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Defending Conspiracy Cases: Mission Impossible?

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Defending conspiracy cases has never been an easy task. There were days in which joint trials of 20, 30, 40, or even 50 defendants were not uncommon, creating insuperable problems for defense lawyers. Even though large joint-defendant trials are not as common today, severe problems remain, particularly in light of the frequent use of the conspiracy charge at the federal level. In this article I will discuss some of the recent issues which create special difficulties for criminal defense lawyers. With regard to these issues, there is, as some would say, good news and bad news.

The Bad News

Proof of the Agreement

Proving an agreement, obviously central to the conspiracy count, is rarely a difficult task for the prosecution. There need not be an express agreement and circumstantial evidence can be used to prove the existence of the agreement. One troublesome development, making the agreement even easier to prove, is the so-called unilateral approach to conspiracy. This approach was first promoted by the drafters of the Model Penal Code and has been adopted by a number of state legislatures. The typical statute is much the same as Section 8-2 of the Illinois Criminal Code which provides:

"Conspiracy. (a) Elements of the offense.
"A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

(b) Co-conspirators.
"It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or
(2) Has been convicted of a different offense, or
(3) Is not amenable to justice, or
(4) Has been acquitted, or
(5) Lacked the capacity to commit an offense."

The key difference between this type of statute and the traditional conspiracy statute is that under the standard view the prosecution must prove that two or more persons actually agreed. Under the unilateral approach the prosecution need only prove that this defendant agreed with another person. In many cases that will matter little. In some cases, however, the difference will be significant. In a recent Indiana case, the defendant was intent on murdering her husband. She asked the aid of two persons, one of whom was a police detective, the other a police agent. At no time did the officer or the agent have any intent to commit the murder. The defendant was con-

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vicced of conspiracy to commit murder because she had agreed to commit the crime, even though the other “conspirators” had not.

This view of conspiracy law has been subject to considerable criticism as the major rationale for the conspiracy charge—the fear of group activity—is nonexistent in such cases. Nevertheless, a growing number of states has adopted the approach and as all charges are brought in a single proceeding” the defendants could be sentenced consecutively for violations of the respective conspiracy statutes.12

The result in Rodriguez will create severe difficulties for defense counsel in drug conspiracy cases. Braverman clearly held that a single agreement could not be split into several agreements merely because it violated more than one statute. As stated by Judge Rubin in his dissenting opinion in Rodriguez:

“...I see little difference between fragmenting a conspiracy according to the number and diversity of its objectives in order to charge several violations of a single statute, and using the same technique to charge violations of two statutory provisions. The teaching of Braverman is that a conspiracy cannot be so fragmented.”

In spite of this criticism, however, several circuits have utilized the reasoning in Rodriguez14 and the Fifth Circuit itself has applied the rule to drug conspiracies and conspiracies under the RICO statute (Racketeer Influenced and Corrupt Organizations, 18 USC §1961, et seq.).15

Co-Conspirator Declarations

Statements made by co-conspirators during the course of and in furtherance of the conspiracy are admissible at trial against the declarant and any other members of the conspiracy. While the very nature of this rule has been subject to some criticism, it is a well-entrenched feature of evidence law. Three aspects of it, however, are troublesome.

First, what kind of evidence can be used to prove that the declarant and the defendant were both members of the ongoing conspiracy and to prove that the statements were made in furtherance of that conspiracy? Most courts take the position that the hearsay declaration itself cannot be used to prove the membership in the conspiracy. There is, however, a rather ominous line of cases which suggests that under the new Federal Rules of Evidence hearsay evidence itself is admissible to prove the conspiracy.

For instance, in United States v. Vincent16 the Sixth Circuit relied heavily on the fact that the finding with regard to the membership in the conspiracy was a finding to be made by the trial judge rather than the jury. As a consequence, the judge is not “bound by the rules of evidence.” Hence, in the Sixth Circuit the trial judges can rely on the hearsay statements themselves in determining the membership in the conspiracy. If ever there was potential for a bootstrapping admissibility finding, it certainly exists today in the federal courts of Michigan, Ohio, Kentucky, and Tennessee.

