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Federal Conspiracy Law: A Brief Overview

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Summary

Zacarias Moussaoui, members of the Colombian drug cartels, members of organized crime, and some of the former Enron executives have at least one thing in common: they all have federal conspiracy convictions. The essence of conspiracy is an agreement of two or more persons to engage in some form of prohibited conduct. The crime is complete upon agreement, although some statutes require prosecutors to show that at least one of the conspirators has taken some concrete step or committed some overt act in furtherance of the scheme. There are dozens of federal conspiracy statutes. One, 18 U.S.C. 371, outlaws conspiracy to commit some other federal crime. The others outlaw conspiracy to engage in various specific forms of proscribed conduct. General Section 371 conspiracies are punishable by imprisonment for not more than five years; drug trafficking, terrorist, and racketeering conspiracies all carry the same penalties as their underlying substantive offenses, and thus are punished more severely than are Section 371 conspiracies. All are subject to fines of not more than $250,000 (not more than $500,000 for organizations); most may serve as the basis for a restitution order, and some for a forfeiture order.

The law makes several exceptions for conspiracy because of its unusual nature. Because many united in crime pose a greater danger than the isolated offender, conspirators may be punished for the conspiracy, any completed substantive offense which is the object of the plot, and any foreseeable other offenses which one of the conspirators commits in furtherance of the scheme. Since conspiracy is an omnipresent crime, it may be prosecuted wherever an overt act is committed in its furtherance. Because conspiracy is a continuing crime, its statute of limitations does not begin to run until the last overt act committed for its benefit. Since conspiracy is a separate crime, it may be prosecuted following conviction for the underlying substantive offense, without offending constitutional double jeopardy principles; because conspiracy is a continuing offense, it may be punished when it straddles enactment of the prohibiting statute, without offending constitutional ex post facto principles. Accused conspirators are likely to be tried together, and the statements of one may often be admitted in evidence against all.

In some respects, conspiracy is similar to attempt, to solicitation, and to aiding and abetting. Unlike aiding and abetting, however, it does not require commission of the underlying offense. Unlike attempt and solicitation, conspiracy does not merge with the substantive offense; a conspirator may be punished for both.

An abridged version of this report without footnotes and most citations to authority is available as CRS Report R41222, *Federal Conspiracy Law: A Sketch*, by Charles Doyle.

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Introduction

"Almost every headline-grabbing prosecution has involved a conspiracy charge."[1] Terrorists, drug traffickers, mafia members, and corrupt corporate executives have one thing in common: most are conspirators subject to federal prosecution.[2] Federal conspiracy laws rest on the belief that criminal schemes are equally or more reprehensible than are the substantive offenses to which they are devoted. The Supreme Court has explained that a "collective criminal agreement—[a] partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality."[3] Moreover, observed the Court, "[g]roup association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked."[4] Finally, "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."[5] In sum, "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."[6] Congress and the courts have fashioned federal conspiracy law accordingly.[7]

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[1] Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1310 n. 4 (2003).

An abridged version of this report, without the footnotes or citations to authority found here, is available as CRS Report R41222, *Federal Conspiracy Law: A Sketch*, by Charles Doyle.

[2] Zacarias Moussaoui was convicted of conspiring to commit the terrorist attacks that occurred on September 11, 2001, United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); Wadih El-Hage was convicted of conspiring to bomb the U.S. embassies in Kenya and Tanzania, *In re* Terrorist Bombings, 552 F.3d 93, 107 (2d Cir. 2008).

Members of an Atlanta street gang were convicted of conspiring to engage in drug trafficking, among other offenses, United States v. Flores, 572 F.3d 1254, 1258 (11th Cir. 2009); motorcycle gang members were convicted of conspiracy to traffic in drugs, United States v. Deitz, 577 F.3d 672, 675-76 (6th Cir. 2009).

Dominick Pizzponia was convicted on racketeering conspiracy charges in connection with the activities of the "Gambino organized crime family of La Cosa Nostra," United States v. Pizzonia, 577 F.3d 455, 459 (2d Cir. 2009); Michael Yannotti was also convicted on racketeering conspiracy in connection with activities of the "Gambino Crime Family," United States v. Yannotti, 541 F.3d 112, 115-16 (2d Cir. 2008).

Jeffrey Skilling, a former Enron Corporation executive, was convicted of conspiracy to commit securities fraud and mail fraud, United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009); Bernard Ebbers, a former WorldCom, Inc. executive, was likewise convicted of conspiracy to commit securities fraud, United States v. Ebbers, 458 F.3d 110, 112 (2d Cir. 2006).

[3] Iannelli v. United States, 420 U.S. 770, 778 (1975), quoting Callanan v. United States, 364 U.S. 587, 593-94 (1961); *see also* Paul Marcus, *The Crime of Conspiracy Thrives in Decisions of the United States Supreme Court*, 64 U. KAN. L. REV. 343 (2015).

[4] *Iannelli*, 420 U.S. at 778.

[5] *Id.*

[6] *Id*.

There have long been contrary views, *e.g.*, Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922) ("A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought."); *Hyde v. United States*, 222 U.S. 347, 387 (1912) (Holmes, J, with Lurton, Hughes & Lamarr, JJ.) (dissenting) ("And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved."), both quoted in substantial part in Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1310 n. 6 (2003).

[7] Federal prosecutors have used, and been encouraged to use, the law available to them, Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) ("[C]onspiracy, that darling of the modern prosecutor's nursery"); United States v.

The *United States Code* contains dozens of criminal conspiracy statutes. One, 18 U.S.C. 371, outlaws conspiracy to commit any other federal crime. The others outlaw conspiracy to commit some specific form of misconduct, ranging from civil rights violations to drug trafficking.[8] Conspiracy is a separate offense under most of these statutes,[9] regardless of whether the conspiracy accomplishes its objective.[10] The various conspiracy statutes, however, differ in several other respects. Section 371 and a few others require at least one conspirator to take some affirmative step in furtherance of the scheme. Many have no such explicit overt act requirement.[11]

Section 371 has two prongs. One outlaws conspiracy to commit a federal offense; a second, conspiracy to defraud the United States. Section 371 conspiracy to commit a federal crime requires that the underlying misconduct be a federal crime. Section 371 conspiracy to defraud the United States and a few others have no such prerequisite.[12] Section 371 conspiracies are punishable by imprisonment for not more than five years. Elsewhere, conspirators often face more severe penalties.[13]

These differences aside, federal conspiracy statutes share much common ground because Congress decided they should. As the Court observed in *Salinas*, "When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. [When] [t]he relevant statutory phrase is 'to conspire,' [w]e presume Congress intended to use the term in its conventional sense, and certain well-established principles follow."[14]

These principles include the fact that regardless of its statutory setting, every conspiracy has at least two elements: (1) an agreement (2) between two or more persons.[15] Members of the conspiracy are also liable for the foreseeable crimes of their fellows committed in furtherance of the common plot.[16] Moreover, statements by one conspirator are admissible evidence against all.[17]

Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) ("[P]rosecutors seem to have conspiracy on their word processors as Count I"); Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 684 (2009) ("What options do prosecutors have in the terrorism-prevention scenario when [other charges] are unavailable for lack of evidence linking the suspect to a designated foreign terrorist organization? One possibility is conspiracy liability.").

[8] 18 U.S.C. § 241 (civil rights conspiracies); 21 U.S.C. § 846 (drug trafficking conspiracies).

[9] *Iannelli*, 420 U.S. at 777.

[10] United States v. Salahuddin, 765 F.3d 329, 341 (3d Cir. 2014); United States v. Vallone, 752 F.3d 690, 697 (7th Cir. 2014); United States v. Torres-Vazquez, 731 F.3d 41, 45 (1st Cir. 2013).

[11] Whitfield v. United States, 543 U.S. 209, 219 (2005) (18 U.S.C. § 1956(h) (conspiracy to commit money laundering) no overt act requirement); Salinas v. United States, 522 U.S. 52, 63 (1997) (*id.* § 1962(d) (RICO conspiracy) no overt act requirement); United States v. Shabani, 513 U.S. 10, 13-4 (1994) (21 U.S.C. § 846 (conspiracy to violate the Controlled Substances Act) no overt act requirement).

[12] *E.g.*, 18 U.S.C. § 956 (conspiracy in the U.S. to commit certain violent acts overseas, acts which ordinarily are crimes under the laws of the place where they occur but which need not be separate federal crimes for purposes of a prosecution under § 956). Although it is generally known for its proscription against conspiracies to violate other federal laws, § 371 also outlaws conspiracies to defraud the United States. Conviction under the defraud portion of §371 does not require that the underlying misconduct be a separate federal crime.

[13] The 20-year maximum penalties of §1956 apply to conspiracies to launder and to the underlying laundering offense alike, 18 U.S.C. § 1956(h). The penalties that apply to drug trafficking under 21 U.S.C. § 841 (up to life imprisonment) apply with equal force to conspiracies to traffic, id. § 846.

[14] Salinas v. United States, 522 U.S. 52, 63 (1997).

[15] United States v. Jimenez Recio, 537 U.S.270, 274 (2003).

[16] Pinkerton v. United States, 328 U.S. 640, 647 (1946).

[17] FED. R. EVID. 801(d)(2)(E).

Conspiracies are considered continuing offenses for purposes of the statute of limitations and venue.[18] They are also considered separate offenses for purposes of sentencing and of challenges under the Constitution's ex post facto and double jeopardy clauses.[19]

Background

Although it is not without common law antecedents, federal conspiracy law is largely of Congress's making. It is what Congress provided, and what the courts understood Congress intended. This is not to say that conspiracy was unknown in pre-colonial and colonial England,[20] but simply that it was a faint shadow of the crime we now know. Then, it was essentially a narrow form of malicious prosecution, subject to both a civil remedy and prosecution.[21] In the late 18th and early 19th Centuries, state courts and legislatures recognized a rapidly expanding accumulation of narrowly described wrongs as "conspiracy." The patchwork reached a point where one commentator explained that there were "few things left so doubtful in the criminal law, as the point at which a combination of several persons in a common object becomes illegal."[22]

Congress enacted few conspiracy statutes prior to the Civil War. It did pass a provision in 1790 that outlawed confining the master of a ship or endeavoring to revolt on board.[23] This, Justice Story, sitting as a circuit judge, interpreted to include any conspiracy to confine the prerogatives of the master of ship to navigate, maintain, or police his ship.[24] The same year, 1825, Congress

[18] Toussie v. United States, 397 U.S. 112, 122 (1970) (statute of limitations begins to run with the last overt act in furtherance of the conspiracy); Whitfield v. United States, 543 U.S. 209, 218 (2005) (venue is proper in any district in which an overt act in furtherance of the conspiracy was committed).

[19] *Salinas v. United States*, 522 U.S. 52, 65 (1997)("conspiracy is a distinct evil, dangerous to the public, and so punishable in itself"); *United States v. Felix*, 503 U.S. 378, 390 (1992)("[T]he commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses ... [a]nd the plea of double jeopardy is no defense to a conviction for both offenses"); *United States v. Munoz-Franco*, 487 F.3d 25, 55 (1st Cir. 2007)("For 'continuing offenses' such as the bank fraud and conspiracy charges at issue here, however, the critical question is when the conduct ended. As we have explained, where a 'continuing offense' straddles the old and new law ... applying the new is recognized as constitutionally sound. In other words, a conviction for a continuing offense straddling enactment of a statute will not run afoul of the Ex Post Facto clause unless it was possible for the jury, following the court's instructions, to convict '*exclusively*' on pre-enactment conduct")(here and hereafter internal citations and quotation marks have been omitted unless otherwise indicated).

[20] *See generally* James Wallace Bryan, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY (1909); Percy Henry Winfield, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

[21] IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 136 (1769) (transliteration supplied) ("A conspiracy also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may either have a civil action by writ of the conspirators ... or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king").

