A Tangled Web To Unravel: Conspiracy, RICO Prosecutions and Pinkterton Liability

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The Racketeer Influenced and Corrupt Organization statute (RICO)[1] was enacted as part of the Organized Crime Control Act of 1970. It has been described as "a complex, powerful, and controversial law."[2]

Prosecutors and defense attorneys continue to debate whether the act is over or underused. To the defense, it is a dangerous tool of prosecution. The United States Attorney Manual explains that the RICO statutes effectively give prosecutors an end run around the elements of the substantive criminal offense "[b]y making it a crime to acquire, receive income from, or operate an enterprise through a pattern of racketeering, RICO allows prosecutors to abandon a reliance on discrete statutes. Instead, they can prosecute patterns of criminal acts committed by direct and indirect participants in criminal enterprises."[3]

The United States Department of Justice/Criminal Resource Manual § 2482 reads that:

> A defendant in a case charging a conspiracy may be liable for each of the substantive counts charged in an indictment under three separate theories:
>
> 1. Actual commission of the crime;
> 2. Participation in the crime as an aider or abettor;
> 3. Liability under a *Pinkerton* theory.
> 4. Defendants that find themselves the subject of a RICO indictment will read closely that the indictment very likely charges all three.

One will see from the outset how truly complicated it is to defend these cases. The overlapping between these approaches create a very complicated web to unravel. If simple aider and abettor and conspiracy liability were not enough, the Pinkerton doctrine is a judicially-created rule that makes each member of a conspiracy liable for crimes that other members commit to further their joint criminal design.

In *Pinkerton v. United States*,[4] the Court held that the substantive acts of one co-conspirator to advance the ends of the conspiracy "may be the act of all" in the conspiracy "**without any new agreement specifically directed to that act.**"[5] (emphasis added.) Pinkerton's focus is on the substantive offenses as opposed to merely the overt acts. The only limitation suggested in Pinkerton is where the substantive offense "did not fall with the scope of the unlawful project, or" was not reasonable foreseen as a consequence of the criminal plan.[6]

At first glance, Pinkerton seems just to be aider and abettor liability or complicity liability. Looking closer, it is important to understand it in the distinction between an overt act and the substantive offense. Remember that an overt act is an act done openly to manifest desire that the object of the conspiracy be completed. Often the substance offense is the overt act, but not always. It was well settled that a co-conspirator is responsible for the overt acts of a co-conspirator. But could a co-conspirator then be guilty of a substantive offense committed solely by a co-conspirator. Pinkerton ultimately held that a co-conspirator can be convicted of substantive offenses committed by a co-conspirator so long as it was reasonably foreseeable that the substantive offense was within the scope of the unlawful project.

Where this becomes incredibly dangerous is when the conspiracy involves multiple co-conspirators some of whom may not even know each other. For instance, "[a] hub-and-spoke conspiracy is one in which a "'key man' [or hub] directs and coordinates the activities and individual efforts of various combinations of people.'"[7] It is settled that "[i]t is irrelevant that particular conspirators may not have known other conspirators," because when a "'key man' directs and coordinates the activities and individual efforts of various combinations of people," the hub may be properly convicted of a single conspiracy.[8] Ohio Courts follow the Pinkerton rule finding a defendant "vicariously guilty of the object crimes committed in furtherance of the conspiracy by any of the other conspirators."[9]

Then add to this complex mix, the rules of evidence excepting co-conspirator statements from hearsay and allowing co-defendants to be tried together and the legal and factual battle will be like no other. A defendant might then find herself defending statements of alleged co-conspirators some of whom she may never met. Conspiracy law is rather straightforward. Take just 18 U.S.C. § 1349, which reads "[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." To establish a charge of conspiracy, the government must prove (1) a unity of purpose (2) an intent to achieve a common illegal goal, and (3) an agreement to work towards that goal, which the defendant knowingly joined.[10]

The focus of a conspiracy prosecution will always be on the agreement. You will hear the prosecutor's refrain, "We only need to prove the agreement." There can be no conspiracy without evidence that the defendant agreed to work with someone else, but in a conspiracy, "rarely is there direct evidence of a qualifying agreement."[11]

Although an overt act is an element under the general conspiracy statute in 18 U.S.C.A. § 371, which requires as an element that one or more of the conspirators "do an[ ] act to effect the object of the conspiracy," some conspiracy statutes like 18 U.S.C.A. § 1349 and 18 U.S.C.A.§ 286 do not contain an overt-act requirement. If being charged with conspiracy was not dangerous enough, no allegation or proof of an overt act will be required at trial.[12] It is just the agreement you will hear.

Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if the statement is offered against an opposing party and was made by the party's co-conspirator during and in furtherance of the conspiracy." In *United States v. Enright*,[13] the Sixth Circuit directs that before a statement by a co-conspirator can be admitted as non-hearsay pursuant to Fed.R.Evid. 801(d)(2)(E), the party offering it must show by a preponderance of the evidence that (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the co-conspirator's statements were made in furtherance of the conspiracy.[14] In a similar manner, Ohio's Evid.R. 801(D)(2) exempts co-conspirator statements from the definition of "hearsay."

Pursuant to Fed.R.Evid. 104, the Court should make a finding regarding the admissibility of party admissions. This is colloquially referred to as an Enright hearing. In making an Enright finding, "a mere conclusory statement will not always suffice."[15] The reason these co-conspirator statements are dangerous is that "out-of-court statements are presumed unreliable." As such, the amount of independent evidence required to support an Enright finding "is not merely a scintilla, but rather, enough to rebut the presumed unreliability of the hearsay."[16] Independent evidence to support the finding requires some evidence other than the proffered co-conspirator statements. The government though still bears the burden of proving these three factors but only by a preponderance of the evidence.[17]

Moreover, although the rule does not require that both parties be co-conspirators; it does require that "the statement to be 'offered against a party' and be made by 'a co-conspirator of a party during the course and in furtherance of the conspiracy.'"[18] Culberson is an example of the dangers of extended conspiracies. During his trial, the government introduced a recorded statement between his co-defendant and an unindicted cooperating former co-conspirator. Those statements were admitted against Culberson.
A statement is in furtherance of a conspiracy if it is intended to promote the "objectives of the conspiracy."[19] The Sixth Circuit, in Warman, described the "in furtherance of" requirement as "[w]e have found statements to be in furtherance of a conspiracy where they "identify other co-conspirators and their roles, 'apprise other co-conspirators of the status of the conspiracy, or indicate 'the source or purchaser of controlled substances.'"[20]

Look closely first at the language in the statement. Mere "narrative declarations" by a co-conspirator concerning conspiracy activities or culpability are not considered to be in furtherance of the conspiracy.[21] Moreover, "mere idle conversation" and merely "retrospective statements" are not admissible."[22] Statements which simply describe the events that occurred are not made in furtherance of the conspiracy.[23]

Remember too that it is not so easy to leave a conspiracy. A conspiracy is only terminated when its "central criminal purposes" have been accomplished.[24] Statements designed to conceal an ongoing conspiracy are made in furtherance of the conspiracy for purposes of Rule 801(d)(2)(E).[25] A statement made by a co-conspirator after the crime may be admissible under Evid.R. 801(D)(2)(e) if it was made in an effort to conceal the crime.[26] It is the same under Ohio law: "A conspiracy does not necessarily end with the commission of the crime. A statement made by a co-conspirator after the crime may be admissible under Evid.R. 801(D)(2)(e) if it was made in an effort to conceal the crime."[27]

The Sixth Amendment confrontation right provides little comfort either. The Supreme Court held the right to confrontation applies to all "testimonial statements."[28] To determine whether a statement is testimonial in nature, the proper inquiry is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."[29] In Crawford, the Supreme Court noted that a statement made in furtherance of a conspiracy is an example of an inherently non-testimonial statement.[30]

A testimonial statement by a co-defendant is something different; although *Bruton v. United* States,[31] provides a path for the government to nonetheless admit these statements. In Bruton, a postal inspector testified at trial that one of two co-defendants charged with armed postal robbery had confessed that he and Bruton had committed the crime. The United States Supreme Court found the admission of this confession "posed a substantial threat to petitioner's right to confront the witnesses against him[.]" The Supreme Court also held this problem could not be cured by limiting instructions to the jury, stating that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."

A Bruton problem can be "remedied" by: "(1) exclusion of the confession, (2) severance of the trial, or (3) redaction of the confession to avoid mention or obvious implication of the non-confessing defendant."[32] Redaction of the statement, however, may still result in a Bruton violation if "the circumstances of the case and other evidence admitted virtually compel the inference that 'blank' is [the defendant]."[33] Nonetheless, Courts seem generally inclined to redact as opposed to severing trials which brings with it additional burden on the judiciary.

Whenever a defendant raises the Bruton issue, the government will likely first assert that joinder of defendant is proper per Fed.R.Crim.P. 8(b). The rule provides that two or more defendants may be charged "in the same indictment or information 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."

