ For this reason, this section briefly discusses the co-conspirator exception to the hearsay rule. Part A addresses evidentiary issues, and Part B reviews Sixth Amendment concerns.

A. Evidentiary Issues

Under Rule 801(d)(2)(E) of the Federal Rules of Evidence, a "statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."⁹⁷ To admit a co-conspirator's statement into evidence under Rule 801, the trial judge must determine by a preponderance of the evidence⁹⁸ that: (1) a conspiracy existed; (2) the defendant and declarant were involved in the conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy.⁹⁹

1121 (9th Cir. 1990); *see also* *United States v. Phillips*, 630 F.2d 1138, 1146-47 (6th Cir. 1980) (stating that when only other alleged conspirator was insane, defendant could not be convicted because insane person lacked capacity to enter into agreement).

95. *Compare* *United States v. Neal*, 990 F.2d 355, 358-59 (8th Cir. 1993) (finding that coercion exists if fear is well-grounded and defendant cannot avoid threatened harm) *and* *United States v. Becerra*, 992 F.2d 960, 964 (9th Cir. 1993) (determining that coercion occurs when there is imminent threat, a fear that threat will be carried out, and no opportunity to escape) *with* *United States v. Logan*, 49 F.3d 352, 359 (8th Cir. 1995) (concluding that defendant failed to prove coercion defense because he did not establish that he had well grounded apprehension of death or serious bodily injury if he did not continue to participate in conspiracy) *and* *United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994) (stating that in order to establish coercion defense, defendant must show that necessary threatened force was present at time of his agreement to participate in conspiracy) *and* *United States v. Tanner*, 941 F.2d 574, 588 (7th Cir. 1991) (declaring that defendant failed to offer evidence that he had no reasonable way of escaping injury or death to himself or his family).

96. *See* *United States v. Gaytan*, 74 F.3d 545, 558 (5th Cir. 1996) (relying on quantity calculations contained in PSR's based on co-conspirator testimony to convict defendant); *United States v. Powers*, 75 F.3d 335, 340 (7th Cir. 1996) (allowing government to present testimony from several co-conspirators concerning defendant's involvement and participation in conspiracy); *United States v. McCarthy*, 97 F.3d 1562, 1570 (8th Cir. 1996) (permitting co-conspirator to testify that he personally delivered marijuana shipment to defendant); *United States v. Flores-Rivera*, 56 F.3d 319, 324 (1st Cir. 1995) (letting co-conspirator testify that defendant was member of conspiracy and accompanied him in drug drop-offs); *United States v. Williams*, 56 F.3d 63, 63 (4th Cir. 1995) (allowing co-conspirators to testify concerning defendant's involvement and participation in conspiracy); *United States v. Vaandering*, 50 F.3d 696, 699 (9th Cir. 1995) (convicting defendant of conspiracy to possess methamphetamine with intent to distribute based on testimony of co-conspirator); *United States v. Owens*, 70 F.3d 1118, 1125 (10th Cir. 1995) (holding defendant guilty of conspiracy based on testimony of co-conspirators confirming his involvement and participation).

97. *FED. R. EVID.* 801(d)(2)(E) [hereinafter "Rule 801" in notes]; *see also* *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (stating that co-conspirator exception to hearsay rule is "steeped in our jurisprudence").

98. *See infra* note 114 and accompanying text (discussing standard of proof necessary for determination of admissibility of co-conspirator hearsay statements).

99. *See* *Bourjaily*, 483 U.S. at 175; *United States v. Ivy*, 83 F.3d 1266, 1284 (10th Cir. 1996); *United States v. Rivera*, 22 F.3d 430, 435 (2d Cir. 1994); *United States v. Carter*, 14 F.3d 1150, 1155 (6th Cir. 1994); *United States*

When weighing the evidence to determine the admissibility of a co-conspirator's statement, a court may look at the content of the statement itself but must also consider independent evidence.¹⁰⁰ Courts should examine "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."¹⁰¹

In determining whether a conspiracy existed for admissibility purposes, courts are not limited solely to consideration of the crimes charged. Out-of-court statements by co-conspirators may be admissible under Rule 801 even if the defendant is not charged formally with conspiracy in the indictment.¹⁰² However, when conspiracy is not charged, judges are more likely to admit a co-conspirator's statement if the conspiracy is closely related to the crime with which the defendant is charged.¹⁰³

v. Sepulveda, 15 F.3d 1161, 1180 (1st Cir. 1993); United States v. Mahkimetas, 991 F.2d 379, 382 (7th Cir. 1993); United States v. Beckham, 968 F.2d 47, 50 (D.C. Cir. 1992); United States v. Local 560, 974 F.2d 315, 337 (3d Cir. 1992); United States v. Blevins, 960 F.2d 1252, 1255 (4th Cir. 1992); United States v. Fragoso, 978 F.2d 896, 899 (5th Cir. 1992); United States v. Garza, 980 F.2d 546, 553 (9th Cir. 1992); United States v. Thompson, 976 F.2d 666, 670 (11th Cir. 1992); United States v. Carper, 942 F.2d 1298, 1301 (8th Cir. 1991).

FED. R. EVID. 104(a) states: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges." FED. R. EVID. 104(a). As with other questions of admissibility, Rule 104 requires a threshold determination of admissibility before applying Rule 801. Such determinations are left to the discretion of the trial judge. FED. R. EVID. 104(b).

