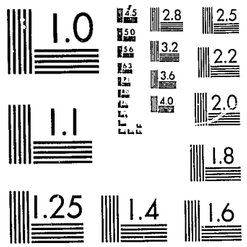

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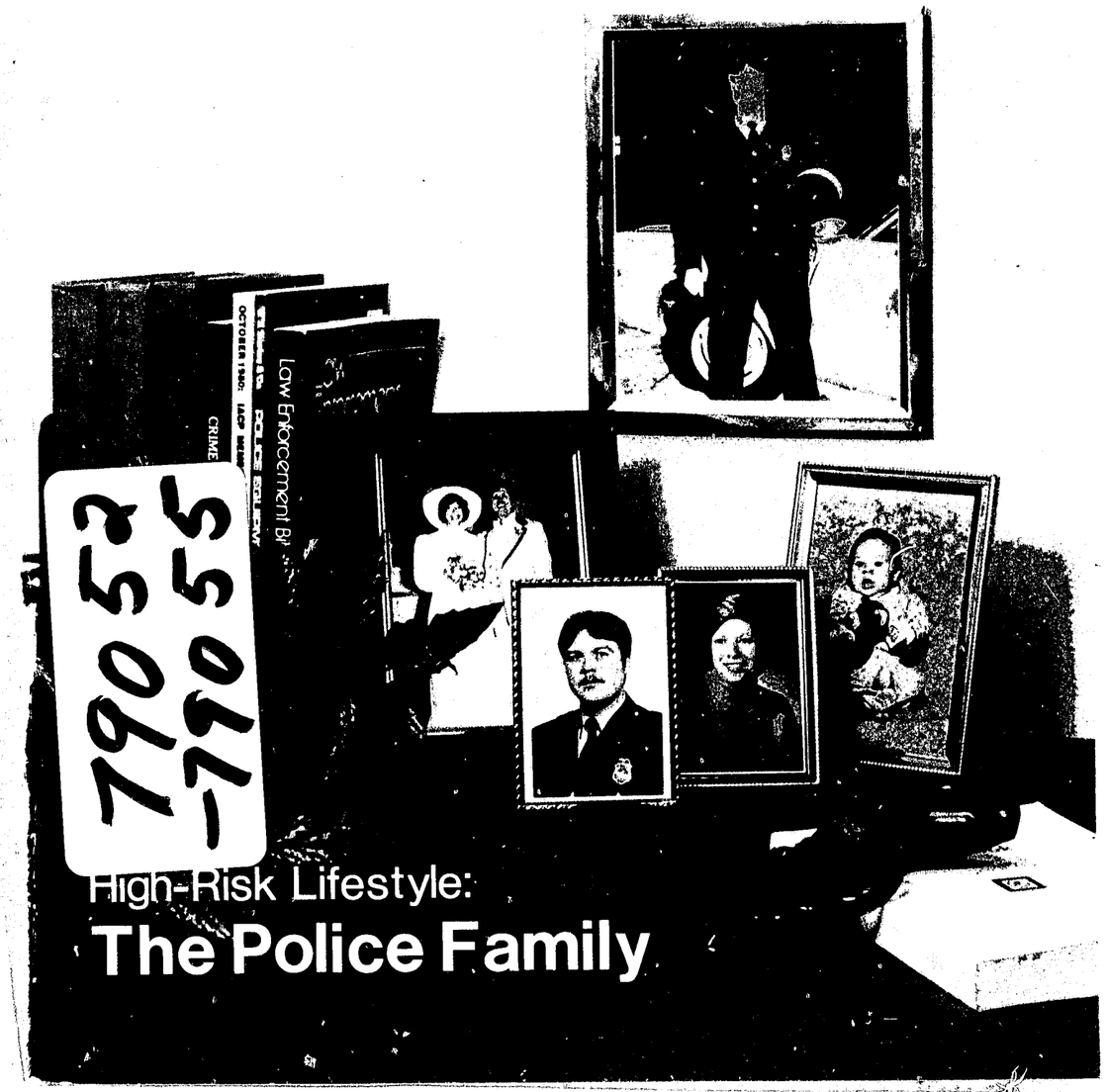

High-Risk Lifestyle: The Police Family

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The Legal Digest

79055

CHAINS, WHEELS, AND THE SINGLE CONSPIRACY (Part I)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Suppose A and B steal an automobile and sell it to C, the owner of a chop-shop that fronts as a legitimate automotive repair business. Then a week later, B and D burglarize a home and sell stolen jewelry to C. In addition to the substantive offenses of motor vehicle theft and burglary, does this activity constitute one criminal conspiracy among all three thieves and the fence or two separate conspiracies with A, B, and C participating in a stolen auto conspiracy and B, C, and D participating in a burglary conspiracy? From a constitutional point of view, does it matter whether the evidence tends to establish one large conspiracy as opposed to two smaller ones? If it does matter, and the prosecutor desires to try jointly as many suspects as possible, how does an investigator gather evidence showing one large conspiracy?