[22] III JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 1138 (3d Am. ed. 1839) noting that conspiracy included combinations "to commence suits against a person with a view to extorting money from him" or "to manufacture a base material in the form and color of genuine indigo, with the intent to sell it as indigo" or to cheat a man "by making him drunk and playing falsely at cards with him, but did not include combinations "to obtain money from a bank by drawing their checks on the bank when they have no funds there" or "to cheat and defraud a man by selling him an unsound horse." Of course, this is not a situation limited to the law of conspiracy.

[23] Act of April 30, 1790, ch. IX, §12, 1 Stat. 114 (1790).

[24] United States v. Hamilton, 26 Fed. Cas. 259, 260 (C.C.D. Mass. 1825) (No. 15,346).

outlawed conspiracies to engage in maritime insurance fraud.[25] Otherwise, there were no federal conspiracy statutes until well after the mid-century mark.

During the War Between the States, however, Congress enacted four sweeping conspiracy provisions, creating federal crimes that have come down to us with little substantive change. The first, perhaps thought more pressing at the beginning of the war, was a seditious conspiracy statute.[26] Shortly thereafter, Congress outlawed conspiracies to defraud the United States through the submission of a false claim,[27] and followed that four years later with prohibitions on conspiracies to violate federal law or to defraud the United States.[28] This last enactment has traveled through the years substantively unchanged, appearing first as Section 37 of the 1909 Criminal Code[29] and then in the 1948 revision as 18 U.S.C. § 371.[30]

Notwithstanding the existence of a general conspiracy statute, Congress has enacted more topically focused conspiracy statutes from time to time. The Reconstruction civil rights conspiracy provisions,[31] the Sherman Act anti-trust provisions,[32] and the drug and racketeering statutes[33] stand as perhaps the most prominent of these individual provisions. All of them—general and topical alike—have a common element: an agreement by two or more persons.

Two or More Persons

There are no one-man conspiracies.[34] At common law where husband and wife were considered one, this meant that the two could not be guilty of conspiracy without the participation of some third person.[35] This is no longer the case.[36] In like manner at common law, corporations could not

[25] Act of March 3, 1825, ch.65, §23, 4 Stat. 122 (1825) (conspiracy "to cast away, burn, or otherwise destroy, ship or vessel ... with intent to injure any person ... that hath underwritten ... any policy of insurance thereon.").

[26] Act of July 31, 1861, c. 33, 12 Stat. 284 (1861), as amended 18 U.S.C. 2384.

[27] Act of March 2, 1863, c.67, §§1, 3, 12 Stat. 696, 698 (1863), as amended, 18 U.S.C. 286.

[28] Act of March 2, 1867, c.169, §30, 14 Stat. 484 (1867)("that if two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not exceeding two years. And when any offence shall be begun in one judicial district of the United State and completed in another, every such offence shall be deemed to be committed in either of the said districts, and may be dealt with, inquired of, tried, determined and punished in either of the said district, in the same manner as if it had been actually and wholly committed therein"), as amended 18 U.S.C. 371.

[29] 35 Stat. 1096 (1909), codified, 18 U.S.C. § 88 (1940 ed.).

[30] 62 Stat. 701 (1948), as codified, 18 U.S.C. § 371 (1952 ed.). The revision did increase the maximum prison term from two to five years with a proviso that conspiracy to commit a misdemeanor may be punished no more severely than the underlying misdemeanor.

[31] Act of April 20, 1871, c. 22, §2, 17 Stat. 13, 14 (1871), as amended, 18 U.S.C. 241.

[32] Act of July 2, 1890, c. 647, §§1, 2, 3, 26 Stat. 209 (1890), as amended, 15 U.S.C. 1, 2, 3.

[33] P.L. 91-513, Tit. II, §406, 84 Stat. 1265 (1970), as amended, 21 U.S.C. 846, and P.L. 91-452, Tit. IX, §901(a), 84 Stat. 942 (1970), as amended, 18 U.S.C. 1962(d), respectively.

[34] Rogers v. United States, 340 U.S. 367, 375 (1951)("[A]t least two persons are required to constitute a conspiracy."); United States v. Vallee, 807 F.3d 508, 522 (2d Cir. 2015) ("We have taken a bilateral approach to the crime of conspiracy: at least two people must agree."); United States v. Dumeisi, 424 F.3d 566, 580 (7th Cir. 2005) (quoting United States v. Matkimetas, 991 F.2d 379, 383 (7th Cir. 1993)) ("[T]he elements of the crime of conspiracy are not satisfied unless one conspires with at least one true co-conspirator").

[35] Dawson v. United States, 10 F.2d 106, 107 (9th Cir. 1926).

[36] United States v. Dege, 364 U.S. 51, 54-5 (1960) ("Suffice it to say that we cannot infuse into the conspiracy statute a

be charged with a crime.[37] This too is no longer the case. A corporation is criminally liable for the crimes, including conspiracy, committed at least in part for its benefit, by its officers, employees and agents.[38] Conversely, an informant or undercover officer cannot be counted as one of the necessary two.[39]

Notwithstanding the two-party requirement, a conspirator's liability does not depend on a co-conspirator having been tried or even identified, as long as the government produces evidence from which the conspiracy might be inferred.[40] Even the acquittal of a co-conspirator is no defense,[41] although no conviction is possible if all but one alleged conspirator are acquitted.[42] Moreover, a person may conspire for the commission of a crime by a third person though he himself is legally incapable of committing the underlying offense.[43]

On the other hand, two people may not always be enough. The so-called Wharton's Rule places a limitation on conspiracy prosecutions when the number of conspirators equaled the number of individuals necessary for the commission of the underlying offense.[44] "The narrow rule is implicated 'only when it is *impossible under any circumstances* to commit the substantive offense without cooperative action.'"[45] Under federal law, the rule "stands as 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."[46] And under federal law, the rule reaches no further than to the types of

fictitious attribution to Congress of regard for the medieval notion of woman's submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress by regarding her as a person whose legal personality is merged in that of her husband making the two one.").

[37] I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765) (transliteration supplied) (punctuation in the original) ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though it's members, may, in their distinct individual capacities.").

[38] United States v. Agosto-Vega, 617 F.3d 541, 552-53 (1st Cir. 2010); United States v. Singh, 518 F.3d 236, 249-51 (4th Cir. 2008); United States v. Hughes Aircraft Co., 20 F.3d 974, 978-80 (9th Cir. 1994); *cf.* N.Y. Cent. & H.R.R. v. United States, 212 U.S. 481, 492-93 (1909) (at least in the case of a statutory offense and in absence of a contrary congressional intent).

[39] United States v. Leal, 921 F.3d 951, 959 (10th Cir. 2019) (quoting United States v. Barboa, 777 F.3d 1420, 1422 (10th Cir. 1085)) ("Although, two or more people must agree to form a conspiracy, an informant cannot count toward that requirement:'[T]here can be no indictable conspiracy involving only the defendant and government agents or informers.'"); United States v. Garner, 915 F.3d 167, 170 (3d Cir. 2019); United States v. Wenxia Man, 891 F.3d 1253, 1265 (11th Cir. 2018); United States v. Brown, 879 F.3d 1048 (9th Cir. 2018).

[40] United States v. Meléndez-González, 892 F.3d 9, 17-18 (1st Cir. 2018); United States v. Camara, 908 F.3d 41, 46-7 (4th Cir. 2018); United States v. Mitchell, 792 F.3d 581, 582-83 (5th Cir. 2015); United States v. Mann, 701 F.3d 274, 296 (8th Cir. 2012); United States v. Price, 258 F.3d 539, 545 (6th Cir. 2001); United States v. Contreras, 249 F.3d 595, 598 (7th Cir. 2001).

[41] *Meléndez-González*, 892 F.3d at 17-18; United States v. Parker, 871 F.3d 590, 606 (8th Cir. 2017); United States v. Ross, 703 F.3d 836, 883 (6th Cir. 2012); United States v. Lo, 447 F.3d 1212, 1226 (9th Cir. 2006); United States v. Johnson, 440 F.3d 1286, 1294-295 (11th Cir. 2006).

[42] United States v. Tyson, 653 F.3d 192, 207 (3d Cir. 2011).

[43] Salinas v. United States, 522 U.S. 52, 64 (1997); United States v. Hoskins, 902 F.3d 69, 77 (2d Cir. 2018); United States v. Moussaoui, 591 F.3d 263, 297 (4th Cir. 2010).

[44] United States v. Wright, 506 F.3d 1293, 1298 n.4 (10th Cir. 2007) ("Wharton's Rule is that an agreement by two persons to commit a particular crime cannot be prosecuted as conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."); United States v. Sanjar, 876 F.3d 725, 744 (5th Cir 2017).

[45] *Id.* at 744 (italics in the original) (quoting United States v. Pagan, 992 F.2d 1387, 1390 (5th Cir. 1993)).

[46] *Iannelli v. United States*, 420 U.S. 770, 781-82 (1975); *United States v. Bornman*, 559 F.3d 150, 156 (3d Cir. 2009).

offenses that gave birth to its recognition—dueling, adultery, bigamy, and incest[47]—unless Congress has indicated otherwise.[48]

Agreement

The essence of conspiracy is an agreement to commit some act condemned by law.[49] Thus, there is no conspiracy when one of the two parties only feigns agreement, as in the case of an undercover officer or informant.[50] Moreover, proximity does not constitute agreement; "mere association, standing alone, is inadequate; an individual does not become a member of a conspiracy merely associating with conspirators known to be involved in crime."[51] Yet, the conspiratorial agreement may be evidenced by word or action; that is, the government may prove the existence of the agreement either by direct evidence or by circumstantial evidence from which the agreement may be inferred.[52] "Relevant circumstantial evidence [may] include[]: the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among codefendants; mutual representation of defendants to third parties; and other

[47] *Id.*, 559 F.3d at 156 ("In the classic Wharton's Rule offenses—adultery, bigamy, incest, and dueling—the harms attendant upon the commission of the substantive offense are restricted to the parties in the agreement. Hence, Wharton's Rule has no applicability here [to bribery]"); United States v. Hines, 541 F.3d 833, 838 (8th Cir. 2008) ("Wharton's Rule ... applies when there is a general congruence of the conspiracy agreement and the completed substantive offense. This general congruence exists when the parties to the agreement are the only persons who participate in commission of the substantive offense, ... the immediate consequences of the crime rest on the parties themselves rather than on society at large, and when the agreement that attends the substantive offense does not appear like to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.").

[48] *Sanjar*, 876 F.3d at 744 n.11 (quoting *Payan*, 992 F.2d at 1391) ("As it is often the case, there is an exception to this exception. Wharton's Rule is just a 'judicial presumption, to be applied in the absence of legislative intent to the contrary.'"); United States v. Langford, 647 F.3d 1309, 1331-32 (11th Cir. 2011) (citing United States v. McNair, 605 F.3d 1152, 1216 (11th Cir. 2010)) when holding that the Wharton's Rule does not apply to conspiracy to violate 18 U.S.C. § 666, in the absence of express congressional intent, because § 666 bribery is unlike the crimes (dueling, adultery, bigamy, and incest) that gave rise to the rule.).

[49] United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)) ("The Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" That agreement is 'a distinct evil…'"); *see also* United States v. Flores, 945 F.3d 687, 712 (2d Cir. 2019) ("The crux of a conspiracy is an agreement between two or more persons to join together to accomplish something illegal."); United States v. Annamalai, 939 F.3d 1216, 1232 (11th Cir. 2019) (quoting Ocasio v. United States, 136 S. Ct. 1423, 1429 (2016)) ("'The fundamental characteristic of a [§ 371] conspiracy is a joint commitment to an endeavor which, if completed, would satisfy all of the elements of [underlying substantive] criminal offense.'"); United States v. Cruse, 805 F.3d 795, 811 (7th Cir. 2015) (emphasis in the original) ("[T]he *agreement* is essential evil at which the crime of conspiracy is directed"); United States v. Lapier, 796 F.3d 1090, 1096 (9th Cir. 2015) ("Conspiracy is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.").