100. As of December 1, 1997, Rule 801(d)(2) reads in pertinent part: "The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." FED. R. EVID. 801(d)(2). This amendment addresses the question left open by *Bourjaily*—whether using co-conspirator statements alone would be enough to establish admissibility. *Amendments to the Federal Rules of Evidence*, 171 F.R.D. 712 (1997).

To the extent that they have dealt with the question, the majority of circuit courts have held that some evidence in addition to the hearsay statements is required. See United States v. Gatling, 96 F.3d 1511, 1520 (D.C. Cir. 1996) (holding that there must be independent evidence of conspiracy apart from the statement); United States v. Tellier, 83 F.3d 578, 580 (2d Cir. 1996) (finding hearsay statement inadmissible without independent corroborative evidence of defendant's participation in conspiracy); United States v. Lindemann, 85 F.3d 1232, 1239 (7th Cir. 1996) (requiring that some evidence, independent of statements, exist to corroborate conspiracy's existence); United States v. Lopez-Gutierrez, 83 F.3d 1235, 1242 (10th Cir. 1996) (finding that independent evidence is required, but it need not be substantial); United States v. Clark, 18 F.3d 1337, 1341 (6th Cir. 1994) (stating that relying solely on hearsay statement was not sufficient); *Sepulveda*, 15 F.3d at 1182 (holding that co-conspirator's statement, standing alone, was insufficient to meet preponderance standard of Rule 801); United States v. Silverman, 861 F.2d 571, 578 (9th Cir. 1988) (same). But see United States v. Neal, 78 F.3d 901, 905 (4th Cir. 1996) (declaring that court has not yet determined when independent evidence of conspiracy is required); United States v. Meggers, 912 F.2d 246, 248 (8th Cir. 1990) (stating that out of court statement is admissible if on independent aid the court is satisfied that, more likely than not, statement was made during course of and in furtherance of conspiracy).

101. *Amendments to the Federal Rules of Evidence*, 171 F.R.D. at 717.

102. See United States v. Godinez, 110 F.3d 448, 454 (7th Cir. 1997) (holding that government need not even charge a conspiracy in order for co-conspirator statement to be admitted); United States v. Rivera, 68 F.3d 5, 7 (1st Cir. 1995) (same); *Carter*, 14 F.3d at 1155 (same); United States v. Blankenship, 954 F.2d 1224, 1230 (6th Cir. 1992) (same); United States v. Washington, 952 F.2d 1402, 1407 (D.C. Cir. 1991) (same); United States v. Maldonado-Rivera, 922 F.2d 934, 962 (2d Cir. 1990) (same); United States v. Helmel, 769 F.2d 1306, 1313 (8th Cir. 1985) (same); United States v. Cawley, 630 F.2d 1345, 1350 (9th Cir. 1980) (same); United States v. Trowery, 542 F.2d 623, 626-27 (3d Cir. 1976) (same).

103. See United States v. Lyles, 593 F.2d 182, 194 (2d Cir. 1979) (stating that conspiracy must be "factually

To satisfy the second prong of the admissibility requirement, the declarant and the defendant must both be found to have been members of the conspiracy.¹⁰⁴ Once this determination has been made, any witness can recount the statement, regardless of whether or not the statement was originally made to a conspiracy member.¹⁰⁵

The determination of whether a proffered statement by a co-conspirator is admissible as a statement made during the course of and in furtherance of the conspiracy depends upon the particular facts of each case.¹⁰⁶ In every case the trial court must first certify that the statement was made during the existence of the conspiracy.¹⁰⁷ Second, it must determine if the statement was made in furtherance of the conspiracy. Any statement by a co-conspirator which promotes the main objectives of the conspiracy is considered to be in furtherance of the conspiracy and is admissible.¹⁰⁸ Courts have typically accepted that the defendant "[takes] the conspiracy as he [finds] it."¹⁰⁹ Therefore, statements made by co-conspirators

intertwined" with offense with which defendant is charged); *accord* United States v. Kendall, 665 F.2d 126, 131 (7th Cir. 1981) (same).

104. *See supra* note 97 and accompanying text (quoting Rule 801).

105. *See* United States v. Lampley, 68 F.3d 1296, 1300 (11th Cir. 1995) (admitting tape-recorded conversations because conspiracy existed when statements were made and defendant subsequently joined that conspiracy); United States v. Zarnes, 33 F.3d 1454, 1468 (7th Cir. 1994) (declaring recorded conversations concerning drug dealings admissible as statements of co-conspirators against defendant even though statements were made after defendant was in jail); United States v. Beal, 940 F.2d 1159, 1161 (8th Cir. 1991) (finding tape recordings of co-conspirator's conversations admissible even though not all parties in conversations were identified); United States v. Daly, 842 F.2d 1380, 1387 (2d Cir. 1986) (admitting recorded telephone conversations when statements made "plainly" referred to continuing conspiracy); *cf.* United States v. Rivera-Santiago, 872 F.2d 1073, 1085 (1st Cir. 1989) (holding that statement of unidentified individual about another's role in conspiracy would have been inadmissible if timely objection had been made).

106. *See supra* notes 61-64 and accompanying text (discussing determination of scope of conspiracy).

