

Scoping the Conspiracy

By John A. Townsend

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The essence of a conspiracy under 18 U.S.C. section 371 is the agreement to undertake a prohibited object¹ and some reasonably foreseeable overt act in furtherance of that agreement.² A critical element of the agreement is its scope. What was the object of the agreement? What actions are reasonably foreseeable in furtherance of the agreement? On those determinations hinge important consequences — (1) the commencement of the statute of limitations for prosecution of the conspiracy³ and (2) so-called *Pinkerton* liability⁴ for acts committed by coconspirators.

In recent related decisions, the First Circuit struggled with (and perhaps misapplied) the law concerning the scope of conspiracy in the context of determining the

criminal statute of limitations for an alleged money laundering conspiracy: *United States v. Upton*, 559 F.3d 3 (1st Cir. 2009) (main opinion), and *United States v. Alberico*, 559 F.3d 24 (1st Cir. 2009) (opinion in related case decided on the basis of *Upton*). The issue is what acts, completed after the main objects of the conspiracy have been achieved, can be treated as further acts within the original scope of the conspiracy so as to hold open the statute of limitations. The issue also addresses *Pinkerton* liability if the further acts are offenses. For example, assume that originally the conspirators specifically agreed that they would not report the proceeds or any earnings from the proceeds on their tax returns for the next 10 years to make the proceeds invisible and thus, they imagine, perfect the original crime. Under *Pinkerton*, each conspirator would be liable for the other conspirators' tax crimes associated with the omission (whether tax evasion under section 7201 or tax perjury under section 7206(1)). And, of course, each such tax crime would refresh the statute of limitations on the original conspiracy.

In the *Upton* and *Alberico* cases, outside the five-year statute of limitations,⁵ the defendants had stolen about \$1 million cash and subsequently engaged in a real estate transaction, allegedly to launder the stolen money. Each individual's tax returns for 1997 (the year of the original crime) and later years did not report or pay tax on either the stolen money or the rental income from the real estate. Each defendant failed to file a tax return for 1999 which, if filed, should have reported the gain on the sale of the real estate.

The defendants were charged for conspiracy to commit money laundering, in violation of 18 U.S.C. sections 1956(a)(1)(B) and (h), and 1957(a); filing a materially false income tax return for 1997, in violation of section 7206(1); and failing to file an income tax return for 1999, in violation of section 7203.

A nontax conspiracy must have some act within the relevant conspiracy statute of limitations — five years.⁶ Focusing on the conspiracy charge, the only "acts" within

¹*United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977). The commission of an act within the scope of the conspiracy can also refresh the starting date for a statute of limitations for an underlying substantive offense that was an object of the conspiracy. See *United States v. Beacon Brass Co., Inc.*, 244 U.S. 43 (1952). The conspiracy crime has attributes of a contract, which invite focus on the agreement. A contract or agreement requires essential terms and definiteness to be a cognizable agreement. The great Hardy Dillard, former contracts professor and dean of the University of Virginia School of Law, provided the following notable example of an illusory agreement: A young beau promises a young lass on whom he is lavishing attention, "I'll marry you if I choose to." There was no contract — no agreement to marry, and any consideration the lass tenders is irrelevant. An unconditional promise does not exist. That type of scrutiny about the existence and scope an agreement is also required in the conspiracy area to determine whether there was an agreement for which a party can be held criminally culpable.

²*United States v. Recio*, 537 U.S. 270, 274 (2003), citing *inter alia* *Iannelli v. United States*, 420 U.S. 770, 777 (1975); see *Pinkerton v. United States*, 328 U.S. 640 (1946).

³The commission of an act within the scope of the conspiracy can also refresh the starting date for a statute of limitations for an underlying substantive offense that was an object of the conspiracy. See *United States v. Beacon Brass Co. Inc.*, 244 U.S. 43 (1952).

⁴*Pinkerton*, 328 U.S. 640.

⁵18 U.S.C. section 3282. Two general conspiracies (18 U.S.C. section 371) — the conspiracy to commit tax evasion and the defraud conspiracy (the so-called *Klein* conspiracy) — have a six-year statute of limitations under section 6531(1) and (8). The conspiracy alleged in *Upton* and *Alberico* was a conspiracy to commit money laundering, a conspiracy defined in 18 U.S.C. section 1956(h) and thus subject to the general five-year statute of limitations under Title 18. The *Klein* conspiracy is named for the leading 18 U.S.C. section 371 defraud conspiracy case in a tax setting, *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

⁶See *Id.*

the critical five-year limitations period were the defendants' respective failures to file their 1999 tax returns, which would have been due on April 15, 2000. The relevant issue on appeal was whether the defendants' 1999 failures to file were acts within the scope of the conspiracy, thus making the conspiracy charge timely.⁷ This issue split the panel, with a majority holding that the failures to file were reasonably foreseeable acts in furtherance of the conspiracy.

Grunewald v. United States, 353 U.S. 391 (1957), sets the conceptual basis for resolving this issue. In *Grunewald*, the Supreme Court dealt with the general conspiracy statute (18 U.S.C. section 371). The government asked the Court to hold that concealing the substantive crime after its commission was within the implied scope of the conspiracy to commit the substantive crime and that the overt acts of concealment thus set the statute of limitations for prosecution. The Court rejected that attempt:

In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In [*Krulewitch v. United States*, 336 U.S. 440 (1949)] it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an "actual" agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment. There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.

Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch v. United States*, *supra*. It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government, faced by the bar of the three-year statute [now five years], is attempting to open the very floodgates against which *Krulewitch* warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and

merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.⁸

In *Upton*, *Grunewald* thus appeared to be an insuperable barrier, even though the conspiracy was charged under the money laundering conspiracy statute rather than the general conspiracy statute. However, the First Circuit distinguished *Grunewald* on the grounds that concealment was the very essence of the crimes charged (concealment money laundering and conspiracy to commit the same).⁹ Therefore, all acts of concealment could be considered in furtherance of the conspiracy. The court reasoned:

Where, as we have established is the case here, the substantive crime that is the object of the conspiracy has the intent to conceal as an element, the success of the conspiracy itself may depend on further concealment. Consequently, additional acts of concealment that facilitate the central aim of the conspiracy are in furtherance of the conspiracy. See, e.g., *United States v. Goldberg*, 105 F.3d 770, 774 (1997) (acts of tax evasion were "integral and self-evident part of" fraud conspiracy charged under 18 U.S.C. § 371); *United States v. Mann*, 161 F.3d 840, 859 (5th Cir. 1998) (acts designed to frustrate regulatory oversight were "central" to conspiracy involving fraud within savings and loan institution); *United States v. Esacove*, 943 F.2d 3, 5 (5th Cir. 1991) (acts designed to protect money laundering conspiracy against government investigation held "necessary" part of conspiracy). And, as noted above, the jury was entitled to infer that the conspirators' parallel failures to file tax returns for 1999 were part of an ongoing plan to engage in concealment money laundering, rather than merely being later attempts to cover up a completed crime.¹⁰

In effect, the majority reasoned, because the alleged conspiracy did include concealment by definition, any act that would have the effect of concealing was within

⁸*Grunewald v. United States*, 353 U.S. 391, 403-405 (1957).

⁹The First Circuit explained the nature of the charges as follows:

In this case, the indictment charged that Upton and Alberico conspired to violate 18 U.S.C. sections 1956(a)(1)(B) and 1957(a). Section 1956(a)(1)(B) prohibits engaging in financial transactions involving the proceeds of unlawful activities:

knowing that the transaction is designed in whole or in part — (I) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. section 1956(a)(1)(B) (emphasis supplied). The focus of the prohibition is thus trained on the design to conceal or disguise. The concealment feature distinguishes section 1956(a)(1)(B) from section 1957(a). Section 1957(a) prohibits monetary transactions in criminally derived property, but does not contain an element of concealment or disguise.

Upton, 559 F.3d 10.

¹⁰*Id.* at 13-14 (some case citations omitted).

⁷A recent Second Circuit case, *United States v. Josephburg*, 562 F.3d 478 (2d Cir. 2009), continues the trend in holdings that there is no Fifth Amendment basis for failing to file a return.

the scope of the conspiracy and the date of that act could be a start date for calculating the statute of limitations.

This holding drew a vigorous dissent on the basis that *Grunewald's* analysis required that the parties have originally agreed to the subsequent act (failure to file, for which there was no proof of agreement) or that the specific act (failure to file, as an act of concealment) was within some general scope of the conspiracy. Certainly, under *Grunewald*, evading a tax liability arising from income derived from the criminal proceeds cannot per se be considered within the scope of the original crime. As in *Grunewald*, just because a conspirator may have a reason to conceal the original crime (the theft of cash and/or the original laundering of the criminal proceeds by purchasing the property) does not mean that a subsequent act (failing to report the sale proceeds from the property by failing to file a tax return) was taken in furtherance of and reasonably foreseeable from the original crime. The dissenter found that there was no express or implied agreement that the defendants would fail to file their 1999 returns as a method of further concealing the crime or the laundering of the proceeds from the original substantive offense. Each of the defendants may have had that intent when he failed to file, but *Grunewald* does not permit that intent to be presumed as part of the original agreement and thus within the scope of the conspiracy. Consistent with his reading of *Grunewald*, the dissenter objected to conflating a mere subsequent act of concealment into the original agreement simply because it occurred, which would mean that statute of limitations

might go on indefinitely, depending on the unforeseeable individual acts of conspirators who are no longer conspiring.¹¹

These cases raise a troubling specter. For concealment money laundering charges, any subsequent (infinite future) failure to timely report the proceeds of the original criminal act or profits on investment of those proceeds on tax returns may be considered a concealment within the scope of an original conspiracy. Or, when there is not even a conspiracy, failure to file may presumably be considered an act of concealment as to an individual's personal exposure to a money laundering charge. From a practical standpoint, persons engaging in money laundering frequently — perhaps usually — do not report and pay tax on either the proceeds from the original crime or the periodic income (for example, interest or dividends) derived from the investment of the those proceeds. They thereby may annually refresh the statute of limitations or engage in a subsequent fresh crime via that concealment concerning their income tax filings. The specter is raised of the never-ending conspiracy that troubled the Supreme Court in *Grunewald*.

Not only is this troubling from a normal conspiracy perspective, but also it highlights the problem with money laundering conspiracies — that they are subject to the draconian sentences for money laundering¹² rather than the five-year sentence under the general conspiracy statute (18 U.S.C. section 371).

¹¹*Id.* at 16 *ff.*

¹²18 U.S.C. section 1956(h).