[50] As noted earlier, '"[T]here can be no … conspiracy with a government informant who secretly intends to frustrate the conspiracy.'" United States v. Wenxia Man, 891 F.3d 1253, 1265 (11th Cir. 2018) (quoting United States v. Broughton, 689 F.3d 1260, 1277 (11th Cir. 2012)); *see also* United States v. Leal, 921 F.3d 951, 959 (10th Cir. 2019); United States v. Garner, 915 F.3d 167, 170 (3d Cir. 2019); United States v. Brown, 879 F.3d 1048 (9th Cir. 2018).

[51] United States v. Wardell, 591 F.3d 1279, 1288 (10th Cir. 2009); *see also* United States v. Martinez, 900 F.3d 721, 728 (5th Cir. 2018); United States v. Espinoza-Valdez, 889 F.3d 654, 657 (9th Cir. 2018); United States v. Parker, 871 F.3d 590, 601 (8th Cir. 2017).

[52] United States v. Feldman, 936 F.3d 1288, 1305 (11th Cir. 2019) (quoting United States .v Azmat, 805 F.3d 1018, 1035 (11th Cir. 2015)) ("The existence of an agreement may 'be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme. A conspiracy conviction will be upheld if 'the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him.'"); *see also Flores*, 945 F.3d at 712; United States v. Tinghui Xie, 942 F.3d 228, 240 (5th Cir. 2019); United States v. Hamilton, 929 F.3d 943, 945 (8th Cir. 2019); United States v. Tull-Abreau, 921 F.3d 294, 305 (1st Cir. 2019).

evidence suggesting unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy."[53]

Each of the federal circuit courts of appeal has acknowledged an exception to liability in controlled substances cases: an agreement of buyer to purchase a small amount of drugs and of seller to provide them does not constitute a conspiratorial agreement.[54] The courts claim different explanations for the narrow exception. Some do so under the rationale that there is no singularity of purpose, no necessary agreement, in such cases: "the buyer's purpose is to buy; the seller's purpose is to sell."[55] Others do so to avoid sweeping mere one-time customers into a large-scale trafficking operation.[56] Still others do so lest traffickers and their addicted customers face the same severe penalties.[57] All agree that the exception rarely extends beyond the one-time small transaction.[58]

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[53] United States v. Wardell, 591 F.3d at 1287-88.

[54] United States v. Famania-Roche, 537 F.3d 71, 78 (1st Cir. 2008); United States v. Lyle, 919 F.3d 716, 737 (2d Cir. 2019); United States v. Bailey, 840 F.3d 99,l 108 (3d Cir. 2018); United States v. Howard, 773 F.3d 519, 525 (4th Cir. 2014); United States v. Chapman, 851 F.3d 363, 377 (5th Cir. 2017); United States v. Potter, 927 F.3d 446, 454 (6th Cir. 2019); United States v. Hopper, 934 F.3d 740, 754-55 (7th Cir. 2019); United States v. Davis, 867 F.3d 1021, 1033-34 (8th Cir. 2017); United States v. Ocampo-Estrada, 873 F.3d 661, 665 (9th Cir. 2017); United States v. Leal, 921 F.3d 951, 962 n.9 (10th Cir. 2019); United States v. Achey, 943 F.3d 909, 917 (11th Cir. 2019); United States v. Bostick, 791 F.3d 127, 139 (D.C. Cir. 2015).

[55] United States v. Hopper, 934 F.3d 740, 754 (7th Cir. 2019) (emphasis in the original) (quoting United States v. Neal, 907 F.3d 511, 515 (7th Cir. 2018)) ("Our cases 'have underscored that ordinary drug transactions do not entail or reflect a conspiracy, for the buyer's only purpose is to buy and the seller's only purpose is to sell: the buyer and seller lack a *shared* criminal goal.'"); United States v. Boykin, 794 F.3d 939, 949 (8th Cir. 2015) ("Because the crime of conspiracy requires a concert of action among two or more persons for a common purpose, the mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction."); United States v. Bacon, 598 F.3d 772, 777 (11th Cir. 2010) ("[T]he joint objective necessary for a conspiracy conviction is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs").

[56] *Davis*, 867 F.3d at 1034 ("While proof of a conspiracy requires evidence of more than simply a buyer-seller relationship, we have limited buyer-seller relationship cases to those involving only evidence of a single transient sales agreement and small amounts of drugs consistent with personal use."); United States v. Lapier, 796 F.3d 1090, 1095 (9th Cir. 2015) ("A conviction for conspiracy cannot be based solely on the purchase of an unlawful substance, even though such a transaction necessarily involves an agreement between at least two parties, the buyer and the seller. Rather, conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale itself. Were the rule otherwise, every narcotics sale would constitute a conspiracy.); *Bostick*, 791 F.3d at 139-40 ("[A] jury may properly find a conspiracy, rather than a buy-sell agreement, where the evidence shows that a buyer procured or a seller sold drugs with knowledge of the overall existence of the conspiracy. Among the factors demonstrating such knowledge are the existence of repeated, regular deals; drug quantities consistent with redistribution; and the extension of credit to the buyer."); United States v. Johnson, 592 F.3d 749, 754 (7th Cir. 2010) ("When the alleged coconspirators are in a buyer-seller relationship, however, we have cautioned against conflating the underlying buy-sell agreement with the drug-distribution agreement that is alleged to form the basis of the charge conspiracy. To support a conspiracy conviction there must be sufficient evidence of an agreement to commit a crime other than the crime that consists of the sale itself.").

[57] United States v. Parker, 554 F.3d 230, 234-35 (2d Cir. 2009) ("As a literal matter, when a buyer purchases illegal drugs from a seller, two persons have agreed to a concerted effort to achieve the unlawful transfer of the drugs from the seller to the buyer. According to the customary definition, that would constitute a conspiracy with the alleged objective of a transfer of drugs. Our case law, however, has carved out a narrow exception to the general conspiracy rule for such transactions.... [If] an addicted purchaser, who acquired drugs for his own use and without intent to distribute it to others, were deemed to have joined a conspiracy with his seller for the illegal transfer of the drugs from the seller to himself, the purchaser would be guilty of substantially the same crime, and liable for the same punishment, as the seller. The policy to distinguish between transfer of an illegal drug and the acquisition of possession of the drug would be frustrated. The buyer-seller exception thus protects a buyer or transferee from the severe liabilities intended only for transferors"); United States v. Delgado, 672 F.3d 320, 333 (5th Cir. 2012).

[58] *See, e.g.*, *Achey*, 843 F.3d at 917 ("When considering whether a purchaser or seller of drugs was in fact a conspirator, an agreement may be inferred when the evidence shows a continuing relationship that results in the repeated transfer of

Overt Acts

Conviction under 18 U.S.C. § 371 for conspiracy to commit a substantive offense requires proof that one of the conspirators committed an overt act in furtherance of the conspiracy.[59] More than a few federal statutes, however, have a conspiracy component that does not include an explicit overt act requirement.[60] Whether these statutes have an implicit overt act requirement can be determined only on a statute-by-statute basis.[61] Even there, however, the courts have sometimes reached different conclusions.[62] In the case of prosecution under other federal conspiracy statutes that have no such requirement, the existence of an overt act may be important for evidentiary and procedural reasons. The overt act need not be the substantive crime which is the object of the conspiracy, an element of that offense, or even a crime in its own right.[63] Moreover, a single overt act by any of the conspirators in furtherance of plot will suffice.[64]

Conspiracy to Defraud the United States

Section 371 has two prongs, alike but for a single exception. The first, more frequently prosecuted, requires agreement, overt act, and an underlying federal criminal offense. The elements of the second prong, sometimes styled conspiracy to defraud the United States, do not require an underlying federal criminal offense. The elements of conspiracy to defraud the United States under 18 U.S.C. § 371 are: (1) an agreement of two or more persons; (2) to defraud the United States; and (3) an overt act in furtherance of the conspiracy committed by one of the

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illegal drugs to the purchaser… A conspiracy to distribute controlled substances may also be interred from a drug transaction where the amount of drugs allows an inference of a conspiracy to distribute drugs."); *Hopper*, 934 F.3d at 755 ("A nonexhaustive list of characteristics that strongly distinguish a conspiracy from a buyer-seller relationship includes: sales on credit or consignment, an agreement to look for other customers, a payment of commission on sales, an indication that one party advised the other on the conduct of the other's business, or an agreement to warn of future threats to each other's business stemming from competitors or law enforcement authorities."); *Lyle*, 919 F.3d at 737 ("[W]here there is additional evidence showing an agreement to join together to accomplish an objective beyond the sale transaction, the evidence may support a finding that the parties intentionally participated in a conspiracy.").

[59] 18 U.S.C. § 371 ("and one or more of such persons do any act to effect the object of the conspiracy"); United States v. $11,500.00 in United States Currency, 869 F.3d 1062, 1072 (9th Cir. 2017); United States v. Ngige, 780 F.3d 497, 503 (1st Cir. 2015); United States v. Salahuddin, 765 F.3d 329, 338 (3d Cir. 2014); United States v. Mathis, 738 F.3d 719, 735 (6th Cir. 2014).

[60] United States v. Pascacio-Rodriguez, 749 F.3d 353, 361-362 (5th Cir. 2014) ("[A] survey of federal conspiracy statutes reveals that Congress has sometimes required an overt act, but more often it has not. The general federal conspiracy provision, which applies to conspiracy 'to commit any offense against the United States, or to defraud the United States ... in any manner or for any purpose,' requires an overt act. In more specifically tailored conspiracy statutes, the majority do not require an overt act. A review of conspiracy provisions that might generally be described a pertaining to nonviolent crimes reveals that at least 15 such provisions require an overt act, while at least 99 do not.").

[61] *Salahuddin*, 765 F.3d at 338, quoting, *Whitfield v. United States*, 543 U.S. 209, 214 (2005) ("With this in mind, the *Whitfield* Court distilled the following rule: if a statutory text is modeled on § 371, the general conspiracy statute, 'it gets an overt-act requirement,' but if it is modeled on the Sherman Act ... which omits any express overt-act requirement, 'it dispenses with such a requirement.'").

[62] *See e.g.*, United States v. Jett, 908 F.3d 252, 265 (7th Cir. 2018) ("Only one court of appeals, the Firth Circuit, continued to state that the Hobbs Act contains an overt-act requirement.").

[63] Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Bradley, 917 F.3d 493, 505 (6th Cir. 2019); United States v. Kozeny, 667 F.3d 122, 132 (2d Cir. 2011); United States v. Rehak, 589 F.3d 965, 971 (8th Cir. 2009); United States v. Soy, 454 F.3d 766, 768 (7th Cir. 2006); United States v. Lukens, 114 F.3d 1220, 1222 (D.C. Cir. 1997).