107. Generally, the conspiracy ends and the statute of limitations for prosecution of the conspiracy begins once the main objectives of the conspiracy have been accomplished. *See supra* notes 66-71 and accompanying text (discussing statutes of limitations for enforcement of conspiracy statutes).

108. *See* United States v. Guyton, 36 F.3d 655, 659 (7th Cir. 1994) (determining that statements intended to familiarize others with conspiratorial operations are in furtherance of conspiracy); United States v. Blakey, 960 F.2d 996, 998 (11th Cir. 1992) (admitting statements which serve to aid in conspiracy as statements made in furtherance of conspiracy, but not admitting statements which implicate one conspirator for the purpose of shifting blame from another); United States v. Simmons, 923 F.2d 934, 945 (2d Cir. 1991) (declaring statements made to enhance trust and cohesion among conspirators admissible since made in furtherance of conspiracy); United States v. Blakeney, 942 F.2d 1001, 1021 (6th Cir. 1991) (holding that statement regarding conspiracy's progress made to solicit assistance is in furtherance of conspiracy and thus admissible); United States v. Lujan, 936 F.2d 406, 411 (9th Cir. 1991) (stating that statements made to encourage continued participation in conspiracy properly admitted as in furtherance of conspiracy); United States v. Garcia, 893 F.2d 188, 190 (8th Cir. 1990) (finding statement of facts of conspiracy in furtherance when made in order to recruit co-conspirators); United States v. Munson, 819 F.2d 337, 341 (1st Cir. 1987) (determining statement identifying co-conspirator as source of cocaine admissible as in furtherance of conspiracy); *cf.* Krulewitch v. United States, 336 U.S. 440, 443-44 (1949) (holding exception does not extend to uncharged defendant's statements made after alleged conspiracy ended); United States v. Mayes, 917 F.2d 457, 464 (10th Cir. 1990) (stating that, to be admissible, statements do not actually need to further conspiracy but only need to have been intended to promote conspiratorial objectives).

109. United States v. Adamo, 882 F.2d 1218, 1230 (7th Cir. 1989) (first alteration in original) (citations omitted). *See also* United States v. Saccoccia, 58 F.3d 754, 778 (1st Cir. 1995) (holding that by joining conspiracy

prior to the time the defendant joined the conspiracy may be admissible against the defendant.¹¹⁰

The statement of a co-conspirator made to an undercover agent before an arrest is also considered to be in furtherance of the conspiracy, but an admission or confession made after an arrest is not.¹¹¹ Additionally, casual comments and narrative descriptions are generally found to be inadmissible hearsay.¹¹² Furthermore, statements made after the events about past conduct are not in furtherance of the conspiracy and, therefore, are inadmissible.¹¹³

individual effectively adopts prior co-conspirator declarations); *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992) (finding that defendant need not have entered conspiracy at its inception in order to incur liability for unlawful acts of conspiracy committed both before and entry); *United States v. Barksdale-Contreras*, 972 F.2d 111, 114 (5th Cir. 1992) (determining that one who joins ongoing conspiracy has adopted prior acts and declarations of conspirators made since formation and in furtherance of conspiracy).

110. *United States v. Lampley*, 68 F.3d 1296, 1301 (11th Cir. 1995) (stating that declarations of all members of conspiracy are admissible against defendant, even if occurring before defendant joined conspiracy); *United States v. Lokey*, 945 F.2d 825, 835 (5th Cir. 1991) (same); *United States v. Brown*, 943 F.2d 1246, 1255 (10th Cir. 1991) (discussing agreement among circuits that co-conspirator hearsay statements are admissible even if made before defendant joined conspiracy); *United States v. Tuchow*, 768 F.2d 855, 868 (7th Cir. 1985) (determining that declarations by conspirators made before defendant entered into conspiracy are admissible against defendant); *United States v. Leroux*, 738 F.2d 943, 949-50 (8th Cir. 1984) (same).

111. *United States v. Ascarrunz*, 838 F.2d 759, 762 (5th Cir. 1988) (declaring that although arrest operates as withdrawal and statements of arrested co-conspirator cannot be used against other co-conspirators, statements of unarrested co-conspirator can be introduced against arrested conspirator). The rationale behind this rule is that an arrest serves as a withdrawal from the conspiracy and ends the individual's participation in it. *Compare* *Fiswick v. United States*, 329 U.S. 211, 217 (1946) (finding post-arrest admission or confession is not in furtherance of conspiracy) *and* *United States v. Lombard*, 72 F.3d 170, 189 (1st Cir. 1995) (holding arrest terminates conspiracy, but allowing declaration based on other grounds) *and* *United States v. Alonzo*, 991 F.2d 1422, 1425 (8th Cir. 1993) (determining that statements made while declarant is in custody which incriminate co-conspirators lack "indicia of reliability") *and* *United States v. Magana-Olvera*, 917 F.2d 401, 408-09 (9th Cir. 1990) (declaring statements made while in custody to gain favoritism of police are not in furtherance of conspiracy) *with* *United States v. Jones*, 913 F.2d 1552, 1563 (11th Cir. 1990) (finding tape-recorded conversation between two co-conspirators after one had been arrested admissible because there was sufficient evidence to show that conspiracy was continuing) *and* *United States v. Urrego-Linares*, 879 F.2d 1234, 1240 (4th Cir. 1989) (determining telephone call between two arrested co-conspirators properly admitted because evidence showed conspiracy continued).