Related to the problem of proving the existence of the conspiracy and membership in it is the manner of presentation of evidence. As every experienced criminal defense lawyer knows, the government is not first required to prove the existence of the conspiracy and the membership in it and then offer the hearsay statement to the jury. To the contrary, the general rule is that the trial judge, in his or her discretion, may allow the offer of the statement first. A limiting instruction would then be given, noting that the statement is “subject to being connected up” by later proof to the satisfaction of the trial judge.

Such a procedure is fraught with great risk, as a later failure to “connect up” may not wholly eliminate the impression the statement made on the jurors’ minds. In only one recent case, however, was it suggested that the trial judge first would be required to find sufficient proof of the conspiracy before the statement could be admitted. Ultimately, in that case the Fifth Circuit en banc reversed.17

The final co-conspirator declaration issue concerns the use of statements where the defendant/conspirator is currently on trial but the declarant/co-conspirator was previously acquitted of the same conspiracy charge. The courts take the position that the statement of the acquitted co-conspirator is admissible.
of it. As stated by the Seventh Circuit:16

"[T]he differences between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference in burden of proof, mean that neither collateral estoppel nor res judicata automatically bars the use of statements by a person who has been acquitted of the crime of conspiracy...."17

This rule makes sense because the burdens of the government are very different; the prosecution must only make a prima facie showing, or demonstrate by a preponderance of the evidence, that a statement was supposed to have been made.

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The evidence, that a statement was made during the course of and in furtherance of the conspiracy. Nevertheless, as a matter of policy it is somewhat difficult to justify this rule. After all, a jury found that the government did not prove that the defendant was a functioning member of the conspiracy when the statement was supposed to have been made. Considering the great weight given to the co-conspirator’s declaration in many trials, this evidence may be decisive.

The Slight Evidence Rule

Proof of guilt must be personal. The government must prove, beyond a reasonable doubt, that this defendant committed the crime. Is it possible, then, that “[o]nce the existence of a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient proof of his involvement in the scheme”? Not only is such a view possible, but it is the prevailing law in most circuits. As the Eighth Circuit pointed out in the above quote, the essence of the proof requirement goes to the establishment of the conspiracy, rather than the connection of the defendant to it.18 Sometimes this “slight evidence rule” is formulated differently:

"Once the existence of a conspiracy is established, evidence establishing beyond reasonable doubt a connection of a defendant with a conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. Thus, the word ‘slight’ properly modifies ‘connection’ and not ‘evidence.’ It is tied to that which is proved, not to the type of evidence or the burden of proof."19

The rationale behind the rule is hard to justify, no matter how formulated. It states that appellate review is limited to determining whether slight evidence existed, not to whether there was substantial evidence to support a finding of proof beyond a reasonable doubt as to this individual defendant.

The Concurrent Sentence Doctrine

Let us suppose the common situation. The defendants are convicted of distribution (or possession) of narcotics and conspiracy to distribute the drugs. The sentences given for the two charges are concurrent rather than consecutive. The defendants appeal. Focusing its attention on one of the counts – and it does not truly matter which – the appellate court concludes that there is no error with regard to that count. Will the defendant then have review in the appellate court of the second count?

In most cases the answer is no; applying the concurrent sentence doctrine most courts will say it is unnecessary to look to the claims with regard to the remaining count. These issues raised can often be extremely damaging to the defendant. Nevertheless, a good many courts apply the doctrine in precisely that way.22

The Good News

Up to this point I have painted a rather stark portrait of the problems faced in defending conspiracy cases. There is some good news, however.