[64] *Bradley*, 917 F.3d at 505; United States v. LaSpina, 299 F.3d 165, 176 (2d Cir. 2002); United States v. Schlei, 122 F.3d 944, 975 (11th Cir. 1997); United States v. Nelson, 66 F.3d 1036, 1044 (9th Cir. 1995).

conspirators.[65] The "fraud covered by the statute reaches any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of any department of the Government"[66] by "deceit, craft or trickery, or at least by means that are dishonest."[67] The plot must be directed against the United States or some federal entity; a scheme to defraud the recipient of federal funds is not sufficient.[68] The scheme may be designed to deprive the United States of money or property, but it need not be so; a plot calculated to frustrate the functions of an entity of the United States will suffice.[69]

One or Many Overlapping Conspiracies

The task of sifting agreement from mere association becomes more difficult and more important with the suggestion of overlapping conspiracies. Criminal enterprises may involve one or many conspiracies. Some time ago, the Supreme Court noted that "[t]hieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates: They may, but it takes more than knowledge that he is a 'fence' to make them such."[70] Whether it is a fence, or a drug dealer, or a money launderer, when several seemingly independent criminal groups share a common point of contact, the question becomes whether they present one overarching conspiracy or several separate conspiracies with a coincidental overlap. In the analogy suggested by the Court, spokes with a common hub need an encompassing rim to function as a wheel.[71] When several criminal enterprises overlap, they are one overarching conspiracy or several overlapping conspiracies depending, however evidenced, upon whether they share a single unifying purpose and understanding—one common agreement.[72]

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[65] United States v. Margarita Garcia, 906 F.3d 1255, 1277 (11th Cir. 2018); United States v. Conti, 804 F.3d 977, 979-80 (9th Cir. 2015); United States v. Mubayyid, 658 F.3d 35, 52 (1st Cir. 2011); United States v. Root, 585 F.3d 145, 157 (3d Cir. 2009); United States v. World Wide Moving, N.V., 411 F.3d 502, 516 (4th Cir. 2005).

[66] Tanner v. United States, 483 U.S. 107, 128 (1987); Dennis v. United States, 384 U.S. 855, 861 (1966); Glasser v. United States, 315 U.S. 60, 66 (1942); Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); and Haas v. Henkel, 216 U.S. 462, 479 (1910); *see also* United States v. Kelerchian, 937 F.3d 895, 905 (7th Cir. 2019); United States v. Rodman, 776 F.3d 638, 642 (9th Cir. 2015).

[67] *Glasser*, 315 U.S. at 66; *Hammerschmidt*, 265 U.S. at 188; *Margarita Garcia*, 906 F.3d at 1277; *Conti*, 804 F.3d at 980.

[68] *Tanner*, 483 U.S. at 128-32; United States v. Mendez, 528 F.3d. 811, 814-15 (11th Cir. 2008).

[69] *Hammerschmidt*, 265 U.S. at 188 ("It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation."); United States v. Elbeblawy, 899 F.3d 925, 938-39 (11th Cir. 2018); United States v. Ballistrea, 101 F.3d 827, 832 (2d Cir. 1996) ("This provision not only reaches schemes which deprive the government of money or property, but also is designed to protect the integrity of the United States and its agencies"); United States v. Dean, 55 F.3d 640, 647 (D.C. Cir. 1995) ("If the government's evidence showed that Dean conspired to impair the functioning of the Department of Housing and Urban Development, no other form of injury to the Federal Government need be established for the conspiracy to fall under § 371.").

[70] Kotteakos v. United States, 328 U.S. 750, 755 (1946).

[71] *Id.* at 754-55("As the Circuit Court of Appeals said, there were at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all dealt independently with Brown as their agent. As the Government puts it, the pattern was that of separate spokes meeting at a common center, though, we may add, without the rim of the wheel to enclose the spokes.").

[72] United States v. Singh, 924 F.3d 1030, 1054 (9th Cir. 2019) (quoting United States v. Fernandez, 388 F.3d 1199, 1226 (9th Cir. 2004)) ("A single conspiracy can only be demonstrated by proof that an overall agreement existed among the conspirators. Furthermore, the evidence must show that each defendant knew, or had reason to know, that his benefits were probably dependent upon the success of the entire operation."); United States v. Dixon, 901 F.3d 1322, 1335 (11th Cir. 2018); United States v. Perez-Trevino, 891 F.3d 369, 372 (8th Cir. 2018); United States v.

In determining whether they are faced with a single conspiracy or a rimless collection of overlapping schemes, the courts typically look for "'whether a common goal existed [among the conspirators],' 'the nature of underlying scheme,' and 'the overlap of participants.' 'It is important to note that separate transactions are not necessarily separate conspiracies, so long as the conspirators act in concert to further a common goal.'"[73]

When Does It End?

Conspiracy is a crime which begins with a scheme and may continue on until its objective is achieved or abandoned.[74] Any overt act demonstrates the plot's continued vitality. This will ordinarily include distribution of the conspiracy's spoils.[75] Yet overt acts of concealment do not extend the life of the conspiracy beyond the date of the accomplishment of its main objectives,[76] unless concealment is one of the main objectives of the conspiracy.[77]

The liability of individual conspirators continues on from the time they joined the plot until it ends or until they withdraw.[78] The want of an individual's continued active participation is no defense as long as the underlying conspiracy lives and he has not withdrawn.[79] An individual who

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Belanger, 890 F.3d 13, 30 (1st Cir. 2018); United States v. Pinson, 860 F.3d 152, 162 (4th Cir. 2017).

[73] *Dixon*, 901 F.3d at 1335 (quoting United States v. Richardson, 532 F.3d 1279, 1284 (11th Cir. 2008)); *see also Belanger*, 890 F.3d at 30 (quoting United States v. Fenton, 367 F.3d 14, 19 (1st Cir. 2004)) ("And when it comes to evaluating whether a single conspiracy existed (as opposed to two), we are clear to 'consider the totality of the circumstances, paying particular heed to factors such as [1] the existence of a common goal, [2] evidence of interdependence among the participants, and [3] the degree to which their roles overlap.'"); United States v. Sanders, 778 F.3d 1042, 1047 (D.C. Cir. 2015) (quoting United States v. Lopesierra-Gutierrez, 708 F.3d 193, 207 (D.C. Cir. 2013)) ("The factors relevant to determining whether there was a single conspiracy rather than multiple conspiracies include 'whether the participants shared a common goal, were dependent upon one another, and were involved together in carrying out at least some parts of the plan.'").

The test is a little different when the question deals with a succession of conspiracies or conspiratorial segments, *e.g.*, United States v. Pierre, 795 F.3d 847, 849-50 (8th Cir. 2015) ("In determining whether separately-charged conspiracies are really a single conspiracy, this court applies a 'totality of the circumstances' test. In applying that test, our cases consider: (1) the timing of the alleged conspiracies; (2) the identity of alleged co-conspirators; (3) the offenses charged in the indictments; (4) the overt acts charged or other description of the offenses charged which indicate the nature and scope of the activity charged; and (5) the locations of the alleged conspiracies.").

[74] United States v. Wilbur, 674 F.3d 1160, 1176 (9th Cir. 2012) ("[C]onspiracy continues until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy."); United States v. Fishman, 645 F.3d 1175, 1195 (10th Cir. 2011); United States v. Payne, 591 F.3d 46, 69 (2d Cir. 2010) ("Conspiracy is a continuing offense ... one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course").

[75] United States v. Morgan, 748 F.3d 1024, 1036-37 (10th Cir. 2014); *but see*, United States v. Rutigliano, 790 F.3d 389, 400 (2d Cir. 2015) ("We [have] held that interest payments made ... over an indefinite and prolonged period eventually ceased to be overt acts in furtherance of a conspiracy. [We] thus recognize[] an exception to the ordinary rule ... that a conspirator's receipt of anticipated benefits within the statute of limitations period can, by itself, constitute an overt act in furtherance of an ongoing conspiracy").

[76] United States v. Bornman, 559 F.3d 150, 153 (3d Cir. 2009) (citing Grunewald v. United States, 353 U.S. 391, 413 (1957)); United States v. Turner, 548 F.3d 1094, 1097 (D.C. Cir. 2008).

[77] United States v. Upton, 559 F.3d 3, 10 (1st Cir. 2009); United States v. Weaver, 507 F.3d 178, 185-86 (3d Cir. 2007).

[78] United States v. Lebedev, 932 F.3d 40, 51 (2d Cir. 2019); United States v. Hodge, 594 F.3d 614, 619 (8th Cir. 2010); United States v. Caldwell, 589 F.3d 1323, 1330 (10th Cir. 2009).

[79] Smith v. United States, 568 U.S. 106, 114 (2013) (emphasis in the original) ("[A] defendant's membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely *inactive* after joining it"); *Lebedev*, 932 F.3d at 51 ("That members of a conspiracy have had a disagreement or a falling out is not, however, sufficient to establish withdrawal from the conspiracy."); United States v. Gaye, 902 F.3d 780, 795 (8th Cir. 2018) (inactivity not enough);

claims to have withdrawn must show either that he took some action to make his departure clear to his co-conspirators or that he disclosed the scheme to the authorities.[80] The burden that he has withdrawn rests with the defendant.[81] "Withdrawal terminates the defendant's liability for post withdrawal acts of his co-conspirators, but he remains guilty of conspiracy."[82]

Sanctions

Imprisonment and Fines

Section 371 felony conspiracies are punishable by imprisonment for not more than five years and a fine of not more than $250,000 (not more than $500,000 for organizations).[83] Most drug trafficking, terrorism, racketeering, and many white collar conspirators face the same penalties as those who committed the underlying substantive offense.[84]

The United States Sentencing Guidelines greatly influence the sentences for federal crimes.[85] Federal courts are bound to impose a sentence within the statutory maximums and minimums. Their decision of what sentence to impose within those boundaries, however, must begin with a determination of the sentencing recommendation under the guidelines.[86] Reasonableness standards govern review of their sentencing decisions,[87] and a sentence within the Sentencing Guidelines range is presumed reasonable.[88]

United States v. Sitzmann, 893 F.3d 811, 824 (D.C. Cir. 2018) ("[A]rrest, without more, does not indicate withdrawal.").

[80] United States v. Leoner-Aguirre, 939 F.3d 310, 318 (1st Cir. 2019) (quoting United States v. Juodakis, 834 F.3d 1099, 1102 (1st Cir. 1987)) ("To withdraw, 'conspirator must act affirmatively either to defeat or disavow the purposes of the conspiracy'"); United States v. Patton, 927 F.3d 1087, 1096 (10th Cir. 2019); *Gaye*, 902 F.3d at 795; *Sitzmann*, 893 F.3d at 824.

[81] *Smith*, 568 U.S. at 113; *Leoner-Aguirre*, 939 F.3d at 318; *Patton*, 927 F.3d at 1096; *Gaye*, 902 F.3d at 795; United States v. Shephard, 892 F.3d 666, 673 (4th Cir. 2018).

[82] *Smith*, 568 U.S. Ct. at 111; United States v. Faulkner, 895 F.3d 488, 494 (7th Cir. 2018); United States v. Green, 835 F.3d 844, 852 (8th Cir. 2016); United States v. Salazar, 751 F.3d 326, 330-31 (5th Cir. 2015); United States v. Smith, 749 F.3d 465, 498 (6th Cir. 2014).

[83] 18 U.S.C. §§ 371, 3571. An offender may be fined twice of the amount of the gain or loss associated with the offense, even when such a fine would exceed the otherwise applicable $250,000/$500,000 maximums. *Id.* § 3571(b)(2), (d).

[84] *E.g.*, 21 U.S.C. § 846 ("Any person who ... conspires to commit any offense defined in [the Controlled Substances Act] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the ... conspiracy"); 18 U.S.C. § 2339B ("Whoever knowingly provides material support or resources to a foreign terrorist organization.... or conspires to do so, shall be fined under this title, or imprisoned not more than 15 years, or both"); *id.* §§ 1962(d), 1963(a)("(d) It shall be unlawful for any person to conspire to violate any of the [racketeering] provisions of subsection (a), (b), or (c) of this section.... (a) Whoever violates any provision of section 1962 ... shall be fined under this title, or imprisoned for not more than 20 years ... or both"); *id.* § 1349 ("Any person who ... conspires to commit any offense under this chapter [relating to mail fraud, wire fraud, etc.] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of ... the conspiracy").

[85] See generally, CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[86] Gall v. United States, 552 U.S. 38, 49 (2007); United States v. Demma, 948 F.3d 722, 726 (6th Cir. 2020); United States v. Vasquez-Abarca, 946 F.3d 990, 994 (7th Cir. 2020); United States v. Brown, 892 F.3d 385, 399 (D.C. Cir. 2018).