112. *United States v. Heater*, 63 F.3d 311, 325 (4th Cir. 1995) (declaring "idle chatter" not in furtherance of conspiracy); *United States v. Perez*, 989 F.2d 1574, 1578 (10th Cir. 1993) (holding that statement "in furtherance" must be more than mere narrative of prior events); *United States v. Johnson*, 927 F.2d 999, 1002 (7th Cir. 1991) (determining "idle chatter" does not advance "normal information flow between co-conspirators"); *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991) (stating that in order to fulfill "in furtherance" requirement, statements had to be more than mere conversation and declarant had to intend to further common conspiratorial objectives); *United States v. Heinemann*, 801 F.2d 86, 95 (2d Cir. 1986) (finding narrative account of one co-conspirator about another's past activities inadmissible); *United States v. DeLuna*, 763 F.2d 897, 909 (8th Cir. 1985) (concluding that statements that merely inform listener or reader of declarant's activities are not admissible as statements made in furtherance of conspiracy).

However, the fact that some portions of the statement may have been "idle chatter" may not render the entire statement inadmissible. *See* *United States v. Schmit*, 881 F.2d 608, 612 (9th Cir. 1989) (determining that fact that portions of statement were "idle chatter" or casual admissions of culpability did not make denial of motion to suppress reversible error).

113. *See* *United States v. Gutierrez*, 48 F.3d 1134, 1137 (10th Cir. 1995) (stating that narrative declarations of past conduct are not in furtherance of conspiracy); *United States v. Mitchell*, 31 F.3d 628, 632 (8th Cir. 1994)

1. *Standard of Proof*

The Supreme Court has held that the existence of a conspiracy, the declarant and defendant's participation in it, and the fact that a hearsay statement was made during the course of and in furtherance of the conspiracy need only be proven by a preponderance of the evidence.¹¹⁴

2. *Order of Proof*

Although the Supreme Court has defined the quantum of proof necessary for admission of co-conspirator hearsay,¹¹⁵ it has declined to designate an order of proof for trial courts to follow in determining whether the standard has been met.¹¹⁶ Most circuits have held that the trial court may admit a co-conspirator's statement, subject to the government's eventual proof by a preponderance of the evidence of the elements required under Rule 801.¹¹⁷ Indeed, these circuits have held that a separate hearing outside the presence of the jury is not necessary and that, if the government fails to meet its burden of proof during its presentation of the case, an instruction to the jury to disregard the statement is sufficient to negate any prejudice to the defendant which may have occurred.¹¹⁸

(declaring post facto descriptions of conspiracy to third parties inadmissible); *see also* FED. R. EVID. 801(d)(2)(E) (establishing co-conspirator exception to the hearsay rule).

114. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration").

115. *Id.*

116. *Id.* at 176 n.1.

117. *United States v. Wilson*, 102 F.3d 968, 972 (8th Cir. 1996) (concluding that order of proof is subject to discretion of trial judge and admission subject to eventual proof of conspiracy); *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1224 (5th Cir. 1994) (stating that court may conditionally admit co-conspirator statements subject to later determination that factual predicates were met); *United States v. Tracy*, 12 F.3d 1186, 1199 (2d Cir. 1993) (holding that co-conspirator statements may be conditionally admitted subject to later submission of necessary evidence of prerequisites for admission of statement); *United States v. Moss*, 9 F.3d 543, 549 (6th Cir. 1993) (declaring that admission of co-conspirator statement subject to eventual proof of conspiracy); *United States v. Pedigo*, 12 F.3d 618, 628 (7th Cir. 1993) (holding pre trial hearing unnecessary for submission subject to eventual acceptable proof; court may declare mistrial or issue limiting instruction to jury if government fails to link up evidence); *United States v. Blevins*, 960 F.2d 1252, 1256 (4th Cir. 1992) (concluding no hearing needed before co-conspirator statements admitted); *United States v. Perez*, 959 F.2d 164, 167 (10th Cir. 1992) (stating that trial judge must make determination of admissibility but that it is not always practical to have determination made first); *United States v. Gambino*, 926 F.2d 1355, 1360 (3d Cir. 1991) (determining that control over order of proof belongs to trial judge, and admission subject to later connection is acceptable); *United States v. Tamez*, 941 F.2d 770, 775 (9th Cir. 1991) (finding that *Bourjaily* did not mandate a hearing nor require an express finding); *United States v. Van Hemelryck*, 945 F.2d 1493, 1498 (11th Cir. 1991) (stating that statements may be admitted subject to proof of requirements during trial); *United States v. Medina*, 761 F.2d 12, 17 (1st Cir. 1985) (stating hearing is not mandated).