The single vs. multiple conspiracy issue raised by these questions is one of the most perplexing problems facing courts in criminal conspiracy cases.[1] The investigation of this crime can be particularly cumbersome when the evidence establishes a large criminal organization with several persons actively participating in a variety of unlawful acts, while others appear only on the periphery of the enterprise.

Answers to the questions posed previously can provide some guidance to investigators trying to prove one criminal conspiracy based on the activities of numerous individuals. The first part of the article reviews the substantive law of conspiracy and addresses the constitutional considerations raised in both single and multiple conspiracy prosecutions. Next month, in the second part of the article, the "chain" and "wheel"[2] structural forms of conspiracies will be analyzed to show investigators how such concepts have been used successfully to overcome a variety of constitutional challenges to conspiracy prosecutions.

The Conspiracy Weapon

In 1925, Judge Learned Hand referred to the criminal conspiracy charge as that "darling of the modern prosecutor's nursery."[3] This comment seems as relevant today as it was some 56 years ago, for the recent emphasis on organized and white-collar crime prosecutions[4] has made the conspiracy indictment, or additional count of conspiracy in an indictment alleging substantive offenses, a potent prosecutorial weapon. Federal prosecutors generally will include a conspiracy charge whenever a case involves multiple defendants,[5] and there are indications that local prosecutors are increasing their use of the conspiracy charge as an effective approach to such criminal activities as the distribution of narcotics, public corruption, corporate theft, and consumer fraud.[6]

Conspiracy prosecutions are attractive for a variety of reasons. First, the crime of conspiracy permits the intervention of criminal law at a time prior to the commission of a substantive offense. Courts have long recognized the uniqueness in the criminality

Special Agent Campane

of group action. There is a sense of special danger to the public welfare in the combination of individuals bent on committing a crime. The support and cooperation of co-conspirators are believed to increase the likelihood of criminal conduct on the part of each participant and to reduce the possiblity of withdrawal. Many years ago, the U.S. Supreme Court characterized it as follows:

> ". . . an offense of the gravest character, sometimes quite outweighing in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery and adding to the importance of punishing it when discovered."[7]

Second, a conspirator is not allowed to shield himself from prosecution because of a lack of knowledge of the details of the conspiracy, or its intended victims, or the identity of his co-conspirators and their contributions; conspiracy is designed to prevent the opportunity for escaping punishment by someone claiming anonymity within a group. Schemes to defraud, for example, often require a division of labor among numerous individuals in a complex organization. The crime of conspiracy provides society with some protection from such organizations before the plan has gone so far as to be punishable for attempt, when only the active participants can be reached.[8]

Third, and most importantly, there are valuable evidentiary and tactical advantages available to a prosecutor in conspiracy cases. Under the co-conspirator exception to the hearsay rule, an act or declaration by one co-conspirator committed in furtherance of the conspiracy is admissible against each co-conspirator.[9] A conspiracy trial may take place in any jurisdiction where any overt act is committed by any of the conspirators.[10] The statute of limitations is tolled with each additional overt act.[11] Under the theory of complicity, a conspirator is liable for the substantive crimes of his co-conspirators and can be punished for both the conspiracy and the completed substantive offense.[12] Even late joiners to an ongoing conspiracy can be liable for prior acts of co-conspirators if the agreement by the latecomer is made with full knowledge of the conspiracy's objective.[13] Finally, increased judicial convenience and economy are attractive features in conspiracy prosecutions. As a result, judges are generally reluctant to sever defendants for separate trials.[14]

In view of such enticing advantages available to prosecutors in conspiracy cases, investigators should expect to be called upon to gather evidence alleging the existence of one or more conspiracies, in addition to the traditional investigation of substantive crimes.

"The single vs. multiple conspiracy issue . . . is one of the most perplexing problems facing courts in criminal conspiracy cases."

Conspiracy—Development of The Law

The crime of conspiracy began as an English statute narrowly drawn to provide a remedy for a few specific offenses against the administration of justice, such as the procurement of false indictments or the maintenance of vexatious suits. Proof of the falsity of the charge was shown by the jury's acquittal of the defendant.[15] The crime began its gradual expansion in the *Poulterers' Case*,[16] decided in 1611. The defendants confederated to accuse a man falsely of robbery, but he was so obviously innocent that the grand jury refused to return an indictment. As a defense to a subsequent damage suit, the poultry merchants claimed no conspiracy existed because the crime was never consummated, that is, the accused was never indicted, tried, and then acquitted. But the court decided that confederating itself constituted the basis of the crime rather than the actual lodging of an indictment followed by a formal acquittal.