Proof of the Agreement

Most courts do reject the unilateral conspiracy view and rely on the traditional view that “the crime of conspiracy requires a concert of action among two or more persons for a common purpose....”23 Moreover, the serious potential in federal prosecutions for the unilateral approach does not exist at this time. The standard view under both the general conspiracy section and the Title 21 drug conspiracy provisions is that proof of a “true agreement” conspiracy is required. Under the early drafts of the proposed revised criminal code, however, the Model Penal Code unilateral approach to conspiracy would have been adopted. In the most recent proposal put forth the unilateral approach has been rejected.24

Cumulative Punishment, Multiple Conspiracies

While the en banc disposition in Rodriguez will no doubt send chills down the spines of the defense lawyers who see double conspiracy charges, the Supreme Court as yet has not spoken to this point. Further,
Judge Rubin's dissent is a telling one, focusing on the rationale behind Braverman. At this time there is no clear indication that the Rodriguez view will prevail throughout the country. At least two other circuits have expressly rejected the reasoning of the Fifth Circuit.25

Co-Conspirator Declaration
The co-conspirator declaration is an established exception to the hearsay rule. And, more importantly, it is heavily used in conspiracy prosecutions. Still, the concerns expressed above may not be as serious as they appear. While the Sixth Circuit allows the use of hearsay to establish the conspiracy and its membership, most other courts do not. Most courts say that the "out-of-court statement itself may [not] be considered by the trial judge in determining its admissibility."27

The second co-conspirator declaration problem relates to the order of proof. This continues to be an area of concern, as in many cases the declaration comes in well before the supporting evidence is found by the trial court. Still, if the proper connection is not made and instructions are not likely to cure the harm, the mistrial remedy always is available. Also, even though the order of the proof is within the discretion of the trial court, some courts are now stating that the "preferred" order of proof is to have the foundation laid for the declaration allowing conditional admission only when necessary.28

The problem of the acquitted declarant—while not terribly rare—is not all that significant as a practical matter. In most cases the declarant in a prior trial is not acquitted. Indeed, in most cases, the declarant and the defendant are jointly on trial so the situation will not arise. In the case in which the declarant has been acquitted it is true that most courts will not say that there is a per se rule against the admissibility of his or her out-of-court declaration. The trial judge will, however, look to the acquittal "as relevant and persuasive in the determination of whether the government has demonstrated the requisite criminal joint venture."29

The Slight Evidence Rule
We finally come to an area where the good news is clearly overwhelming the bad news. The good news comes from the Fifth Circuit in an en banc opinion which is likely to have very significant impact. Judge Coleman in a panel decision stated:

"I cannot bring myself to believe that upon appellate review only 'slight evidence' is required to connect a particular defendant with a conspiracy. 'Substantial evidence' should be, and I believe is the test."30

In the en banc disposition of the case the other twelve judges of the Fifth Circuit agreed. In an opinion written by Judge Coleman the court stated:

"We are convinced that when the sufficiency of the evidence to support any criminal conviction, including conspiracies, is challenged on appeal the correct standard of review is substantial evidence, it being understood, of course, that the evidence is to be viewed in the light most favorable to the government. The 'slight evidence' rule as used and applied on appeal in conspiracy cases since 1969 should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly banished as to all appeals hereafter to be decided by this court."31

The Concurrent Sentence Doctrine
This doctrine is applied all too often to limit the substantive legal challenges by conspiracy defendants. In recent years, however, more attention has been given to the adverse collateral consequences which can arise from the unreviewed convictions. Several courts now have advised the district judges that they will review all claims in the normal situations.

"Despite such statements, we have often applied the doctrine mechanically without really considering the adverse consequences. Because it may have been unclear in our past cases, we now expressly hold that a court may not apply the concurrent sentence doctrine at least in the situation where there is a significant likelihood that the defendant will suffer adverse collateral consequences from the unreviewed conviction."32

The Second Circuit was even more direct when it noted that "utilization of the concurrent sentence doctrine is now the exception rather than the rule."33

Conclusion
Is it "mission impossible" today for the defense lawyer in the world of conspiracy prosecutions? No, the good news in some of the important areas does help to balance out the bad news. However, it is still very difficult for the criminal defense lawyer who is handling a conspiracy case. In addition to the matters discussed above, there are numerous other matters which raise concerns for the defense...