118. *See United States v. Ruiz*, 987 F.2d 243, 246 (5th Cir. 1993) (finding that district court is not required to conduct pretrial hearing to determine admissibility of co-conspirator statements); *Blevins*, 960 F.2d at 1256 (same); *United States v. Doerr*, 886 F.2d 944, 967 (7th Cir. 1989) (stating that pretrial hearing for decision which is not final is inefficient means of resolving factual issues arising under co-conspirator exception). *But cf.* *United States v. Lopez-Guiterrez*, 83 F.3d 1235, 1242 (10th Cir. 1996) (stating that preferred order of proof in

B. Sixth Amendment Issues

The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to confront witnesses at trial.¹¹⁹ This right is usually protected through the application of a two-prong test used to determine the admissibility of hearsay testimony: (1) the declarant is unavailable to testify; and (2) the statement bears independent "indicia of reliability."¹²⁰ However, the Supreme Court has abolished this test with respect to determinations of admissibility of co-conspirator hearsay, holding that the Confrontation Clause requires neither proof of the unavailability of the declarant co-conspirator¹²¹ nor any independent inquiry into the reliability of the proffered statement.¹²²

V. ENFORCEMENT

If the conspiracy succeeds, the conspirators can be charged, convicted, and sentenced for both the substantive crime(s) and the conspiracy offense.¹²³ Part A discusses the vicarious liability of a defendant for acts of her co-conspirators; Part B analyzes issues raised by joinder and severance of multiple defendants; and Part C treats the effect on a defendant of the acquittal of other co-conspirators.

determining admissibility is for district court first to hold hearing outside presence of jury to determine by preponderance of evidence existence of predicate conspiracy) *United States v. Owens*, 70 F.3d 1118, 1123 (10th Cir. 1995) (holding that district court must either hold hearing outside presence of jury or provisionally admit evidence with caveat that it must be linked during trial); *United States v. Allison*, 908 F.2d 1531, 1534 n.2 (11th Cir. 1990) (same).

119. U.S. CONST. amend. VI. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." *Id.*

120. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

121. *United States v. Inadi*, 475 U.S. 387, 394-95 (1986). The Court held that, unlike other exceptions, co-conspirator hearsay testimony has evidentiary significance of its own. Conspirators are likely to speak to each other differently when furthering their illegal goals than when on the witness stand. Thus, the former testimony is more than a mere substitute for live testimony. *Id.*

122. *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987). The Court reiterated its *Roberts* holding that an independent inquiry into reliability is unnecessary when the evidence "falls within a firmly rooted hearsay exception." *Id.* at 183 (quoting *Roberts*, 448 U.S. at 66). The Court further held that the co-conspirator hearsay rule is such an exception and, thus, no independent inquiry into reliability is needed. *Id.*

123. *Iannelli v. United States*, 420 U.S. 770, 777 (1975) (determining that conspiracy and substantive offenses are separate crimes); *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996) (concluding that conspiracy is separate and distinct crime from substantive offense); *United States v. Ambers*, 85 F.3d 173, 178 (4th Cir. 1996) (finding that conspiracy is distinct crime from overt acts that support it); *United States v. McCullah*, 76 F.3d 1087, 1104 (10th Cir. 1996) (holding that conspiracy charge and substantive charge are separate offenses and that one offense is not lesser included offense of the other), *cert. denied* 117 S. Ct. 1699 (1997); *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996) (stating that basic criminal law principles hold that commission of substantive offense and conspiracy to commit it are separate and distinct), *cert. denied* 117 S. Ct. 531 (1996), 117 S. Ct. 1109 (1997), 117 S. Ct. 1328; *United States v. Bennett*, 44 F.3d 1364, 1375 (8th Cir. 1995) (finding that substantive offense is distinct from conspiracy to commit that or another substantive offense); *United States v. Morris*, 957 F.2d 1391, 1403 (7th Cir. 1992) (determining that conspiracy and completed substantive offense are separate crimes and may be punished by separate sentences); *United States v. Inafuku*, 938 F.2d 972, 973 (9th Cir. 1991) (stating that crime of conspiracy is entirely separate from completed substantive offense); *cf. supra* note 91 and accompanying text (discussing point that conspiracy does not need to succeed for defendants to be prosecuted for conspiracy).

A. Vicarious Liability

Under the *Pinkerton* rule of vicarious liability, conspirators may be held liable for any foreseeable overt acts committed by a co-conspirator in furtherance of the conspiracy.¹²⁴ This rule lessens the government's burden in establishing the defendant's guilt in the conspiracy.¹²⁵ Once the existence of a conspiracy is established, only slight evidence connecting the defendant to the conspiracy is needed for a conviction.¹²⁶

B. Joinder and Severance

An important question in conspiracy cases is whether co-conspirators should be tried jointly or separately. Although joint trials create a danger that the fact-finder will transfer guilt among co-conspirators,¹²⁷ conspiracy charges usually provide a proper basis for joinder.¹²⁸ Severance will be granted only if a defendant can make "a strong showing of prejudice."¹²⁹

124. See *supra* notes 61-64 and accompanying text (explaining *Pinkerton* rule).

125. For a theory limiting the *Pinkerton* rule, see *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989) (recognizing due process limitations on *Pinkerton* doctrine in cases involving attenuated relationships between conspirator and substantive crime); see also *United States v. Alvarez*, 755 F.2d 830, 851 n.27 (11th Cir. 1985) (proposing limitation on vicarious liability by holding liable only those conspirators with actual knowledge of circumstances of conspiracy or who played more than minor part in conspiracy). However, most circuits have declined to limit the *Pinkerton* rule in this manner.