[87] Gall v. United States, 552 U.S. at 46 (citing United States v. Booker, 543 U.S. 220, 260-62 (2005)); United States v. Cabezas-Montano, 949 F.3d 567, 605 (11th Cir. 2020).

[88] Rita v. United States, 551 U.S. 338, 347 (2007); United States v. Escobar, 909 F.3d 228, 241 (8th Cir. 2018); United States v. Collins, 799 F.3d 554, 596 (6th Cir. 2015). Appellate courts will also presume the reasonableness of a

The Sentencing Guidelines system is essentially a scoring system. Federal crimes are each assigned a numerical base offense level and levels are added and subtracted to account for the various aggravating and mitigating factors in a particular case. For example, the offense of providing material support to a terrorist organization, 18 U.S.C. § 2339B, has a base offense level of 26, which may be increased by 2 levels if the support comes in the form of explosives,[89] and may be increased or decreased still further for other factors. The guidelines designate six sentencing ranges of each total offense level; the appropriate range within the six is determined by extent of the offender's criminal record. For instance, the sentencing range for a first-time offender with a total offense level of 28 would be imprisonment for between 78 and 97 months (Category I); while the range for an offender in the highest criminal history category (Category VI) would be imprisonment for between 140 and 175 months.[90]

The base offense level for conspiracy is generally the same as that for the underlying offense, either by operation of an individual guideline,[91] or by operation of the general conspiracy guideline.[92] In any event, conspirators who play a leadership role in an enterprise are subject to an increase of from 2 to 4 levels,[93] and those who play a more subservient role may be entitled to a reduction of from 2 to 4 levels.[94] In the case of terrorism offenses, conspirators may also be subject to a special enhancement that sets the minimum total offense level at 32 and the criminal history category at VI (regardless of the extent of the offender's criminal record).[95] An example from a wire fraud "score card" appears in the margin.[96]

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defendant-challenged, below-guideline sentence. United States v. Sifuentes, 945 F.3d 865, 869 (5th Cir. 2019); United States v. Smith-Kilpatrick, 942 F.3d 734, 747 (6th Cir. 2019); United States v. De La Torre, 940 F.3d 938, 953 (7th Cir. 2019).

[89] U.S.S.G. § 2M5.3(a), (b).

[90] U.S.S.G. Sentencing Table.

[91] *E.g.*, U.S.S.G. § 2D1.1 (drug trafficking).

[92] U.S.S.G. § 2X1.1.

[93] U.S.S.G. § 3B1.1.

[94] U.S.S.G. § 3B1.2.

[95] U.S.S.G. § 3A1.4. *E.g.*, United States v. Stewart, 590 F.3d 93, 136 (2d Cir. 2009)("The district court initially calculated Yousry's Guidelines range based on a total offense level of 28 criminal history category of I, for a range of 78 to 97 months. According to the government, Yousry's applicable Guidelines range should have been enhanced in accordance with the terrorism enhancement provided by the Guidelines, U.S.S.G. §3A1.4. The district court concluded to the contrary that the terrorism enhancement did not apply to Yousry because he did not act with the requisite state of mind.").

[96] United States v. Alisuretove, 788 F.3d 1247, 1253 (10th Cir. 2015): "Base Offense Level: The base offense level for a violation of 18 U.S.C. § 1349 [conspiracy to commit wire fraud] is found in USSG § 2X1.1. According to USSG § 2X1.1(a), the base offense level is based on the base offense level for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty. In this case, the substantive offense is Wire Fraud, 18 U.S.C. § 1343. The base offense level for which is found in USSG § 2B1.1. That section provides that an offense involving theft, fraud or counterfeit instruments base offense level is 7, if the defendant was convicted of an offense referenced to this guideline; and that offense of conviction has a statutory maximum term of imprisonment of 20 or more year[s].

"The defendant in this case is convicted of Conspiracy to Commit Wire Fraud; therefore, the defendant's base offense level is 7. USSG § 2B1.1(a)(1). Additionally, if the offense involved 250 or more victims, increase by 6 levels. USSG § 2B1.1(b)(2)(C). There are a total of 19 financial institutions that are identified as victims in this case in addition to 276 individuals whose accounts were compromised; therefore, 6 levels are added.

"Additionally, if the loss was more than $200,000 but less than $400,000, 12 levels are added. USSG § 2B1.1(b)(1)(G). The total intended loss in this case has been identified as $360,856.80. Additionally, if the offense involved sophisticated means, increase by 2 levels. USSG § 2B1.1(b)(10)(C). As cited in the offense conduct, the defendants would travel from the Seattle, Washington, area to place a debit card skimmer on the inside of gas pumps

The Sentencing Guidelines also address the imposition of fines below the statutory maximum. The total offense level dictates the recommended fine range for individual and organizational defendants. For instance, the fine range for an individual with a total offense level of 28 is $12,500 to $125,000.[97] The recommended fine range for an organization with a total offense level of 28 is $6,300,000 (assuming the loss or gain associated with the organization offense exceeds the usual $500,000 ceiling).[98]

Restitution

A conspiracy conviction may result in a restitution order in a number of ways:[99] as part of a plea bargain;[100] as a condition of probation or supervised release;[101] or by operation of a restitution statute.[102] The federal criminal code features two general restitution statutes and a handful of others for restitution for specific offenses.[103] Section 3663A calls for mandatory restitution following conviction for a federal crime of violence, fraud, or other crime against property.[104] Section 3663 authorizes discretionary restitution following conviction for other offenses in federal criminal code or drug trafficking offenses. The individual restitution statutes sometimes make mandatory restitution that might otherwise be discretionary[105] and sometimes make procedural adjustments that deviate from the norm.[106] Finally, Section 3663A specifically requires restitution for any person directly harmed by a crime that involves "a scheme, *conspiracy*, or pattern of criminal activity."[107]

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with the intent to capture the card data and "pin" number.

"The defendants would retrieve the data from the skimming device and place it on a card through a computer, to withdraw money from the victims['] bank accounts at numerous ATMs. Pursuant to USSG § 2B1.1(b)(11)(B), if the offense involved the production of any unauthorized access device, increase by 2 levels. The defendants in this case produced numerous fraudulent debit cards to make withdrawals from various ATMs; therefore, 2 levels are added; [resulting in a total offense level of 26.]"

[97] U.S.S.G. § 5E1.2.

[98] U.S.S.G. § 8C2.4.

[99] *See generally* CRS Report RL34138, *Restitution in Federal Criminal Cases*, by Charles Doyle.

[100] 18 U.S.C. §§ 3663(a)(3), 3663A(c)(2); *e.g.*, United States v. Elson, 577 F.3d 713, 724-25 (6th Cir. 2009) ("Elson's plea agreement explicitly provides that Elson will 'pay restitution to victims of the conspiracy to defraud orchestrated by Richard D. Schultz (J.A. 209), which is an offense different from his offense conviction—conspiracy to obstruct a grand jury investigation.... Accordingly, the district court properly ordered Elson to pay restitution to the victims of the conspiracy to defraud Schultz's creditors.").

[101] 18 U.S.C. §§ 3563(b)(2), 3583(d); *see, e.g.*, United States v. Betts, 886 F.3d 198, 201 (2d Cir. 2018).

[102] *E.g.*, 18 U.S.C. §§ 2252(b), 2259. A restitution obligation may also flow from a conspirator's criminal liability for the underlying substantive offense or from a conspirator's liability for any criminal overt acts of a co-conspirator.

[103] A third general provision, 18 U.S.C. § 3664, provides the procedural framework for issuance and enforcement of restitution orders.

[104] It also requires restitution following conviction for an offense under 21 U.S.C. § 856(a) (maintaining drug-involved premises); under 18 U.S.C. §1365 (consumer product tampering); or under *id.* § 670 (theft of medical products). *Id.* § 3663A(c)(ii), (iii), (iv).

[105] *E.g.*, *id.* §§ 228(d) (mandatory restitution for failure to pay child support); 1593 (mandatory restitution for human trafficking offenses); 2248(mandatory restitution for sexual abuse offenses); 2259 (mandatory restitution for child pornography offenses); 2323(c) (mandatory restitution for certain copyright offenses); 2327 (mandatory restitution for telemarketing fraud); 21 U.S.C. § 853(q) (mandatory restitution for amphetamine or methamphetamine manufacturing offenses).

[106] *E.g.*, 18 U.S.C. §§ 43(c) (restitution covering various costs associated with the criminal interference with animal enterprises); 2264 (restitution covering various costs associated with federal domestic violence offenses).

[107] *Id.* § 3663A(a)(2) (emphasis added).

Forfeiture

Whether property confiscation flows as a natural consequence of a conspiracy depends on the underlying substantive offense. The general civil forfeiture statute, 18 U.S.C. 981, lists a series of substantive offenses for which forfeiture is authorized. Some of the offenses bring conspiracy with them; others do not.[108] The general criminal forfeiture statute, 18 U.S.C. 982, takes the same approach.[109] Several criminal statutes feature their own forfeiture provisions; the Controlled Substances Act (CSA) and RICO are perhaps the most notable of these.[110] Forfeiture follows as a consequence of conspiracy to violate either of these statutes.[111] Other free-standing, conspiracy-enveloping statutes apply to human trafficking offenses,[112] theft of trade secrets,[113] child pornography,[114] and interstate transportation of a child for unlawful sexual purposes,[115] to name a few.

Relation of Conspiracy to Other Crimes

Conspiracy is a completed crime upon agreement or, when statutorily required, upon agreement and the commission of an overt act. Conviction does not require commission of the crime that is the object of the conspiracy.[116] On the other hand, conspirators may be prosecuted for conspiracy, for any completed offense which is the object of the conspiracy,[117] and for any foreseeable offense committed in furtherance of the conspiracy.[118]

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[108] *Id*. § 981(a)(1)(C) (emphasis added) ("The following property is subject to forfeiture to the United States: ... (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to ... any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title [which includes all the money laundering and racketeering predicate offenses], *or a conspiracy to commit such offense*.").

[109] *Id*., § 982(a)(2) (emphasis added) (calling for the confiscation of proceeds realized from "a violation of, *or a conspiracy to* -- (A) section ... 1341, 1343, 1344 of this title [relating to mail, wire and bank fraud], affecting a financial institution"); *id*. § 982(a)(8) (emphasis added) (calling for the confiscation of proceeds from, and property used to facilitate or promote, "an offense under section ... 1341, or 1343, *or of a conspiracy to* commit such an offense, if the offense involves telemarketing"). Civil forfeitures are accomplished through civil proceedings in which the property is treated as the defendant; criminal forfeitures are accomplished as part of the criminal proceedings against the property owner. United States v. Ursery, 518 U.S. 267, 275 (1996); *see generally* CRS Report 97-139, *Crime and Forfeiture*, *Crime and Forfeiture* by Charles Doyle.

[110] 21 U.S.C. §§ 854, 881 (CSA criminal and civil forfeiture); 18 U.S.C. § 1963(a) (RICO criminal forfeiture).

[111] CSA outlaws conspiracy to violate its provisions and calls for civil and criminal confiscation of property associated with a violation of any its proscriptions, including conspiracy. 21 U.S.C. §§ 846, 853, 881. RICO likewise outlaws conspiracy to violate its provisions and requires confiscation of property association with its provisions, including conspiracy. 18 U.S.C. §§1962(d), 1963(a).

[112] *Id*. § 1594 (civil and criminal forfeiture).

[113] *Id*. §§ 1831, 1832, 1834 (criminal forfeiture).

[114] *Id*. §§ 2251(e), 2252(b), 2252A(b), 2253 (criminal forfeiture), 2254 (civil forfeiture).

[115] *Id*. §§ 2423(e), 2428 (civil and criminal forfeiture).