During the latter half of the 17th century, the crime of conspiracy expanded as part of the common law to include agreements to commit any criminal or otherwise unlawful activity. Courts generally applied the rationale of the *Poulterers' Case*, that the gist of the crime of conspiracy was the agreement among confederates and no additional overt act was necessary. The crime also included agreements to commit lawful acts where the means employed were unlawful. In the case of *Rex* v. *Edwards*,[17] decided in 1724, the defendants were indicted for conspiring to marry off a pauper woman to the inhabitant of another town so that their own town might escape liability for support. Ignoring any distinction between law and morals, the prosecutor argued that although the end result (a married woman) was lawful, the purpose of the agreement, namely, to dispose of a town liability, was immoral and rendered the agreement illegal.

This development resulted in the confusing common law definition of conspiracy as a combination of two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means.[18] The object need not, in theory, be a substantive crime. Agreements to commit civil wrongs or to do something immoral or wrongful may be punishable as criminal conspiracies,[19] although many States provide by statute that the object of a criminal conspiracy must be some crime or some felony.[20] Some statutory definitions also provide the additional requirement of proof of an overt act in furtherance of the conspiracy.[21]

But it is the confederating together, the agreement to commit a crime, which furnishes the basis for most conspiracy liability today, and the crime is complete when the agreement is entered into, the overt act being a less significant element of proof.[22] The need to understand and prove the scope of the agreement and the participants to it is the key to success in any conspiracy prosecution.

Constitutional Considerations

As a result of the pervasive present-day use of the conspiracy charge, courts, commentators, and defense attorneys are quick to note the potential for abuse to which such prosecutions lend themselves.[23] That is, while focusing on group behavior, the prosecution may fail to address adequately the constitutional rights of the various individual defendants.

A variety of such constitutional guarantees may be raised and successfully litigated regardless of whether a defendant is prosecuted for his participation in one conspiracy or whether his activities suggest his participation in multiple conspiracies, and regardless of the particularities of varying State conspiracy statutes.

Charging A Single Conspiracy

The evidence may suggest one overall conspiracy, while proof at trial establishes the existence of two or more. It has long been held that in such a case, the variance between the charge and the proof may "affect the substantial rights"[24] of the accused. Althought these rights are rarely well-articulated by the courts, they are founded on two specific constitutional guarantees spelled out by the U.S. Supreme Court over 30 years ago.

In *Berger* v. *United States*,[25] decided in 1934, a single conspiracy to utter counterfeit notes had been charged, but the proof at trial established one conspiracy involving Berger and two co-defendants and another between one of the latter and a fourth defendant. The Supreme Court held that such a variance between the one conspiracy charged and two conspiracies proved did not affect Berger's "substantial rights" to the extent a reversal would have been in order.

But the Court intimated for the first time that such rights are based on the sixth amendment to the U.S. Constitution. The sixth amendment preserves, in part and by implication, an individual's right to a fair trial.[26] A specific component of this sixth amendment protection is the right to be informed of the nature and cause of the accusation.[27] The elements of the charge must be set forth with sufficient particularity to avoid surprise, provide an opportunity for a fair defense, and protect a defendant from a subsequent prosecution by making clear the offense for which he had been previously tried.[28] As the Supreme Court in *Berger* put it:

> "The general rule that allegations and proof must correspond is based upon the obvious requirement (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise at the trial; and (2) that he may be protected against another prosecution for the same offense."[29]

In this case, the Court believed the variance was harmless error because it was equivalent to Berger having been indicted for two conspiracies but convicted of only one, a hypothetical situation in which he could show no prejudice because the evidence against him did prove his involvement in a conspiracy, although a smaller one than that charged.

Nevertheless, the sixth amendment foundation was laid by the Court in the *Berger* case, and it is a potential defense in any complicated single conspiracy prosecution. Defendants will argue that they did not know all the conspirators or what the others were doing; that they are responsible only for what they themselves were doing when caught. Because that usually is only a part of the conspiracy, it is different from the whole, and in consequence, is not the conspiracy alleged in the indictment. For lack of notice of the charge, defendants contend they should be acquitted.[30]

Twelve years later, in 1946, the Supreme Court identified an additional constitutional guarantee available to attack single conspiracy prosecutions. In the leading conspiracy case of *Kotteakos* v. *United States*,[31] 32 defendants were charged in a single conspiracy prosecution for defrauding the Federal Government. The defendants used the same loan broker to assist them to induce various financial institutions and the Federal Housing Administration to grant credit, loans, and advances for housing renovation and modernization. However, the loan applications contained false and fraudulent information because the proceeds were intended to be used for purposes other than required by the National Housing Act. Seven defendants were eventually found guilty.