126. *United States v. Bermea*, 30 F.3d 1539, 1553 (5th Cir. 1994); *United States v. Milligan*, 17 F.3d 177, 183 (6th Cir. 1994). But see *United States v. Ivy*, 83 F.3d 1266, 1285 (10th Cir. 1996) (holding that government must demonstrate more than "casual transactions" between defendant and conspirators).

The Seventh Circuit has held that "substantial" evidence should be the test rather than "slight" evidence or "slight" connection. *United States v. Durrive*, 902 F.2d 1221, 1228-29 (7th Cir. 1990).

127. *United States v. Kotteakos*, 328 U.S. 750, 774 (1946). See also *United States v. Gentry*, 839 F.2d 1065, 1071 (5th Cir. 1988) (recognizing substantial right of co-conspirators not to be tried together for separate offenses committed by others due to danger of prejudicial transference of guilt); *United States v. McVeigh*, 169 F.R.D. 362, 370 (D. Colo. 1996) (recognizing that joint trial of defendants presented unacceptable risk of prejudice to both and granting defendants' motions for severance). There was no danger in *Gentry* of transference of guilt among defendants, because evidence concerning other conspirators who had accepted plea bargains was not introduced at trial. *Gentry*, 839 F.2d at 1071.

128. *United States v. Elder*, 90 F.3d 1110, 1119 (6th Cir. 1996) (favoring joint trial when offenses are all "logically related" to conspiracy); *United States v. Musquiz*, 45 F.3d 927, 931 (5th Cir. 1995) (showing general preference for joint trials in conspiracy cases); *United States v. Shorter*, 54 F.3d 1248, 1258 (7th Cir. 1995) (granting severance only when specific trial right of defendant would be infringed by joint trial); *United States v. Ramey*, 24 F.3d 602, 608 (4th Cir. 1994) (finding joint trials highly favored in conspiracy cases); *United States v. Andrews*, 953 F.2d 1312, 1323 (11th Cir. 1992) (stating that in interest of judicial economy, conspirators should generally be tried together); *United States v. Adkins*, 842 F.2d 210, 211 (8th Cir. 1988) (declaring that defendants charged in same conspiracy or jointly indicted on similar evidence should be tried together).

Joinder is proper under FED. R. CRIM. P. 8(b) if the defendants are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Rule 8(b) requires only that a conspiracy be alleged. There is no requirement under the Rule that the government provide, at the pleading stage, sufficient evidence to support joinder. *United States v. Garner*, 837 F.2d 1404, 1410, 1412 (7th Cir. 1987).

129. The decision to grant a severance is within the discretion of the trial judge. See FED. R. CRIM. P. 14 (requiring showing of prejudice on motion to sever defendants). To make a showing of prejudice on appeal,

C. Acquittal of Other Co-Conspirators

Traditionally, if co-conspirators are tried together, one conspirator cannot be convicted under § 371 if all the other conspirators are acquitted.¹³⁰ The First, Second, Fourth, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits have now departed from this "rule of consistency."¹³¹ The Tenth Circuit has expressed doubt about the continued validity of the rule, but as yet has not expressly rejected it.¹³² In these circuits, if the indictment alleges that unknown persons participated in the conspiracy and the evidence supports their participation, then the named defendant may still be convicted of the conspiracy.¹³³

VI. SENTENCING

Consecutive sentences can be imposed for conspiracy and substantive offense

appellant must show "more than the mere fact that he would have had a better chance for acquittal had he been tried separately . . . [t]he appellant must demonstrate that the jury was unable to compartmentalize the evidence as it related to separate defendants." *Adkins*, 842 F.2d at 212; *see also* *Zafiro v. United States*, 506 U.S. 534, 538 (1993) (finding antagonistic defenses are not per se prejudicial, thus severance is not required); *United States v. Bermea*, 30 F.3d 1539, 1572 (5th Cir. 1994) (requiring severance only if serious risk that joint trial would prevent reliable determination of guilt); *United States v. DeFranco*, 30 F.3d 664, 669-70 (6th Cir. 1994) (stating that severance not required when evidence is more damaging against one defendant than against another).

130. *United States v. Velasquez*, 885 F.2d 1076, 1090-91 (3d Cir. 1989) (holding that evidence was insufficient to convict defendant since it was insufficient to convict co-conspirator of conspiracy); *United States v. Sachs*, 801 F.2d 839, 845 (6th Cir. 1986) (describing traditional rule as "rule of consistency").

131. *United States v. Rogers*, 121 F.3d 12, 16 (1st Cir. 1997) (holding that acquittal of one co-conspirator did not establish that evidence was insufficient to support defendant's conspiracy conviction); *United States v. Anderson*, 76 F.3d 685, 688-89 (6th Cir. 1996) (stating that individual's conviction may stand despite acquittal of other alleged co-conspirators); *United States v. Martinez*, 96 F.3d 473, 477 (11th Cir. 1996) (declaring that conspiracy conviction can stand even if other alleged co-conspirators are unidentified); *United States v. Acosta*, 17 F.3d 538, 545 (2d Cir. 1994) (finding the acquittal of other co-conspirators not grounds for reversal); *United States v. Hughes Aircraft*, 20 F.3d 974, 978 (9th Cir. 1994) (stating that conviction of co-conspirator is valid even when others are acquitted); *United States v. Zuniga-Salinas*, 952 F.2d 876, 878 (5th Cir. 1992) (declaring acquittal of all other defendants not determinative of remaining conspirator's acquittal); *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990) (requiring no acquittal where other defendant acquitted, regardless of inconsistency of verdict); *United States v. Dakins*, 872 F.2d 1061, 1065 (D.C. Cir. 1989) (declining to adopt rule of consistency).