[116] United States v. Jimenez Recio, 537 U.S. 270, 274 (2003); United States v. DeKalaita, 875 F.3d 855, 859 (7th Cir. 2018) ("The post-trial judgment of acquittal on substantive claims does not preclude conviction for conspiracy… The crime of conspiracy is the agreement itself."); United States v. Wolff, 796 F.3d 972, 975 (8th Cir. 2015); United States v. Salahuddin, 765 F.3d 329, 341 (3d Cir. 2014).

[117] Callahan v. United States, 364 U.S. 587, 594-94 (1961) (a defendant may be charged, prosecuted, and sentenced for both conspiracy and the underlying substantive offense); Iannelli v. United States, 420 U.S. 770, 777-78 (1975) ("Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end."); United States v. George, 886 F.3d 31, 41 (1st Cir. 2018).

[118] Pinkerton v. United States, 328 U.S. 640, 646-47 (1946); Smith v. United States, 568 U.S. 106, 111 (2013); United

Aid and Abet

Anyone who "aids, abets, counsels, commands, induces, or procures" the commission of a federal crime by another is punishable as a principal, that is, as though he had committed the offense himself.[119] On the other hand, if the other agrees and an overt act is committed, they are conspirators, each liable for conspiracy and any criminal act committed to accomplish it. If the other commits the offense, they are equally punishable for the basic offense. "Evidence that supports a conspiracy conviction is generally sufficient to support an aiding and abetting conviction."[120] The two are clearly distinct, however, as the Ninth Circuit has noted:

> The difference between the classic common law elements of aiding and abetting and a criminal conspiracy underscores this material distinction, although at first blush the two appear similar. Aiding and abetting the commission of a specific crime, we have held, includes four elements: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent to commit the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that the principal committed the underlying offense. As *Lopez* emphasized, the accused generally must associate[ ] himself with the venture ... participate[ ] in it as something he wish[es] to bring about, and [sought by] his action to make it succeed.
>
> By contrast, a classic criminal conspiracy as charged in 18 U.S.C. § 371 is broader. The government need only prove (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime. Indeed, a drug conspiracy does not even require commission of an overt act in furtherance of the conspiracy.
>
> Two distinctions become readily apparent after a more careful comparison. First, the substantive offense which may be the object in a § 371 conspiracy need not be completed. Second, the emphasis in a § 371 conspiracy is on whether one or more overt acts was undertaken. This language necessarily is couched in passive voice for it matters only that a co-conspirator commit the overt act, not necessarily that the accused herself does so. In an aiding and abetting case, not only must the underlying *substantive offense* actually be completed by someone, but the accused must take some action, a *substantial step,* toward associating herself with the criminal venture.[121]

Attempt

Conspiracy and attempt are both inchoate offenses, unfinished crimes in a sense. They are forms of introductory misconduct that the law condemns lest they result in some completed form of misconduct.[122] Federal law has no general attempt statute.[123] Congress, however, has outlawed

States v. Mathis, 932 F.3d 242, 262 (4th Cir. 2019); United States v. Baker, 923 F.3d 390, 406 (5th Cir. 2019).

[119] 18 U.S.C. § 2. See generally CRS Report R43769, *Accomplices, Aiding and Abetting, and the Like: An Overview of 18 U.S.C. § 2*, by Charles Doyle.

[120] United States v. Martinez, 900 F.3d 721, 729 (5th Cir. 2018).

[121] United States v. Hernandez-Orellana, 539 F.3d 994, 1006-1007 (9th Cir. 2008) (emphasis in the original).

[122] United States v. Rehak, 589 F.3d 965, 971 (8th Cir. 2009); United States v. Iribe, 564 F.3d 1155, 1160 (9th Cir. 2009).

[123] United States v. Sineneng-Smith, 910 F.3d 461, 482 (9th Cir. 2018); United States v. Hite, 769 F.3d 1154, 1162 (D.C. Cir. 2015); United States v. Douglas, 525 F.3d 225, 251 (2d Cir. 2008). *See generally* CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle.

attempt to commit a substantial number of specific federal offenses.[124] Like conspiracy, a conviction for attempt does not require the commission of the underlying offense.[125] Both require an intent to commit the contemplated underlying offense.[126] Like conspiracy, the fact that it may be impossible to commit the target offense is no defense to a charge of attempt to commit it.[127] Unlike conspiracy, attempt can be committed by a single individual.[128] Attempt only becomes a crime when it closely approaches a substantive offense. Conspiracy becomes a crime far sooner. Mere acts of preparation will satisfy the most demanding conspiracy statute, not so with attempt.[129] Conspiracy requires, at most, no more than an overt act in furtherance; attempt, a

[124] *E.g.*, 18 U.S.C. §§ 32(b)(4)(attempts to sabotage commercial aircraft), 33 (attempts to sabotage commercial motor vehicles); 37(a) (attempted violation at international airports), 43(a)(2)(C) (attempted violence directed at animal enterprises), 81 (attempted arson within the special maritime or territorial jurisdiction of the United States), 175 (attempt use of biological weapons), 351(c)(attempted murder or kidnapping of a Member of Congress), 1512 (attempted obstruction of justice), 1956 (attempted money laundering). There are dozens of other attempt statutes in Title 18 of the *United States Code* and many others scattered throughout the other titles, including 21 U.S.C. § 846 (attempt to violate the Controlled Substance Act).

[125] United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) (internal citations omitted) ("[T]he essence of a conspiracy is an agreement to commit an unlawful act. That agreement is a distinct evil, which may exist and be punished whether or not the substantive crime ensues"); United States v. DeKelaita, 875 F.3d 855, 859 (7th Cir. 2017) ("Failing to achieve the conspiracy's goal does not negate the underlying agreement."); United States v. Nguyen, 829 F.3d 907, 917 (8th Cir. 2016) ("In attempt cases, a defendant may be convicted regardless of whether the attempt is successful."); United States v. Salahuddin, 765 F.3d 329, 341 (3d Cir. 2014) ("The goal of the conspiracy—here, obtaining something of value under color of official right—need not be achieved for a conspiracy conviction."); United States v. Williams, 698 F.3d 374, 382 (7th Cir. 2012)("A person who demonstrates by his conduct that he has the intentional and capability of committing a crime is punishable even if his plan was thwarted."); United States v. Macias-Valencia, 510 F.3d 1012, 1014 (9th Cir. 2007) ("Conspiracy and attempt are inchoate crimes that do not require completion of the criminal objective.").

[126] United States v. Anderson, 932 F.3d 344, 350 (5th Cir. 2019) (quoting United States v. Salazar, 958 F.2d 1285, 1293 (5th Cir. 1992)) ("'To be guilty of an attempt, the defendant (1) must have been acting with the … culpability otherwise required for the commission of the crime which he is charged with attempting…'"); United States v. Stahlman, 934 F.3d 1199, 1225 (11th Cir. 2019) (attempt); Ocasio v. United States, 136 S. Ct. 1423, 1429 (2016) ("A defendant must merely reach an agreement with the specific intent that the underlying crime be committed by some member of the conspiracy."); United States v. Babilonia, 854 F.3d 163, 175 (2d Cir. 2017) (quoting United States v. Valle, 807 F.3d 508, 515-16 (2d Cir. 2015)) ("To sustain a conviction for conspiracy, the government must prove that the defendant 'knowingly joined and participated in [the conspiracy]' and 'possessed the specific intent to commit the offense that was the object of the conspiracy.'"); United States v. Rodríguez, 820 F.3d 26, 31 (1st Cir. 2016) (quoting United States v. Sepulveda, 15 F.3d 1161, 1173 (1st Cir. 1993)) ("To sustain a conviction for conspiracy, the government must show 'beyond a reasonable doubt that a conspiracy existed and that a particular defendant agreed to participate in it, intending to commit the underlying substantive offense.'").

[127] United States v. Williams, 553 U.S. 285, 300 (2008)("As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts we not as the defendant believed is not a defense"); United States v. Temkin, 797 F.3d 682, 690 (9th Cir. 2015)("[F]actual impossibility is not a defense to an inchoate offense, such as the attempt for which Temkin was convicted"); United States v. Mehanna, 735 F.3d 32, 54 (1st Cir. 2013) (quoting United States v. Dixon, 449 F.3d 194, 202 (1st Cir. 2006)) ("'[F]actual impossibility is not a defense to … liability … for inchoate offenses such as conspiracy or attempt.'").

[128] United States v. Iribe, 564 F.3d 1155, 1160 (9th Cir. 2009) ("Each of those crimes contains an element that the other does not: Conspiracy does not require a 'substantial step,' while attempt does not require an 'agreement.'").

[129] United States v. Pugh, 945 F.3d 9, 20 (2d Cir. 2019); United States v. Strubberg, 929 F.3d 969, 974 (8th Cir. 2019); United States v. Clark, 842 F.3d 288, 297 (4th Cir. 2016).

substantial step to completion.[130] Moreover, unlike a conspirator, an accused may not be convicted of both attempt and the underlying substantive offense.[131]

An individual may be guilty of both conspiring with others to commit an offense and of attempting to commit the same offense, either himself or through his confederates.[132] In some circumstances, he may be guilty of attempted conspiracy. Congress has outlawed at least one example of an attempt to conspire in the statute which prohibits certain invitations to conspire, that is, solicitation to commit a federal crime of violence, 18 U.S.C. 373.

Solicitation

Section 373 prohibits efforts to induce another to commit a crime of violence "under circumstances strongly corroborative" of an intent to see the crime committed.[133] Section 373's crimes of violence are federal "felon[ies] that [have] as an element the use, attempted use, or threatened use of physical force against property or against the person of another."[134] Examples of "strongly corroborative" circumstances include "the defendant offering or promising payment or another benefit in exchange for committing the offense; threatening harm or other detriment for refusing to commit the offense; repeatedly soliciting or discussing at length in soliciting the commission of the offense, or making explicit that the solicitation is serious; believing or knowing that the persons solicited had previously committed similar offenses; and acquiring weapons, tools, or information for use in committing the offense, or making other apparent preparations for its commission."[135] As is the case of attempt, "[a]n individual cannot be guilty of both the solicitation of a crime and the substantive crime."[136] Although the crime of solicitation is complete upon communication with the requisite intent, renunciation prior to commission of the

[130] A "substantial step" is a necessary element of attempt (United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007)) and an "overt act" a necessary element of conspiracy under 18 U.S.C. § 371, the general conspiracy statute (United States v. Shabani, 513 U.S. 10, 14 (1994)). An overt act is not a necessary element under several individual conspiracy statutes. (*Shabani*, 513 U.S. at 17; Whitfield v. United States, 543 U.S. 209, 211 (2004)).

[131] United States v. Rivera-Relle, 333 F.3d 914, 921-22 n.11 (5th Cir. 2003) (quoting United States v. York, 578 F.2d 1036, 1040 (5th Cir. 1978)) ('"Unlike conspiracy, the prosecution may not obtain convictions for both the completed offense and the attempt if the attempt has in fact been completed. The attempt is an offense included in the completed crime, and, therefore, cannot support a separate conviction and sentence.'").

[132] *Iribe*, 564 F.3d at 1161 ("Here, Defendant conspired to commit an actual kidnapping. He also committed a substantial step toward kidnapping. Thus, he was properly convicted of both conspiring to kidnap and attempting to kidnap.").

[133] 18 U.S.C. 373(a); United States v. Dvorkin, 799 F.3d 867, 878 (7th Cir. 2015) (internal quotation marks omitted) ("To prove a violation of § 373(a), the government must establish (1) with strong corroborative circumstances that a defendant intended for another person to commit a violent federal crime, and (2) that a defendant solicited or otherwise endeavored to persuade the other person to carry out the crime").

[134] 18 U.S.C. 373(a); United States v. Korab, 893 F.2d 212, 215 (9th Cir. 1989) ("Section 373(a) encompasses only solicitations of federal felonies").