The circuit court of appeals believed the trial judge was plainly wrong in supposing that upon the evidence, there could be a single conspiracy, for no connection was shown between any of the defendants other than their mutual use of the same loan broker. The appellate court believed the trial judge should have dismissed the indictment for this material variance between the proof and the pleadings, but nevertheless held the error to be nonprejudicial, since guilt was so manifest it was "proper" to join the conspiracies and "to reverse the conviction would be a miscarriage of justice."[32] Citing *Berger*, the appellate court reasoned that because the proof was sufficient to establish the participation of each petitioner in one or more of several smaller conspiracies, none of them could have been prejudiced because all were found guilty of being members of a single larger conspiracy of the same character.[33]

The Supreme Court disagreed with the lower court and reversed the convictions because due process required the defendants' guilt be proved individually and personally. Although the Court was emphatic in pointing out the necessity of particularized case-by-case analysis on the issue of the materiality of a variance, the opinion showed a shift in emphasis from *Berger's* reliance on the criteria of notice of charges and surprise to the equally important factor of transference of prejudicial evidence.

". . . conspiracy is designed to prevent the opportunity for escaping punishment by someone claiming anonymity within a group."

The Court recognized that when many conspire, they invite mass trial, but in such cases every effort must be made to individualize and safeguard each defendant in his relation to the mass. The Court pointed out:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. . . . That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record." [34]

Single conspiracy prosecutions thus create an additional risk of imposing guilt by association when a judge believes it is too difficult a task for the jury to keep the proof against numerous defendants separate. This transference of guilt may affect a "substantial right" guaranteed by the due process clauses of the 5th and 14th amendments to the U.S. Constitution from which a single conspiracy defendant may seek relief.

In a more recent case, the Second Circuit Court of Appeals in *United States* v. *Bertolotti*[35] reversed the single conspiracy conviction of seven individuals for prejudicial variance when it held that the evidence proved multiple conspiracies. The court cited one item of evidence as a specific example of the prejudice suffered by the defendants, as well as an illustration of the inherent dangers of combining unrelated criminal acts under the roof of an alleged single conspiracy. As part of its investigation, the district attorney's office placed a court-authorized wiretap on the telephone of one suspect. Tapes of 55 intercepted calls were played to the jury and introduced as evidence of narcotics negotiations between two defendants. None of the remaining defendants either participated or was mentioned in any of the 55 taped conversations. As a result, the court stated:

> "The prejudicial effect, however, of requiring the jury to spend two entire days listening to obviously shocking and inflammatory discussions about assault, kidnaping, guns and narcotics cannot be underestimated. No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed." [36]

After a review of the evidence as whole, the court concluded:

> "The possibilities of spill-over effect from testimony on these transactions are patent when the number of defendants and the volume of evidence are weighed against the ability of the jury to give each defendant the individual consideration our system requires." [37]

Having concluded that the variance is material because it affects these "substantial rights," [38] a court will generally consider three alternative remedies. First, if the variance is established before or during trial, the government can be compelled to elect which conspiracy to proceed with and which one or more to sever for separate trials.[39] Most importantly, however, the indictment as a whole is not dismissed. Second, the trial judge may continue the trial but instruct the jury to be alert to the possibility of multiple conspiracies and admonish them to separate carefully defendants and conspiracies.[40] But where, at the close of testimony, it is clear that a jury cannot find a single overall conspiracy as a matter of law, the defendant is also entitled to an instruction that the evidence relating to the other conspiracy or conspiracies may not be used against him under any circumstances.[41] A failure to so charge would require reversal.[42] Third, where the variance between the proof and the pleadings is hopelessly confused or where there is a risk of prejudice, either from evidentiary spillover or transference of guilt, a reversal is in order, with the severance of various defendants and conspiracies for retrial.[43]

Constitutional considerations aside, it tries the patience of a court for a prosecutor to complicate criminal prosecutions of multiple defendants and the inevitable appeals with a joint trial, single conspiracy charge. In *United States* v. *Sperling*,[44] the Federal Government successfully indicted 28 defendants in a single conspiracy prosecution to purchase, process, and resell narcotics from 1971 to 1973. Two defendants were acquitted, two pled guilty, eight were unavailable for trial, three were acquitted by the jury, and two had their cases severed for separate trials.

The convictions of the other 11 defendants were upheld on appeal, but the court warned:

> "We take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself." [45]

Charging Multiple Conspiracies

Adherence to the *Sperling* court's admonition, which suggests prosecution for multiple conspiracies in successive trials or multiple counts in one trial, presents equally hazardous constitutional problems.

The fifth amendment to the Constitution provides, in part, that no person shall be put in jeopardy of life or limb twice for the same offense. This guarantee against double jeopardy protects against a second prosecution for the same offense after acquittal or after conviction, and it protects against multiple punishment for the same offense. The prohibition is not just against being twice punished but being twice put in jeopardy of being punished. It was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.[46]

The same offense requirement becomes particularly significant with conspiracy cases. A prosecutor's attempt to try and convict an individual at successive trials for taking part in two successive conspiracies, when only one overall conspiracy is proved, would result in a conviction for the same offense twice.[47] This prohibited prosecutorial procedure is called "fragmentation," [48] and a defendant would be able to bar the second prosecution at the outset by demonstrating that the activities encompassing the allegation were part of one overall conspiracy for which the defendant had already been put in jeopardy in a former prosecution by the same governmental entity.[49]