Furthermore, if conspirators are tried separately, the acquittal of all co-conspirators does not require the acquittal of the last-tried defendant. *Cortis v. Kenney*, 995 F.2d 838, 840-41 (8th Cir. 1993) (declaring that separate trials exception to rule of consistency applies in trials with and without a jury); *United States v. Senibaldi*, 959 F.2d 1131, 1135 (1st Cir. 1992) (stating "rule of consistency" does not apply in separate trials); *Sachs*, 801 F.2d at 845 (allowing inconsistent verdicts because different juries may hear different evidence in separate trials); *United States v. Roark*, 753 F.2d 991, 995 (11th Cir. 1985) (same).

132. *United States v. Abbott Washroom Sys.*, 49 F.3d 619, 623 (10th Cir. 1995) (declining to decide whether limited rule of consistency remains valid).

133. *United States v. Howard*, 966 F.2d 1362, 1364 (10th Cir. 1992) (stating that if existence of unindicted co-conspirators is proven, then defendant can be convicted); *United States v. Tarpley*, 945 F.2d 806, 810 (5th Cir. 1991) (holding that conviction of defendant can stand even when other named co-conspirators are acquitted if unnamed co-conspirators proven to exist); *cf. Sachs*, 801 F.2d at 845 (declaring that conviction of defendant may stand if charges are never brought against other alleged co-conspirator, or if alleged co-conspirator has not yet been tried; dismissal of charges against defendant not required).

convictions.¹³⁴ The Supreme Court “has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose.”¹³⁵

The Federal Sentencing Guidelines (“Guidelines”), which provide specific rules governing the sentencing ranges for a conspiracy conviction, contain specific offense guideline provisions applicable to conspiracies to commit particular offenses.¹³⁶ Additionally, there is a general catch-all provision applicable to all conspiracies not covered by a specific offense provision.¹³⁷

For the conspiracy conviction, the base offense level of the underlying offense is decreased by three levels, unless defendant completed all acts necessary for the underlying offense.¹³⁸ If the conspiracy participants have completed, or were about to complete, but for apprehension or interruption of some similar event beyond their control, the intended offense, a slightly different formulation applies.¹³⁹

If the defendant is convicted on a single conspiracy count to commit more than one substantive offense, each offense will be analyzed as a separate count of conspiracy.¹⁴⁰ Also taken into consideration are adjustments from the specific

134. *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975) (stating it is well settled that law of conspiracy serves ends different from those served by criminal prohibitions of substantive offense and that consecutive sentences may be imposed); *see also* *United States v. Coonan*, 938 F.2d 1553, 1566 (2d Cir. 1991) (holding that defendant could receive consecutive sentences on RICO and conspiracy counts); *United States v. Walker*, 920 F.2d 513, 519 (8th Cir. 1990) (upholding imposition of consecutive sentences for tax evasion and conspiracy); *United States v. Wade*, 788 F.2d 722, 722 (11th Cir. 1986) (upholding consecutive sentences for conspiracy to possess marijuana with intent to distribute and for accompanying substantive offense).

135. *Iannelli*, 420 U.S. at 778. *But see* *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) (“[A] single conspiracy, charged under general conspiracy statute, however diverse its objects may be, violates but a single statute and no greater penalty than the maximum provided for one conspiracy may be imposed”).

136. *See* U.S. SENTENCING GUIDELINES MANUAL App. A (1998) (indexing the guidelines applicable to each statutory violation) [hereinafter U.S.S.G.].

137. U.S.S.G. § 2X1.1 (1998) (Attempt, Solicitation or Conspiracy); U.S.S.G. § 2X5.1 (1998) (listing other offenses).

138. U.S.S.G. § 2X1.1(b)(2) (1998). *See* *United States v. Medina*, 74 F.3d 413, 417 (2d Cir. 1996) (stating that focus is on defendant’s conduct in determining intended offense, not on probability that conspiracy would have achieved success); *United States v. Depew*, 932 F.2d 324, 330 (4th Cir. 1991) (holding that intended offense conduct carries some weight as actual conduct but that Guidelines authorize reduction of three levels where all acts necessary to complete conspiracy have not occurred).

139. U.S.S.G. § 2X1.1(b)(2) (1998). If multiple counts of conspiracy that are not closely related are involved, then the inquiry of which standard to employ must be determined separately for each count. U.S.S.G. § 2X1.1(b)(2) cmt.4 (1998). In such a case, the offense level of the conspiracy charge is the greater of: the offense level of the substantive charge minus three, under § 2X1.1(b)(2), or the offense level of the offense for which the necessary acts were completed or nearly completed. *Id.* *See* *United States v. Conley*, 92 F.3d 157, 167 (3d Cir. 1996) (pointing out that Guidelines allowed sentencing court to take into consideration conduct that neither was formally charged nor was element of offense of which defendant was convicted); *United States v. Dale*, 991 F.2d 819, 855 (D.C. Cir. 1993) (determining that, in tax evasion conspiracy, district court’s refusal to grant sentencing reduction was not clearly erroneous where record indicated that offense would have been completed but for resignation of one conspirator).