The government will also argue that "[t]he general rule in conspiracy cases is that persons indicted together should be tried together."[34] The government will argue that redaction is enough and that "[w]here a jury must look to other trial evidence to link a defendant to a redacted confession, the Confrontation Clause 'calculus changes' sufficiently to remove the statement from Bruton's protective rule."[35] In essence, the government will argue that it will redact and then let the jury figure out who's name was redacted. With that, although Bruton purports to protect a defendant's Sixth Amendment Right of Confrontation, it provides the government a roadmap to end run around that fundamental right.

With the case law generally supporting the government with all these issues, an appeal is often inevitable. There remains a very real issue of preserving a Bruton issue for appeal as there is still a split among circuits. As far as the Sixth Circuit state of the law, in *United States v. Ford*,[36] the Court did little more than to acknowledge the existence of a circuit split on this question and declined to "wade into this circuit split."

In 2016 in *United States v. Al-Din*, the Sixth Circuit cited Ford and again refused to consider the issue. It wrote:
We review preserved evidentiary challenges based on the Confrontation Clause de novo. *United States v. Vasilakos*, 508 F.3d 401, 406 (6th Cir.2007). When unpreserved, we review for plain error. *United States v. Ford*, 761 F.3d 641, 652 (6th Cir.2014). Generally, a defendant must contemporaneously object to the introduction of disputed evidence or forfeit his claim on appeal. Id. at 653. In this case, Walee and Lewis moved with their codefendants to sever Mustafa's case on the ground that admission of his statements violated *Bruton*, but failed to object when Kranich and Gill used the redacted statements to testify at trial. "Our circuit has not decided whether a motion to sever [alone] preserves a *Bruton* objection. The circuits to consider this question have split on the answer." *Id.* (collecting cases). We do not resolve that question here, because even under de novo review, admission of Mustafa's statements did not violate Walee's and Lewis's confrontation rights. *Id.* at 654.[37]

Not knowing how the Court might rule on preserving the Bruton issue is instructive enough. It should go without saying at this point, that the issue should be preserved both by a pretrial motion to sever as well as an objection at trial. That trial objection should of course be presented to even redacted statements. In fact, the Eighth District Court of Appeals also questioned whether merely objecting without identifying Bruton as the basis was sufficient to preserve the issue for appeal.[38]

Remember to appropriately "federalize" an objection. For instance, in *Duncan v. Henry*,[39] the defense objected to certain "other acts" evidence during a criminal trial by referencing the relevant California Rule of Evidence. The objection was overruled. Ultimately, Henry petitioned the federal court for a writ of *habeas* corpus and alleged that the evidentiary ruling denied him due process as provided by the United States Constitution.

The United States Supreme Court held that Henry's failure to state each and every state and federal constitutional, statutory and evidentiary rule basis had the effect of a waiver of the due process claims.[40] The arguable effect of this ruling requires a litigant to now state *ad nauseam* the "book and verse of the federal constitution" when making evidentiary objections. The trial court of the Eastern District of Michigan though suggests that the rule need not be so strict, "[r]ather, all that is required is that the federal constitutional issue be fairly identified and presented to the state court in such a way that the state court has an opportunity to be alerted to the existence of a federal constitutional question and

have the opportunity to pass on the question."[41] It serves to support that the question of preserving appellate rights though requires the utmost caution.

Some Courts understand this problem. In those instances, a pretrial motion we caption Motion for Inclusive Objections will certainly streamline matters and protect a defendant's appellate and habeas rights. The motion simply states the problem presented by *Duncan v. Henry* and motions the court to rule that every objection inherently states every state and federal constitutional basis.

Even at the appellate stage, these cases have so many moving and overlapping parts. The webbing created by complicity, Pinkerton, co-conspirator statements and RICO is incredibly tight. From the outset defense counsel should try to unwind and separate these issues whereever possible. Know though that this will be no easy task.