United States v. *Palermo*[50] is a case in point. Joseph Amabile was associated with Melrose Park Plumbing, a subcontractor for the Riley Management Company which built various apartment building complexes in suburban Chicago from 1962 to 1965. He was tried and convicted in Federal court for conspiring to extort $48,500 from the managment company by threatening Riley with work stoppages and physical violence, and in so doing, interfering with interstate shipments of construction materials.[51]

In a second prosecution, Amabile was tried and convicted for extorting an additional $64,000 from Riley on a later subcontracted construction project in which Amabile conspired with others, including various public officials in Northlake, Ill. On appeal, Amabile successfully argued his participation in one continuous agreement to extort money from Riley whenever his company was Riley's plumbing subcontractor. The Court held:

> "Although the methods of obtaining money from Riley on the various projects may have been different, the overall objective was the same. . . . Even though the incidents occurred over a period of years, the overall agreement constituted a continuing conspiracy against Riley. Since Amabile has already been tried and convicted of conspiring to extort money from Riley, Amabile's Fifth Amendment rights were violated by placing him in jeopardy twice for the same criminal act." [52]

Even if the prosecution is able to show multiple conspiracies, a defendant may argue that the prosecutor has overreached and has resorted unfairly to multiple charges and successive trials in order to accomplish indirectly what the double jeopardy clause prohibits. The defendant will attempt to show that the prosecution is trying to wear him out with a succession of trials when the evidence suggests a lesser number or only one prosecution. The question is whether such a course has led to fundamental procedural unfairness prohibited by the 5th and 14th amendments, and this is determined by the facts of each case.[53]

The prosecution may be able to avoid double jeopardy and due process claims by establishing evidence of multiple conspiracies, but *United States* v. *Guido*[54] suggests an additional hurdle in the path to successful multiple conspiracy prosecutions. Two defendants pled guilty to Federal drug conspiracy charges in California and were subsequently convicted of similar charges in Arizona. On appeal, the defendants contended that their activities consisted of one conspiracy and

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the multiple convictions twice put them in jeopardy and deprived them of due process by subjecting them to piecemeal prosecutions. A Federal appellate court agreed that the evidence established only one conspiracy, but in a strongly worded opinion devised a different reasoning:

> "Here the defendants were prosecuted twice for the same conspiracy due to the failure of the Arizona prosecutor to evaluate properly the prior California indictment. Guido and Boyle raise double jeopardy and due process claims, but we need not rely upon these constitutional safeguards since, under our supervisory power of the administration of criminal justice, the court has the authority to correct such unfairness." [55]

Another form of fragmentation occurs in conspiracy prosecutions when a defendant is charged at one trial with multiple counts of conspiracy and the proof establishes a lesser number or only one.[56] The principal vice of this procedure is that it, too, may result in multiple punishment for participation in a single conspiracy and is equally violative of the double jeopardy clause.

In *Braverman* v. *United States*,[57] the defendants were indicted on seven counts, each charging a general conspiracy to violate separate sections of the Internal Revenue Code. The Supreme Court held that the defendants' manufacture and sale of untaxed alcohol was one conspiracy. "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." [58]

The common remedy for such unconstitutional fragmentation is fortunately less severe than the outright bar to the subsequent prosecution required in multiple trial fragmentation. The court will generally let the trial proceed and ignore the number of charges on which a defendant is subsequently convicted and impose but a single sentence for the one conspiracy.[59]

Defendants A, B, C, and D, the burglars, thieves, and fence in our hypothetical case, would thus be able to avail themselves of a variety of legitimate constitutional and equitable claims to defeat an attempt to prosecute them for their participation in either a single conspiracy or two separate conspiracies. A prosecutor may be able to avoid this potential dilemma and proceed with the more frequent and desired single conspiracy prosecution if the results of the police officer's investigation are thorough enough to structure the unlawful agreement as either a wheel or chain conspiracy.

Such structural descriptions are generally well-accepted by the courts, and in next month's issue, part two of this article will present an analysis of these configurations and provide the police officer with some examples of the kinds of evidence that can join the spokes to the hub of the wheel or weld the links to the chain so that A, B, C, and D may be jointly tried and successfully prosecuted in a single conspiracy prosecution. **FBI**

(Continued next month)

Footnotes

[1] *See, e.g., Krulewitch* v. *United States*, 336 U.S. 440, 446 (1948) (Jackson, J., concurring) "The modern crime of conspiracy is so vague that it almost defies definition." *Schaffer* v. *United States*, 362 U.S. 511, 524 (1960) (Douglas, J., dissenting) "Conspiracy presents perplexing problems that have long concerned courts." *United States* v. *Perez*, 489 F.2d 51, 57 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974) " . . . [A] frustrating and challenging task indeed. . . ."