140. U.S.S.G. § 1B1.2(d) (1998). For example, if the defendant conspired to commit three robberies, there would be three separate counts of conspiracy for sentencing purposes (even if there was only one actual conspiracy conviction involved). U.S.S.G. § 1B1.2 cmt.4 (1998). However, if the object offenses specified in the single conspiracy count can be grouped under § 3D1.2(d) (for example, a conspiracy to steal three government

offense guideline "for any intended offense conduct that can be established with reasonable certainty."¹⁴¹ Under this analysis, whether or not the defendant qualifies as a "minor participant" or a "minimal participant" becomes relevant.¹⁴²

The Guidelines recognize the concept of vicarious liability through the inclusion of the phrase "conduct for which the defendant would be otherwise accountable."¹⁴³ Thus, for purposes of establishing the offense level for sentencing, acts of co-conspirators that are reasonably foreseeable to the defendant and done in furtherance of the conspiracy are attributable to the defendant.

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checks), then it is not necessary to count each of these as a separate conspiracy charge when sentencing. U.S.S.G. § 1B1.2 cmt.5 (1998); *see* *United States v. Griffith*, 85 F.3d 284, 288-89 (7th Cir. 1996) (finding offense counts to be appropriately grouped where offenses involved same harm).

141. U.S.S.G. § 2X1.1(a) (1998). The only specific offense characteristics that apply are those that are determined to have been specifically intended or actually occurred; speculative specific offense characteristics are not applicable. U.S.S.G. § 2X1.1 cmt.2 (1998).

142. U.S.S.G. § 3B1.2 (1998). A minimal participant is one who is plainly among the least culpable of those involved in the conduct of the group. U.S.S.G. § 3B1.2 cmt.1 (1998). A minor participant is less culpable than most other participants, but whose role could not be described as minimal. U.S.S.G. § 3B1.2 cmt.3 (1998). The defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant. U.S.S.G. § 3B1.2 cmt.1 (1998); *see also* *Rosier v. United States Parole Comm'n*, 109 F.3d 212, 214 (5th Cir. 1997) (determining that defendant did not amount to "minimal" participant because of his role in transporting drugs); *United States v. Ruelas*, 106 F.3d 1416, 1419 (9th Cir. 1997) (concluding that touchstone of determining whether defendant is entitled to downward adjustment as minimal or minor participant is relative culpability); *United States v. Brazel*, 102 F.3d 1120, 1162 (11th Cir. 1997) (holding that girlfriend of drug dealer was not entitled to minimal participant adjustment given her role as co-conspirator); *United States v. Spriggs*, 102 F.3d 1245, 1263 (D.C. Cir. 1996) (affirming trial court's ruling that defendant qualified as a minor not a minimal participant because he participated in drug-related transactions); *United States v. Royal*, 100 F.3d 1019, 1030 (1st Cir. 1996) (stating that defendants are not automatically entitled to downward adjustment in offense level for minor or minimal participation in offense); *United States v. McGrady*, 97 F.3d 1042, 1043 (8th Cir. 1996) (concluding that since defendant was essential to commission of crimes, he did not qualify as minor or minimal participant); *United States v. Cochran*, 14 F.3d 1128, 1131 (6th Cir. 1994) (describing "minimal participant" as one-time participant loading drugs for large drug cartel); *United States v. Bolin*, 35 F.3d 306, 310 (7th Cir. 1994) (determining downward adjustment in sentencing properly denied where defendant was less culpable than other participants but played integral role in counterfeiting scheme).

A sentence may be enhanced if the defendant played a managerial or supervisory role in the conspiracy. U.S.S.G. § 3B1.1 (1998). *See* *United States v. Gavina*, 116 F.3d 1498, 1528 (D.C. Cir. 1997) (stating that defendant's role in linking together cocaine supplier and his confederates in drug supply network warranted addition of two points to his offense level); *United States v. Cruz*, 120 F.3d 1, 3 (1st Cir. 1997) (holding that defendant's offense level was properly increased for aggravated role as manager of drug conspiracy); *United States v. Thomas*, 120 F.3d 564, 574 (5th Cir. 1997) (same); *United States v. Alonso*, 48 F.3d 1536, 1545 (9th Cir. 1995) (concluding that upward adjustment for leadership role was justified where defendant exercised control over other participants in commission of crime); *United States v. Dillard*, 43 F.3d 299, 307-08 (7th Cir. 1994) (enhancing sentence for managerial role in conspiracy where defendant recruited accomplices and had decision-making position in operation).

143. U.S.S.G. § 1B1.3(a)(1) & cmt.2 (1998). *See* *United States v. Wilson*, 116 F.3d 1066, 1076-77 (5th Cir. 1997) (finding that relevant conduct under Guidelines includes all reasonably foreseeable acts of others in furtherance of conspiracy, but that reasonable foreseeability of all drug sales does not automatically follow from membership in conspiracy); *United States v. Childress*, 58 F.3d 693, 723 (D.C. Cir. 1995) (concluding that liability under Guidelines follows from well-settled principles of conspiracy law).