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including prosecutions under the very broad RICO statute34 and so-called Bruton problems.35 There is good reason for the heightened use of the conspiracy charge, especially in joint trials. The reason is that it is a powerful weapon in the prosecution's arsenal:

"It is obvious why some prosecutors, with our aid and comfort, are enamoured bringing allegations of mass conspiracy. No matter how thin the proof as to individual defendants, once the jury has looked at the sheer numbers involved and has been shocked by the extensive evidence of criminal activity by a remote actor, the chance that they [sic] will pay serious attention to the absence of substantial proof as to one individual is not particularly great. A doctrine which permits this impairs liberty."36

(see References, page 86)
Marcus, p. 61

1 See, e.g., Capriola v. United States, 61 F.2d 5 (7th Cir. 1932), cert. denied 287 U.S. 671, where 59 defendants were tried together, and Allan v. United States, 4 F.2d 688 (7th Cir. 1924), cert. denied 267 U.S. 597, where 63 defendants were tried together.

2 But see, United States v. Peterson, 611 F.2d 1313 (10th Cir. 1979), where 14 defendants were joined together for trial, and United States v. Barrentine, 591 F.2d 1069 (5th Cir. 1979), where 18 defendants were joined together. For good discussions of the practical problems involved with multi-defendant conspiracy cases, see, two recent articles in the April 1978 edition of this magazine: Kadish and Nafman, “Handling the Multi-Defendant Criminal Case’’ and Van Camp, “Preparing the Criminal Defense Case’’ (vol. 14, no. 4, pp.33-41).


5 The Prosecution and Defense of Criminal Conspiracy Cases at §2.04.


7 317 U.S. 49 (1942).

8 Id. at 53.

9 As in United States v. Mori, 444 F.2d 240 (5th Cir. 1971), cert. denied 404 U.S. 913, where it was the general conspiracy statute, §371, and the then-drug control statute, 21 U.S.C. §174.

10 612 F.2d 906 (5th Cir. 1980).


12 Note 10, supra, at 924.

13 Id. at 926.


15 United States v. Smith, 574 F.2d 308 (5th Cir. 1978).

16 606 F.2d 149, 153 (6th Cir. 1979).

17 United States v. James, 576 F.2d 1121 (5th Cir. 1978), 590 F.2d 575 (5th Cir. en banc 1979).

18 United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979).

19 United States v. Schmaltz, 562 F.2d 558, 560 (8th Cir. 1977). See also, United States v. Friedman, 593 F.2d 109 (9th Cir. 1979); United States v. Kearney, 560 F.2d 1358 (9th Cir. 1977).

20 United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977).


22 See, e.g., United States v. Muller, 550 F.2d 1375 (5th Cir. 1977); United States v. Carpio, 547 F.2d 490 (9th Cir. 1976).

23 United States v. Mancillas, 580 F.2d 1301 (7th Cir. 1978).

24 As reported out by the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives. See, H.R. 6233, January 10, 1980, as well as the testimony on this point of the author in the Hearings before the Subcommittee, 95th Cong., 1st and 2nd Sess., Serial No. 52 at 336.


26 This out-of-court declaration offered for the truth of the matter asserted is not labeled hearsay under the new Federal Rules, 801(D)(2)(e). The designation aside, the Federal Rules do not change the essence of the normal co-conspirator hearsay exception.

27 United States v. Macklin, 573 F.2d 1046, 1048 n.2 (8th Cir. 1978). See also, United States v. Papia, 560 F.2d 827, 835 (7th Cir. 1977); United States v. James, 590 F.2d 575 (5th Cir. 1979); United States v. DeFilippo, 590 F.2d 1228 (2nd Cir. 1979); United States v. Giese, 597 F.2d 1170 (9th Cir. 1979).

28 United States v. James, 590 F.2d 575, 581-82 (5th Cir. 1979); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).

29 Note 18, supra.

30 United States v. Malatesta, 583 F.2d 748, 764 (5th Cir. 1978) [concurring opinion].

31 United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir. en banc 1979).

32 United States v. Rubin, 591 F.2d 278, 280 (5th Cir. 1979).

33 United States v. Ruffin, 575 F.2d 346, 361 (2nd Cir. 1978).


35 This problem is particularly acute in light of the Supreme Court’s decision in Parker v. Randolph, ___ U.S.____, 99 S Ct. 2132 (1979).


37 United States v. Watson, 594 F.2d 1330, 1345 (10th Cir. 1979) [dissenting opinion of Judge McKay].