[2] *See Note, Federal Treatment of Multiple Conspiracies*, 57 Colum. L. Rev. 387 (1975), which distinguishes the "wheel" from the "chain" conspiracy. The metaphors were used in England as early as 1929. In *Rex* v. *Meyrick And Ribuffi*, 21 Crim. App. R. 94 (1929), two night club owners were convicted of conspiracy to sell whiskey unlawfully and effect a public mischief. The appeals court upheld the conviction and stated, at 101-02: "There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of a circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C with D, and so on to the end of the list of conspirators."

[3] *Harrison* v. *United States*, 7 F.2d 259, 263 (2d Cir. 1925).

[4] *See, e.g.*, Webster, *An Examination of FBI Theory and Methodology Regarding White-Collar Crime Investigation and Prevention*, 17 Am. Crim. L. Rev. 275, 279-80 (1980). The FBI emphasizes such crimes as corruption of political, governmental, business, and labor officials; frauds in Federal programs; bank embezzlements; international frauds; patent and copyright violations.

[5] *See* Marcus, *Conspiracy: The Criminal Agreement In Theory and Practice*, 65 Geo. L.J. 925, (1977) (Summary of interviews with Federal and local prosecutors; conspiracy estimated to account for one-fifth of all Federal indictments); *see also, Principles of Federal Prosecution*, U.S. Department of Justice (1980). Part C, Selecting Charges, advises Federal prosecutors to structure charges to permit proof of the strongest case possible and to ensure the introduction of all relevant evidence. To further this goal, they are encouraged to consider the desirability of adding the conspiracy count where the substantive offense resulted from an unlawful agreement.

[6] *See* Marcus, *Conspiracy: The Criminal Agreement In Theory and Practice*, *supra* footnote 5; also *see, e.g., State* v. *Yormark*, 284 A.2d 549 (N.J. Sup. Ct. App. Div. 1971) (Conspiracy between automobile owners, lawyers, doctors, auto repair shop owners, and insurance adjustor to defraud insurance company); *People* v. *Incerto*, 505 P.2d 1309 (Colo. 1973) (Conspiracy to bribe a judge); *Commonwealth* v. *James*, 326 A.2d 548 (Pa. Sup. Ct. 1974) (Burglary conspiracy); *Commonwealth* v. *Benjamin*, 339 N.E.2d 211 (Mass. App. Ct. 1975) (Conspiracy by employees to defraud a finance company); *People* v. *Quintana*, 540 P. 1097 (Colo. 1975) (Conspiracy to commit perjury to prevent extradition of another).

[7] *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

[8] The Model Penal Code, however, minimizes the group danger aspect, focuses attention on the liability of the individual conspirator, and balances the dangers of prejudice against the need to attack organized criminality. Model Penal Code, § 5.03 (Proposed Official Draft, 1962). This "unilateral" formulation has been adopted by most States. *See Notes, Conspiracy: Statutory Reform Since the Model Penal Code*, 75 Colum. L. Rev. 1122, 1125 (1975).

[9] *United States* v. *Gooding*, 25 U.S. 460, 469 (1827) (12 Wheat.) (dictum); *see generally*. Wigmore, Evidence § 1360 (Chadbourn rev. ed 1978); *see* Fed. R. Evid. 801 (d) (2) (E).

[10] *See Krulewitch* v. *United States* (Jackson, J. concurring) *supra* footnote 1 at 452. This rule reduces to a "phantom" the right of an accused under the sixth amendment to trial by an impartial jury of the State and district wherein the crime was commited; *United States* v. *Bell*, 577 F.2d 1313 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1978), (Government permitted to try two defendants in Georgia when they had stolen automobiles in Illinois and sold them in Illinois without any knowledge that the vehicles would be placed in interstate commerce and without any knowledge that the vehicles would be transported to Georgia by a conspiring purchaser).

[11] *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); *Grunewald* v. *United States*, 353 U.S. 391 396-97 (1957).

[12] *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

[13] *Delli Paoli* v. *United States*, 352 U.S. 232, 237 (1957).

[14] *See generally, Schaffer* v. *United States*, *supra* footnote 1 at 516, (Joinder of defendants not prejudicial even after the dismissal of the conspiracy count); *see United States* v. *Malatesta*, 583 F.2d 748, 760-64 (5th Cir. 1978), (Colman, J., concurring), *cert. denied*, 440 U.S. 962 (1978) (Criticizing a reluctance to sever defendants and the resultant use of a "slight evidence" rule in the fifth circuit.

[15] On the history of conspiracy, *see* Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393 (1922).

[16] *Id.* at 398, summarizing 9 Coke 55b.

[17] *Id.* at 403, summarizing 8 Mod. 320 (1724).

[18] *Commonwealth* v. *Hunt*, 45 Mass. (4 Met.) 111, 123 (1842); *Pettibone* v. *United States*, 148 U.S. 197, 203 (1893); *Pinkerton* v. *United States*, *supra* footnote 12 at 647.