[135] United States v. Hale, 448 F.3d 971, 983 (7th Cir. 2006) (citing, United States v. McNeil, 887 F.2d 448, 450 (3d Cir. 1989)); *see also* Dvorkin, 799 F.3d at 879 (7th Cir. 2015) ("Evidence sufficient to strongly corroborate a defendant's intent includes, but is not limited to, evidence showing that the defendant: (1) offered or promised payment or some other benefit to the person solicited; (2) threatened to punish or harm the solicitee for failing to commit the offense; (3) repeatedly solicited the commission of the offense or expressly stated his seriousness; (4) knew or believed that the person solicited had previously committed a similar offense; or (5) acquire weapons, tools or information, or made other preparations, suited for use by the solicitee.").

[136] *Korab*, 893 F.3d at 213.

substantive offense is a statutory defense.[137] The offender's legal incapacity to commit the solicited offense himself, however, is no defense.[138]

Procedural Attributes

Statute of Limitations

The general statute of limitations for federal crimes is five years;[139] prosecution must begin within five years of when the crime's last element has been satisfied.[140] The five-year limitation applies to offenses under the general conspiracy statute, which has an overt act element.[141] For a prosecution under the general conspiracy statute, prosecution must begin within five years of the last overt act committed in furtherance of the conspiracy.[142] A few individual conspiracy statutes, such as the conspiracy to engage in drug trafficking, have no overt act requirement.[143] For these "no overt act" conspiracy offenses, the statute of limitations for an individual conspirator begins when he effectively withdraws from the scheme, when the conspiracy accomplishes the last of its objectives, or when it is abandoned.[144]

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[137] 18 U.S.C. 373(b)("It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence"); *see also Dvorkin*, 799 F.3d at 880; United States. Temkin, 797 F.3d 682, 689 (9th Cir. 2015).

[138] 18 U.S.C. 373(c)("It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution").

[139] 18 U.S.C. § 3282. Some federal crimes, such as certain terrorism and child abuse offenses have special longer statute of limitations, *e.g.*, *id*. §§ 3283, 3286. Capital offenses may be tried at any time. *Id*. § 3281.

[140] Toussie v. United States, 397 U.S. 112, 115 (1970) (quoting Pendergast v. United States, 317 U.S. 412, 418 (1943)) ("'[S]tatutes of limitations normally begin to run when the crime is complete.'"); United States v. Askia, 893 F.3d 1110, 1116 (8th Cir. 2018) ("A statute of limitations for an offense typically begins to run once it is complete—in other words, once all elements of the offense are established.").

[141] 18 U.S.C. § 371 (emphasis added) ("If two or more persons conspire either to commit an offense against the United States … and *one or more of such persons do any act to effect the object of the conspiracy* …"); United States v. Shabani, 513 U.S. 10,16 (1994); United States v. Bradley, 917 F.3d 493, 505 (6th Cir. 2019); United States v. Jett, 908 F.3d 252, 264 (7th Cir. 2018); United States v. $11,500.00 in United States Currency, 869 F.3d 1062, 1072 (9th Cir. 2017).

[142] United States v. Ellis, 938 F.3d 757, 764 (6th Cir. 2019); United States v. Farias, 836 F.3d 1315, 1324 (11th Cir. 2016); United States v. Bennett, 765 F.3d 887, 895 (8th Cir. 2014); United States v. Chhun, 744 F.3d 1110, 1122 (9th Cir. 2014); United States v. Stewart, 744 F.3d 17, 21 (1st Cir. 2014).

[143] United States v. Shabani, 513 U.S. 10, 11 (1994) ("This case asks us to consider whether 21 U.S.C. § 846, the drug conspiracy statute, requires the Government to prove that a conspirator committed an over act in furtherance of the conspiracy. We conclude that it does not."); *see also* United States v. Whitfield, 543 U.S. 209, 211 (2004) (holding that the statute proscribing conspiracy to engage in money laundering, 18 U.S.C. § 1956(h), has no overt act requirement).

[144] Smith v. United States, 568 U.S. 106, 107 (2013) ("A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution"); United States v. Seher, 562 F.3d 1344, 1364 (11th Cir. 2009) (prosecution under 18 U.S.C. 1956(h) which has no overt act requirement) ("The government satisfies the requirements of the statute of limitations for a non-overt act conspiracy if it alleges and proves that the conspiracy continued into the limitations period. A conspiracy is deemed to continue as long as its purposes have neither been abandoned nor accomplished, and no affirmative showing has been made that it has terminated."); United States v. Magleby, 420 F.3d 1136, 1145 (10th 2005).

Venue

The presence or absence of an overt act requirement makes a difference for statute of limitations purposes. For venue purposes, it does not. The Supreme Court has observed in passing that "this Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense."[145] The lower federal appellate courts are seemingly of the same view, for they have found venue proper for a conspiracy prosecution wherever an overt act occurs—under overt act statutes and non-overt act statutes alike.[146]

Joinder and Severance (One Conspiracy, One Trial)

Three rules of the Federal Rules of Criminal Procedure govern joinder and severance for federal criminal trials. Rule 8 permits the joinder of common criminal charges and defendants.[147] Rule 12 insists that a motion for severance be filed prior to trial.[148] Rule 14 authorizes the court to grant severance for separate trials as a remedy for prejudicial joinder.[149]

The Supreme Court has pointed out that "[t]here is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials play a vital role in the criminal justice system. They promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."[150] In conspiracy cases, a "conspiracy charge combined with substantive counts arising out of that conspiracy is a proper basis for joinder under Rule 8(b)."[151] Moreover, "the preference in a conspiracy trial is that persons charged together should be tried together."[152] In fact, "it will be the rare case, if ever, where a district court should sever the trial of

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[145] Whitfield v. United States, 543 U.S. 209, 218 (2005).

[146] United States v. Camara, 908 F.3d 44, 48 (4th Cir. 2018); United States v. Lange, 834 F.3d 58, 70 (2d Cir. 2016) (cases under 18 U.S.C. § 371 which has an explicit over act requirement); United States v. Sitzman, 893 F.3d 811, 826 (D.C. Cir. 2018); United States v. Lopez, 880 F.3d 974, 982 (8th Cir. 2016) (cases under 21 U.S.C. § 846, which does not have an overt act requirement) *see* United States v. Shabani, 513 U.S. 10, 11 (1994)); *but see* United States v. Kirk Tang Yuk, 885 F.3d 57, 72 (2d Cir. 2018) (venue is only proper with respect to conspirators who reasonably should have foreseen their co-conspirator's venue-establishing overt act).

[147] FED. R. CRIM. P. 8 ("(a) The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. (b) The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.").

[148] FED. R. CRIM. P. 12(b)(3)(D) ("The following must be raised before trial: ... (D) a Rule 14 motion to sever charges or defendants.").

[149] FED. R. CRIM. P. 14 ("(a) If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. (b) Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.").

[150] Zafiro v. United States, 506 U.S. 534, 537 (1993); *see also* United States v. Yurek, 925 F.3d 370, 380 (10th Cir. 2019); United States v. Reed, 908 F.3d 102, 114 n.46 (5th Cir. 2018); United States v. Chavez, 894 F.3d 593, 605 (4th Cir. 2018).

[151] United States v. Williams, 553 F.3d 1073, 78-79 (7th Cir. 2009).

[152] United States v. McDonnell, 792 F.3d 478, 494 (4th Cir. 2015); United States v. Daniel, 933 F.3d 370, 380 (5th Cir. 2019) (quoting United States v. Daniel, 281 F.3d 168, 177 (5th Cir. 2002) and United States v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995) ("'To promote judicial economy and the interests of justice, the federal system prefers joint trials of defendants who are properly charged in joint indictments, particularly in conspiracy cases.'"); United States v. Cortes-

alleged co-conspirators."[153] The Supreme Court has reminded the lower courts that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[154] The Court noted that the risk may be more substantial in complex cases with multiple defendants, but that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice."[155] Subsequently lower federal appellate court opinions have emphasized the curative effect of appropriate jury instructions.[156]

Double Jeopardy and Ex Post Facto

Because conspiracy is a continuing offense, it stands as an exception to the usual ex post facto principles. Because it is a separate crime, it also stands as an exception to the usual double jeopardy principles.

The ex post facto clauses of the Constitution forbid the application of criminal laws which punish conduct that was innocent when it was committed or punish more severely criminal conduct than when it was committed.[157] Increasing the penalty for an ongoing conspiracy, however, does not offend ex post facto constraints as long as the conspiracy straddles the date of the legislative penalty enhancement.[158]

Gomez, 926 F.3d 699, 705 (10th Cir. 2019) (quoting United States v. Tranakos, 911 F.2d 1422, 1426 (10th Cir. 1990)) ("'This is such a case where a single trial is preferred, for the defendants were charged with a single conspiracy.'"); United States v. Jett, 908 F.3d 252, 276 (7th Cir. 2018) ("[T]he preference is that codefendants be tried together. That preference is especially strong from coconspirators who are indicted together."); United States v. Benton, 890 F.3d 697, 713 (8th Cir. 2018).

[153] United States v. Spotted Elk, 548 F.3d 641, 658 (8th Cir. 2008); *but see* United States v. Blunt, 930 F.3d 119, 127 (3d Cir. 2019) (holding that a conspirator's wife should have been granted severance when she would otherwise have to choose between testifying against her husband in her own defense and exercising her privilege not to do so).

[154] *Zafiro*, 506 U.S. at 539; *Daniel*, 933 F.3d at 380; *Blunt*, 930 F.3d at 125 ("The resulting prejudice from such a situation must be 'clear and substantial' and must result in a 'manifestly unfair trial'"); United States v. Bikundi, 926 F.3d 761, 781 (D.C. Cir. 2019) (quoting United States v. Moore, 651 F.3d 30, 95 (D.C. Cir. 2011)) ("In conspiracy trials, severance is generally not mandated despite a disparity in evidence when there is 'substantial and independent evidence for each [defendant's] significant involvement in the conspiracy.'"); United States v. Reed, 908 F.3d 102, 114 (5th Cir. 2018) (quoting various circuit precedents) ("'[T[he federal judicial system has a preference for joint trials of defendants who are indicted together,' and '[a] defendant is not entitled to severance just because it would increase his chance of acquittal or because evidence is introduced that is admissible against certain defendants.' We have held that '[m]erely alleging a spillover effect—whereby the jury imputes the defendant's guilt based on evidence presented against his co-defendants—is an insufficient predicate for a motion to sever.' Instead, a defendant 'must prove that (1) the joint trial prejudiced him to such an extent that the district court not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration.'").

[155] *Zafiro*, 506 U.S. at 539.

[156] *Bikundi*, 926 F.3d at 780 ("District courts retain significant flexibility to determine how to remedy a potential risk of prejudice, including ordering lesser forms of relief such as limiting jury instructions."); United States v. Chavez, 894 F.3d 593, 605 (4th Cir. 2018) ("[T]he district court gave appropriate limiting instructions to the jury that further lessened any risk of unfair prejudice."); United States v. Brown, 849 F.3d 87, 902-3 (3d Cir. 2017) (upholding the use of dual juries to prevent unfair prejudice that might otherwise have resulted from a joint trial).

[157] U.S. Const. Art. I, §§ 9, 10; Stogner v. California, 539 U.S. 607, 612 (2003).

[158] United States v. Julian, 427 F.3d. 471, 482 (7th Cir. 2005) ("It is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not ex post facto as to that crime."); United States v. Valladares, 544 F.3d 1257, 1270-271 (11th Cir. 2008); United States v. Vallone, 752 F.3d 690, 694-95 (7th Cir. 2014).

