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Federal Conspiracy Law: An Abbreviated 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 offense 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." Terrorists, drug traffickers, mafia members, and corrupt corporate executives have one thing in common: most are conspirators subject to federal prosecution. 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." 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." Finally, "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." In sum, "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." Congress and the courts have fashioned federal conspiracy law accordingly.

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. Conspiracy is a separate offense under most of these statutes, regardless of whether the conspiracy accomplishes its objective. 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.

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. Section 371 conspiracies are punishable by imprisonment for not more than five years. Elsewhere, conspirators often face more severe penalties that attend the underlying substantive offense.

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."

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. Members of the conspiracy are also liable for the foreseeable crimes of their fellows committed in furtherance of the common plot. Moreover, statements by one conspirator are admissible evidence against all. Conspiracies are considered continuing offenses for purposes of the statute of limitations and venue. They are also considered separate offenses for purposes of sentencing and of challenges under the Constitution's ex post facto and double jeopardy clauses.

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, 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. 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."

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. 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. The same year, 1825, Congress outlawed conspiracies to engage in maritime insurance fraud. 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. Shortly thereafter, Congress outlawed conspiracies to defraud the United States through the submission of a false claim, and followed that four years later with prohibitions on conspiracies to violate federal law or to defraud the United States. This last enactment has traveled through the years substantively unchanged, appearing as Section 37 of the 1909 Criminal Code and then in the 1948 revision as 18 U.S.C. § 371.

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, the Sherman Act anti-trust provisions, and the drug and racketeering statutes 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. 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. This is no longer the case. In like manner at common law, corporations could not be charged with a crime. 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. Conversely, an informant or undercover officer cannot be counted as one of the necessary two.

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. Even the acquittal of a co-conspirator is no defense, although no conviction is possible if all but one alleged conspirator are acquitted. 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.

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 equals the number of individuals necessary for the commission of the underlying offense. "The narrow rule is implicated 'only when it is *impossible under any circumstances* to commit the substantive offense without cooperative action.'" 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." And under federal law, the rule reaches no further than to the types of offenses that gave birth to its recognition—dueling, adultery, bigamy, and incest—unless Congress has indicated otherwise.

Agreement

The essence of conspiracy is an agreement to commit some act condemned by law. Thus, there is no conspiracy when one of the two parties only feigns agreement, as in the case of an undercover officer or informant. Moreover, proximity does not constitute agreement; "mere association, standing alone, is inadequate; an individual does not become a member of a conspiracy merely by associating with conspirators known to be involved in crime." 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. "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 evidence suggesting unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy."

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. 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." Others do so to avoid sweeping mere one-time customers into a large-scale trafficking operation. Still others do so lest traffickers and their addicted customers face the same severe penalties. All agree, the exception rarely extends beyond the one-time small transaction.

Overt Acts

Conviction under 18 U.S.C. § 371 to commit a substantive federal offense requires proof that one of the conspirators committed an overt act in furtherance of the conspiracy. More than a few federal statutes, however, have a conspiracy component that does not include an explicit overt act requirement. Whether these statutes have an implicit overt act requirement can be determined only on a statute-by-statute basis. Even then, however, the courts have sometimes reached different conclusions. In the case of prosecution under 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. Moreover, a single overt act by any of the conspirators in furtherance of plot will suffice.

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 conspirators. 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" by

"deceit, craft or trickery, or at least by means that are dishonest." 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. 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.

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." 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. 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.

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.'"

When Does It End?

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

The liability of individual conspirators continues on from the time they joined the plot until it ends or until they withdraw. The want of an individual's continued active participation is no defense as long as the underlying conspiracy lives and he has not withdrawn. An individual who 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. The burden that he has withdrawn rests with the defendant. "Withdrawal terminates the defendant's liability for post withdrawal acts of his co-conspirators, but he remains guilty of conspiracy."

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). Most drug trafficking, terrorism, racketeering, and many white collar conspirators face the same penalties as those who commit the underlying substantive offense.