[19] *See, e.g.*, Cal. Penal Code, § 182 (West 1970), which punishes those who conspire to commit any act injurious to the public health and to public morals or to pervert or obstruct justice; 18 U.S.C.A. § 371, which punishes those who commit any offense against the United States or who defraud the United States or any agency thereof.

[20] *See, e.g.*, Va. Code Ann. § 18.2-22; *accord*, N.Y. Penal Law § 105.00-105.15 (McKinney 1975).

[21] *See, e.g.*, N.Y. Penal Law § 105.20, *supra* footnote 20; *accord*, Cal. Penal Code § 184, *supra* footnote 19; 18 U.S.C.A. § 371.

[22] *See, e.g., State* v. *Morelli*, 244 A.2d 499 (N.J. 1968), *cert. denied*, 393 U.S. 952 (1969) (Conspiracy to commit an unlawful abortion upheld even after woman later found not to be pregnant), *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1969) (Hijacking conspiracy complete upon agreement).

[23] For court decisions, *see Krulewitch* v. *United States* (Jackson, J., concurring), *supra* footnote 1 at 445-58 (Interstate prostitution conspiracy); *Schaffer* v. *United States* (Douglas, J. dissenting), *supra* footnote 1 at 517-524 (Interstate transportation of stolen property conspiracy); *United States* v. *Malatesta* (Coleman, J., concurring), *supra* footnote 14 at 760-64 (Conspiracy to conduct a racketeering enterprise); *United States* v. *Kelly*, 349 F.2d 720, 758-59 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966) (Wall Street securities fraud conspiracy); *United States* v. *Mardian*, 546 F.2d 973, 977-80 (D.C. Cir. 1976) (Watergate conspiracy). For legal commentary, *see Developments In the Law of Criminal Conspiracy*, 72 Harv. L. Rev. 920, 923-24 (1959), *see generally*, Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes In the Model Penal Code Of The American Law Institute: Attempt, Solicitation, And Conspiracy* (Part II Conspiracy) 61 Colum. L. Rev 957 (1961). For a defense attorney's point of view, *see White Collar Crime Attorney—Client Privilege Discussed at ABA Meeting*, 27 Cr.L. 2498, 2498-99 (1980), where the remarks of panelists at a symposium on white-collar crime at the American Bar Association's 1980 annual meeting are summarized. One panelist advised defense attorneys to think about ways to cut complex cases up. Pretrial strategies should be directed to "control the compass" of the litigation, i.e., sever defendants and counts, develop a multiple conspiracy analysis, or attack the specificity of the indictment. There is no way in the world, the panelist noted, for a defendant in a lengthy trial with numerous defendants and charges to get a fair trial. There are precious few clients who can afford this kind of protracted litigation, and there are precious few jurors who can sit through a 6- or 8-month trial and come up with any kind of a reasoned conclusion.

[24] *Berger* v. *United States*, 295 U.S. 78, 82 (1934). The phrase is that of § 269 of the Judicial Code, 40 Stat. 1181 (1919), the predecessor of Rule 52(a), Fed. R. Crim. P., which now states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[25] *Id.*

[26] *See Powell* v. *Alabama*, 287 U.S. 45, 71 (1932); *United States* v. *Wade*, 388 U.S. 218, 227 (1967).

[27] U.S. Const. amend. VI provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

[28] *See Kotteakos* v. *United States*, 328, U.S. 750, 775 (1946); *United States* v. *Lindsey*, 602 F.2d 785, 787 (7th Cir. 1979).

[29] *Berger* v. *United States*, *supra* footnote 24 at 82.

[30] See *Blumenthal* v. *United States*, 332 U.S. 539, 551 (1947); also *see generally, Kotteakos* v. *United States*, *supra* footnote 28 at 775. The Court reversed a single conspiracy prosecution on due process grounds but warned that the sixth amendment's notice of charges clause may have provided an alternative reason to reverse: "Nor need we now express opinion whether reversal would be required in all cases where the indictment is so defective that is should be dismissed for such a fault . . ."

[31] *Id.*

[32] *United States* v. *Lekacos*, 151 F 2d 172, 174 (1945).

[33] *Id.* at 173-74.

[34] *Kotteakos* v. *United States*, *supra* footnote 28 at 775.

[35] 529 F.2d 149 (2d Cir. 1975).

[36] *Id.* at 158.

[37] *Id.* at 157.

[38] The "substantial rights" affected in conspiracy cases and explained in the text are not all-inclusive. Courts have intimated, for example, that another due process problem may arise if the co-conspirator exception to the hearsay rule is used to obtain critical testimony in a single conspiracy prosecution that is later found to have been two conspiracies. *See, e.g., United States* v. *Miley*, 513 F.2d 1191, 1208, n.12 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1976); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied, Lynch* v. *United States*, 397 U.S. 1028 (1970).