The double jeopardy clause of the Fifth Amendment declares that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[159] This prohibition condemns successive prosecutions, successive punishments, and successive use of charges rejected in acquittal.[160]

For successive prosecution or punishment, the critical factor is the presence or absence of the same offense. Offenses may overlap, but they are not the same crime as long as each requires proof of an element that the other does not.[161] Since conspiracy and its attendant substantive offense are ordinarily separate crimes—one alone requiring agreement and the other alone requiring completion of the substantive offense—the double jeopardy clause poses no impediment to successive prosecution or to successive punishment of the two.[162]

Double jeopardy issues arise most often in a conspiracy context when a case presents the question of whether the activities of the accused conspirators constitute a single conspiracy or several sequential, overlapping conspiracies. Multiple conspiracies may be prosecuted sequentially and punished with multiple sanctions; single conspiracies must be tried and punished once. Asked to determine whether they are faced with one or more than one conspiracy, the courts have said they inquire whether:

1. the [location] of the two alleged conspiracies is the same;
2. there is a significant degree of temporal overlap between the two conspiracies charged;
3. there is an overlap of personnel between the two conspiracies (including unindicted as well as indicted co-conspirators);
4. the overt acts charged [are related];
5. the *role played* by the defendant [relates to both];
6. there was a common goal among the conspirators;
7. whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators; and
8. the extent to which the participants overlap[ped] in [their] various dealings.[163]

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[159] U.S. Const. Amend. V.

[160] United States v. Dixon, 509 U.S. 688, 696 (1993) ("The prohibition applies both to successive punishments and to successive prosecutions for the same offense."); Yeager v. United States, 557 U.S. 110, 119 (2009) ("[T]he Double Jeopardy Clause precludes [as collateral estoppel] the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial."); United States v. Wittig, 575 F.3d 1085, 1100-101 (10th Cir. 2009) ("[W]hen the only way the government can prove one of the elements of a conspiracy offense is to prove the same facts decided against it in a prior trial on a substantive offense, collateral estoppel bars the attempt.").

[161] Rutledge v. United States, 517 U.S. 292, 297 (1996).

[162] United States v. Felix, 503 U.S. 378, 391 (1992); United States v. Pierre, 795 F.3d 847, 852 (8th Cir. 2015); United States v. Faulkner, 793 F.3d 752, 758 (7th Cir. 2015); United States v. Thomas, 726 F.3d 1086, 1091 (9th Cir. 2013); United States v. Tovar, 719 F.3d 376, 383 (5th Cir. 2013).

[163] United States v. Rigas, 605 F.3d 194, 213 (3d Cir. 2010); *see also* United States v. Pierre, 795 F.3d 847, 849-50 (8th Cir. 2015) ("In determining whether separately-charged conspiracies are really a single conspiracy, this court applies a 'totality of the circumstances' test. In applying that test, our cases consider: (1) the timing of the alleged conspiracies; (2) the identity of alleged co-conspirators; (3) the offenses charged in the indictments; (4) the overt acts charged ... or any other description of the offense charged which indicate the nature and scope of the activity charged; and (5) the locations of the alleged conspiracies."); United States v. Wheeler, 535 F.3d 446, 449 (6th Cir. 2008)(citing factors [1] through [4] in addition to the statutory offenses charged in the indictments); United States v. Njoku, 737 F.3d 55, 69 (5th Cir. 2013).

Co-conspirator Declarations

At trial, the law favors the testimony of live witnesses—under oath, subject to cross examination, and in the presence of the accused and the jury—over the presentation of their evidence in writing or through the mouths of others. The hearsay rule is a product of this preference. Exceptions and definitions narrow the rule's reach. For example, hearsay is usually defined to include only those out-of-court statements which are offered in evidence "to prove the truth of the matter asserted."[164]

Although often referred to as the exception for co-conspirator declarations, the Federal Rules of Evidence treats the matter within its definition of hearsay. Rule 801(d)(2)(E) of the Federal Rules provides that an out-of-court statement is not hearsay if "[t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." For an out-of-court statement to be admissible under the Rule, the government must show by a preponderance of the evidence that (1) a conspiracy existed, (2) the speaker and the defendants were co-conspirators, and (3) the statement was made in furtherance of the conspiracy.[165] The court, however, may receive the statement preliminarily subject to the prosecution's subsequent demonstration of its admissibility by a preponderance of the evidence.[166]

As to the first two elements, a co-conspirator's statement without more is insufficient; there must be "some extrinsic evidence sufficient to delineate the conspiracy and corroborate the declarant's and the defendant's roles in it."[167] As to the third element, "[a] statement is in furtherance of a conspiracy if it is intended to promote the objectives of the conspiracy."[168] A statement is in furtherance, for instance, if it describes for the benefit of a co-conspirator the status of the

[164] FED .R. EVID. 801(c).

[165] Bourjaily v. United States, 483 U.S. 11, 175 (1987); United States v. Merritt, 945 F.3d 578, 586 (1st Cir. 2019); United States v. Mathis, 932 F.3d 242, 254 (4th Cir. 2019) ("To introduce a co-conspirator's statements under Federal Rule of Evidence 801(d)(2)(E), the government was required to show by a preponderance of the evidence that (1) a conspiracy existed, (2) the conspiracy included both the declarants and the defendants against whom the statements were offered, and (3) the statements were made during the course of and in furtherance of the conspiracy."); *see also* United States v. Lebedev, 932 F.3d 40, 51 (2d Cir. 2019); United States v. Torrez, 925 F.3d 391, 395 (8th Cir. 2019); United States v. Gurrola, 898 F.3d 524, 535 (5th Cir. 2018).

[166] *E.g.*, United States v. Leoner-Aguirre, 939 F.3d 310, 320 (1st Cir. 2019); United States v. Haire, 806 F.3d 991, 997 (8th Cir. 2015); United States v. Warman, 578 F.3d 320, 335 (6th Cir. 2009).

[167] United States v. Mitchell, 596 F.3d 18, 23 (1st Cir. 2010); *see also* United States v. Mayfield, 909 F.3d 956, 960 (2018) ("[T]he government must provide independent evidence outside that statements themselves to establish the existence of the conspiracy."); United States v. Liera, 585 F.3d 1237, 1245-246 (9th Cir. 2009); United States v. Benson, 591 F.3d 491, 502 (6th Cir. 2010); United States v. De La Torre, 907 F.3d 581, 593 (8th Cir. 2019) (The Rule applies to the statements of unindicted co-conspirator.).

[168] *Warman*, 578 F.3d at 338; United States v. Flores, 572 F.3d 1254, 1264 (11th Cir. 2009).

scheme, its participants, or its methods.[169] Bragging, or "mere idle chatter or casual conversation about past events," however, is not considered a statement in furtherance of a conspiracy.[170]

Under some circumstances, evidence admissible under the hearsay rule may nevertheless be inadmissible because of Sixth Amendment restrictions. The Sixth Amendment provides, among other things, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The provision was inspired in part by reactions to the trial of Sir Walter Raleigh, who argued in vain that he should be allowed to confront the alleged co-conspirator who had accused him of treason.[171] Given its broadest possible construction, the confrontation clause would eliminate any hearsay exceptions or limitations.[172] The Supreme Court in *Crawford v. Washington* explained, however, that the clause has a more precise reach. The clause uses the word "witnesses" to bring within its scope only those who testify or whose accusations are made in a testimonial context. In a testimonial context, the confrontation clause permits use at trial of prior testimonial accusations only if the witness is unavailable and only if the accused had the opportunity to cross examine him when the testimony was taken.[173] The Court elected to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'"[174] but has suggested that the term includes "affidavits, depositions, prior testimony, or confessions [, and other] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[175]

Since *Crawford*, the lower federal courts have generally held that the Confrontation Clause poses no obstacle to the admissibility of the co-conspirator statements at issue in the cases before them,

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[169] United States v. Mathis, 932 F.3d 242, 254-55 (4th Cir. 2019) (statements in furtherance include a conspirator's statements informing co-conspirators of the status of the scheme or requesting assistance in furtherance of the plot's objectives); United States v. Wenxia Man, 891 F.3d 1253, 1271 (11th Cir. 2018) (quoting United States v. Siegelman, 640 F.3d 1159, 1181 (11th Cir. 2011)) ("Indeed, '[t]he statement need not be necessary to the conspiracy, but must only further the interest of the conspiracy in some way' For example, statements that 'could have been intended to affect future dealings between the parties,' that 'provide reassurance,' that 'serve to maintain trust and cohesiveness or that 'inform [other conspirators] of the current status of the conspiracy' satisfy this standard."); United States v. Tamman, 782 F.3d 543, 553 (9th Cir. 2015); United States v. Meeks, 756 F.3d 1115, 1119 (8th Cir. 2014); United States v. Alviar, 573 F.3d 526, 545(7th Cir. 2009) ("In conspiracy cases statements that are part of the information flow between conspirators intended to help each perform his role satisfy the 'in furtherance' requirement of Rule 801(d)(2)(E).").

[170] *Gurrola*, 898 F.3d at 535-36 (quoting United States v. Cornett, 195 F.3d 776, 782 (5th Cir. 1999)) ("The 'in furtherance of' element 'is not to be construed too strictly lest the purpose of the exception be defeated. However, to pass muster, a statement must advance the ultimate objects of the conspiracy – 'mere idle chatter' will not suffice."). *Warman*, 578 F.3d at 338.

[171] *Crawford v. Washington*, 541 U.S. 36, 44, 52 (2004) ("One of Raleigh's trial judges later lamented that the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.... Raleigh's trial has long been thought as a paradigmatic confrontation violation.").

[172] "If taken literally, the Clause would bar all hearsay, or at least all hearsay uttered by a declarant unavailable for examination at trial," Ben Trachtenberg, *Coconspirator, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 HASTINGS L. J. 581, 637 (2010).

[173] *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States [and Congress] flexibility in their development of hearsay law ... as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[174] *Id.*

[175] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321 (2009), quoting Crawford v. Washington, 541 U.S. at 51-2 (2004).

either because the clause does not bar co-conspirator declarations generally,[176] because the co-conspirator's statement was not offered to establish the truth of the asserted statement,[177] or because admission of the co-conspirator's statement was harmless error.[178]

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[176] *E.g.*, United States v. Yurek, 925 F.3d 423, 437 (10th Cir. 2019) ("Statements in furtherance of a conspiracy are nontestimonial, so they are admissible even when the defendant cannot confront the declarants."); United States v. Mathis, 932 F.3d 242, 255-56 (4th Cir. 2019) ("We conclude that the challenged co-conspirator statements were not testimonial nature. The defendant made the challenged statements to co-conspirators and to Lloyd about criminal activities relating to the DNGS criminal enterprise. Moreover, all the statements were made in furtherance of that criminal conspiracy and were not intended to be used as a substitute for trial testimony. Accordingly, the admission of the challenged statements did not violate the defendants' rights under the Confrontation Clause."); United States v. Mayfield, 909 F.3d 956, 962 (8th Cir. 2018) (quoting United States v. Singh, 494 F.3d 653, 658 (8th Cir. 2007)) ("'However, co-conspirators' statements made in furtherance of a conspiracy and admitted under Rule 801(d)(2)(E) are generally non-testimonial and, therefore, do not violate the Confrontation Clause as interpreted [in *Crawford*].'").

[177] *E.g.*, United States v. Barragan, 871 F.3d 689, 705 (9th Cir. 2017) (quoting United States v. Toliver, 454 F.3d 660, 666 (7th Cir. 2006) ("The informant's statements [relating to a conversation with a co-conspirator] were not admitted for their truth, and 'the admission of such context evidence does not offend the Confrontation Clause.'"); United States v. Cesareo-Ayala, 576 F.3d 1120, 1127-128 (10th Cir. 2009) ("The government contends that Mendez' statements in the two conversations are not hearsay and do not implicate the Confrontation Clause because they were not offered in evidence to prove the truth of the matter asserted. We agree").

[178] United States v. Torrez, 925 F.3d 391, 395 (8th Cir. 2019) (addressing a confrontation challenge raised first on appeal: "Because the jury's believing other witnesses was both necessary and sufficient to obtain Torrez's convictions, admitting the lab report (or testimony about it) could not affect Torrez's substantial rights. Thus, we hold no plain error occurred in the admission of the lab report and related testimony.").