Endnotes

[1]18 U.S.C. 1961-1965
[2]Morgan, Virginia, Civil RICO: The Legal Galaxy's Black Hole, University of Akron Law Revie, Vol. 22:2, (Fall 1988), https://www.uakron.edu/dotAsset/ea46cfff-07b0-417e-974f-2da7f12ffb0e.pdf
[3]U.S. Department of Justice, Local Prosecution of Organized Crime: the Use of State RICO Statutes, October 1993, NCJ-143502, https://www.bjs.gov/content/pub/pdf/lpocusricos.pdf
[4]328 U.S. 640 (1946)
[5]*Id.* at 646-647
[6]*Id.* 648.
[7]*United States v. Barsoum*, 763 F.3d 1321, 1330 (11th Cir. 2014), citing *United States v. Richardson*, 532 F.3d 1279, 1284-1285 (11th Cir.2008); *United States v. Edouard*, 485 F.3d 1324, 1347 (11th Cir.2007).
[8]*Barsoum* at 1330, citing *Richardson*, 532 F.3d at 1284–85, 1286.
[9]*State v. McFarland*, 2018-Ohio-2067, ¶ 33, appeal allowed in part, 2018-Ohio-4495, ¶ 33, 154 Ohio St. 3d 1421, 111 N.E.3d 19 (Proposition of Law No. 1 accepted regarding conspiracy liability.)
[10]*United States v. Boria*, 592 F.3d 476, 481 (3d Cir.2010); *United States v. Pressler*, 256 F.3d 144, 149 (3d Cir.2001).
[11]*Pressler*, 256 F.3d at 149.
[12]*United States v. Chinasa*, 789 F. Supp. 2d 691, 695–97 (E.D. Va. 2011), aff'd, 489 F. App'x 682 (4th Cir. 2012).
[13]579 F.2d 980, 983-984 (6th Cir. 1978)
[14]See *United States v. Wilson*, 168 F.3d 916, 920 (6th Cir.1999).
[15]*United States v. Curro*, 847 F.2d 325, 329 (6 Cir. 1988).
[16]*United States v. Clark*, 18 F.3d 1337, 1342 (6 Cir. 1994).
[17]*Wilson* citing *Bourjaily v. United States*, 483 U.S. 171, 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).
[18]*United States v. Culberson*, Nos. 07–2390, 07–2425, 2009 U.S.App. LEXIS 6384, 2009 WL 776106, at *4 (6th Cir. Mar.24, 2009) (unpublished).
[19]*United States v. Warman*, 578 F3d 320, 338 (6th Cir. 2009) (discussing the "in furtherance of" requirement and citing Clark, 18 F3d at 1342.
[20]*Id.*
[21]*United States v. Fielding*, 645 F.2d 719, 726 (9th Cir. 1981) (per curiam).
[22]*United States v. Phillips*, 664 F.2d 971, 1027 (5th Cir. 1981) cert. denied, 457 U.S. 1136 (1982); *United States v. Lieberman*, 637 F.2d 95, 102-03 (2d Cir. 1980).
[23]*State v. Weimer*, 2016-Ohio-3116, ¶ 45, 66 N.E.3d 50, 60, citing *State v. Braun*, 8th Dist. Cuyahoga No. 91131, 2009-Ohio-4875, 2009 WL 2963759, ¶ 109.
[24]*Grunewald v. United States*, 353 U.S. 391, 401-02 (1957); accord *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977).
[25]*United States v. Payne*, 437 F.3d 540, 546 (6th Cir. 2006).
[26]*Braun v. Morgan*, No. 1:11 CV 00886, 2014 WL 814918, at *38 (N.D. Ohio Feb. 25, 2014), citing *State v. Siller, Cuyahoga App. No. 80219, 2003–Ohio–1948.*
[27]*State v. Weimer*, 2016-Ohio-3116, ¶ 44, 66 N.E.3d 50, 60, citing *State v. Braun*, 8th Dist. Cuyahoga No. 91131, 2009-Ohio-4875, 2009 WL 2963759, ¶ 109.
[28]*Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)*, at syllabus.
[29]*State v. Metter*, 11th Dist. Lake No. 2012–L–029, 2013-Ohio-2039, 2013 WL 2153953, ¶ 35, quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004).
[30]*Id.* at 56, 124 S.Ct. 1354.
[31]391 U.S. 123, 137 (1968)
[32]*Stanford v. Parker*, 266 F.3d 442, 456 (6th Cir. 2001).
[33]*Stanford*, 266 F.3d at 456 (citations omitted).
[34]*United States v. Flannery*, No. 3:09-CR-92, 2010 WL 3283024, at *2 (E.D. Tenn. Aug. 18, 2010), citing *United States v. Smith*, 197 F.3d 225, 230 (6th Cir.1999).
[35]*United States v. Jass*, 569 F.3d 47, 64 (2d Cir. 2009).
[36]761 F.3d 641, 654 (6th Cir. 2014)
[37]*United States v. Al-Din*, 631 F. App'x 313, 321 (6th Cir. 2015)
[38]*State of Ohio vs. Mack.*, No. 42284, 1980 WL 355479, at *2 (Ohio Ct. App. Dec. 24, 1980)
[39](1995), 513 U.S. 364.
[40]*Id.* at 366.
[41]*Barker v. Yukins*, 993 F. Supp. 592, 597 (E.D. Mich. 1998), reversed on other grounds in 199 F.3d 867, 870 (6th Cir. 1999).