[39] *See Commonwealth* v. *Benjamin*, *supra* footnote 6 at 222-223; 8 Moore's Federal Practice § 8.04 [1], where the preferred approach in Federal practice is a motion by the defendants under Rule 12(b)(2), Fed. R. Crim. P., to compel the government to elect the count or counts upon which it desires to proceed; *accord, United States* v. *Bowline*, 393 F.2d 944, 947-48 (10th Cir. 1979).

[40] *See Blumenthal* v. *United States*, *supra* footnote 30; *United States* v. *Sperling*, 506 F.2d 1323, 1341 (2d Cir. 1974), *cert. denied*, 95 S.Ct. 1351 (1975); *Commonwealth* v. *Benjamin*, *supra* footnote 6 at 222-23.

[41] *See United States* v. *Johnson*, 515 F.2d 730 (7th Cir. 1975).

[42] *Blumenthal* v. *United States*, *supra* footnote 30 at 551.

[43] *Kotteakos* v. *United States*, *supra* footnote 28 at 776; *accord, United States* v. *Kelly*, *supra* footnote 23, 758-759; *United States* v. *Borelli*, 336 F.2d 376, 385-87 (2d Cir. 1964), *cert. denied, Cinguergrano* v. *United States*, 379 U.S. 960 (1965); *Commonwealth* v. *Benjamin*, *supra* footnote 6 at 222-223; *cf. Burks* v. *United States*, 437 U.S. 1 (1978), and *Hudson* v. *Louisiana*, 49 U.S.L.W. 4159 (Feb. 24, 1981). If the evidence is found to be legally insufficient to prove a conspiracy to either the trial judge or reviewing court, double jeopardy may preclude retrial; *accord, United States* v. *Bo wline* (Holloway, J., dissenting), *supra* footnote 39 at 951.

[44] *Supra* footnote 40.

[45] *United States* v. *Sperling*, *supra* footnote 40 at 1340-41.

[46] U.S. Const. amend. V, provides, in part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." For the best Supreme Court analysis of this clause, *see Green* v. *United States*, 355 U.S. 184, 187-88 (1957); *accord, North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); *United States* v. *DiFrancesco*, 66 L. Ed. 2d 328, 338-42 (1980).

[47] *See Commonwealth* v. *Benjamin*, *supra* footnote 6 at 221; *United States* v. *Guido*, 597 F.2d 194 (9th Cir. 1979).

[48] *Commonwealth* v. *Benjamin*, *supra* footnote 6 at 222.

[49] *See Abbate* v. *United States*, 359 U.S. 187 (1959) (Activities denounced as criminal by both Federal and State governments are separate offenses and subsequent State or Federal conspiracy prosecutions do not violate the double jeopardy clause); *accord, Bartkus* v. *Illinois*, 359 U.S. 121 (1959) (Double jeopardy does not bar a State prosecution after acquittal in Federal court for alleged Federal crime).

[50] 410 F.2d 468 (7th Cir. 1969).

[51] *United States* v. *Amabile*, 395 F.2d 47 (7th Cir. 1968), *cert. denied*, 401 U.S. 924 (1968).

[52] *United States* v. *Palermo*, *supra* footnote 50 at 471.

[53] *See United States* v. *Papa*, 533 F.2d 815 (2d Cir. 1976), *cert. denied*, 429 U.S. 961 (1976) (Defendant pled guilty to a narcotics conspiracy charge in the Southern District of New York. Subsequent conspiracy trial in the Eastern District of New York upheld, over harassment objection, as a separate agreement). *See also Hoag* v. *New Jersey*, 356 U.S. 464 (1958) (Consecutive trials for the robbery of five individuals on the same occasion upheld over harassment objection).

[54] *Supra* footnote 47.

[55] *United States* v. *Guido*, *supra* footnote 47 at 198.

[56] *See Commonwealth* v. *Benjamin*, *supra* footnote 6 at 221-223; *United States* v. *Morado*, 454 F.2d 167 (5th Cir. 1972), *cert. denied*, 406 U.S. 917 (1972). The government in *Morado* tried a novel approach in the indictment to cut through the constitutional thicket. One count charged a single conspiracy and five additional counts charged multiple conspiracies. Defendants' motion to quash the five multiple counts was upheld on double jeopardy grounds. After trial, the defendants were able to argue the evidence did, indeed, show multiple conspiracies, and since only one was charged, the variance affected their sixth amendment right to notice of charges. Over the government's objection that the defendants were having their cake and eating it too, the court stated, at 170: "A defendant has a fundamental right to be free from both errors. Their unchallenged success in urging that the trial should proceed on the single conspiracy count in no way forecloses them from attacking their convictions."

[57] 317 U.S. 49 (1942).

[58] *Id.* at 53.

[59] *Id.* at 55; *accord, United States* v. *Mon*, 444 F.2d 240 (5th Cir. 1971), *cert denied*, 404 U.S. 913 (1971); *Commonwealth* v. *Benjamin*, *supra* footnote 6.

END