The United States Sentencing Guidelines greatly influence the sentences imposed for federal crimes. 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. Reasonableness standards govern review of their sentencing decisions, and a sentence within the Sentencing Guidelines range is presumed reasonable.

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, 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.

The base offense level for conspiracy is generally the same as that for the underlying offense, either by operation of an individual guideline, or by operation of the general conspiracy guideline. In any event, conspirators who play a leadership role in an enterprise are subject to an increase of from 2 to 4 levels, and those who play a more subservient role may be entitled to a reduction of from 2 to 4 levels. 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). An example from a wire fraud "score card" appears in the margin.

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. 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).

Restitution

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

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. The general criminal forfeiture statute, 18 U.S.C. § 982, takes the same approach. Several criminal statutes feature their own forfeiture provisions; the Controlled Substances Act (CSA) and RICO are perhaps the most notable of these. Forfeiture follows as a consequence of conspiracy to violate either of these statutes. Other free-standing, conspiracy-enveloping forfeiture statutes apply to human trafficking offenses, theft of trade secrets, child pornography, and interstate transportation of a child for unlawful sexual purposes, 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. On the other hand, conspirators may be prosecuted for conspiracy, for any completed offense which is the object of the conspiracy, and for any foreseeable offense committed in furtherance of the conspiracy.

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. 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." 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.

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. Federal law has no general attempt statute. Congress, however, has outlawed attempt to commit a substantial number of specific federal offenses. Like conspiracy, a conviction for attempt does not require the commission of the underlying offense. Both require an intent to commit the contemplated underlying offense. 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. Unlike conspiracy, attempt can be committed by a single individual. 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. Conspiracy requires, at most, no more than an overt act in furtherance; attempt, a substantial step to completion. Moreover, unlike a conspirator, an accused may not be convicted of both attempt and the underlying substantive offense.

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. 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. 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." 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." As is the case of attempt, "[a]n individual cannot be guilty of both the solicitation of a crime and the substantive crime." Although the crime of solicitation is complete upon communication with the requisite intent, renunciation prior to commission of the substantive offense is a statutory defense. The offender's legal incapacity to commit the solicited offense himself, however, is no defense.

Procedural Attributes

Statute of Limitations

The general statute of limitations for federal crimes is five years; prosecution must begin within five years of when the crime's last element has been satisfied. The five-year limitation applies to offenses under the general conspiracy statute, which has an overt act element. 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. A few individual conspiracy statutes, such as the conspiracy to engage in drug trafficking, have no overt act requirement. 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.

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." 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.

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. Rule 12 insists that a motion for severance be filed prior to trial. Rule 14 authorizes the court to grant severance for separate trials as a remedy for prejudicial joinder.

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." 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)." Moreover, "the preference in a conspiracy trial is that persons charged together should be tried together." In fact, "it will be the rare case, if ever, where a district court should sever the trial of alleged co-conspirators." 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." 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." Subsequently lower federal appellate court opinions have emphasized the curative effect of appropriate jury instructions.

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. 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.

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." This prohibition condemns

successive prosecutions, successive punishments, and successive use of charges rejected in acquittal.

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. 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.

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.

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."

Although often referred to as the exception for co-conspirator declarations, the Federal Rules of Evidence treat the matter within the definition of hearsay. Rule 801(d)(2)(E) of the Federal Rules provides that an out-of-court statement is not hearsay if "the 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. The court, however, may receive the statement preliminarily subject to the prosecution's subsequent demonstration of its admissibility by a preponderance of the evidence.

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." As to the third element, "[a] statement is in furtherance of a conspiracy if it is intended to promote the objectives of the conspiracy." A statement is in

furtherance, for instance, if it describes for the benefit of a co-conspirator, the status of the scheme, its participants, or its methods. Bragging, or "mere idle chatter or casual conversation about past events," however, is not considered a statement in furtherance of a conspiracy.

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. Given its broadest possible construction, the confrontation clause would eliminate any hearsay exceptions or limitations. 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. The Court elected to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" 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."

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

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