CONSPIRACY

A Thesis

Presented To

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A detailed analysis of the military law of conspiracy with a comparison of military and federal practice. Emphasis concerns the problems of charging co-conspirators, joint trials, evidentiary considerations (including admissibility of acts and statements of co-conspirators), charging one overt act and proving others, and methods of proving the commission of overt acts. The aspect of the running of the statute of limitations is also considered.

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I. INTRODUCTION

Conspiracy is "the darling of the modern prosecutor's nursery,"[1] and has attracted the comments and criticizms of many legal writers.[2] It has no doubt become a very important weapon in prosecuting criminal actions where more than one person is involved. Its use has led the late Mr. Justice Jackson in a concurring opinion in Krulewitch v. United States[3] to say:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.
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> The modern crime of conspiracy is so vague that it almost defies definition. ...
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> /T/he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory. ...
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> When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other

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1. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).
2. See, e.g., Arens, Conspiracy Revisited, 3 Buffalo L. Rev. 242 (1953); Goldstein, The Krulewitch Warning: Guilt by Association, 54 Geo. L. J. 133 (1965); Klein, Conspiracy-The Prosecutor's Darling, 24 Brooklyn L. Rev. 1 (1957); Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954). Pollack, Common Law Conspiracy, 35 Geo. L. J. 328 (1947); Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393 (1922); Developments in The Law-Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959).
3. 336 U.S. 440 (1949).

> words, a conspiracy often is proved by evidence that is admissible only upon assumption that the conspiracy existed. ...
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> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe the birds of a feather have flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.[4]

The government earned Justice Jackson's warning in this case when they presented evidence of a statement made by the accused's co-conspirator to a witness more than six weeks after the object of the conspiracy had been accomplished. This separate concurrence by Justice Jackson was later cited with approval by the United States Supreme Court in a unanimous decision in Grunewald v. United States,[5] and by the United States Court of Military Appeals in United States v. Beverly.[6]

> We cannot leave this matter without expressing our concern over the fact that we have noticed an increasing trend in the military to charge, in addition to the substantive offense, the crime of conspiracy where two or more accused are believed to have committed an offense in concert. ...
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> In a well reasoned and well documented opinion, he /Justice Jackson/ severely criticizes attempts to imply, presume or construct a conspiracy, except as one may be found from the evidence. ...

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4. Id. At 445-454. See also Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393 (1922); "A doctrine so vague in its outlines and uncertain in its fundamental nature as a criminal conspiracy lends no strength to the law; it is a veritable quicksand of shifting opinion and ill-considered thought." at 393.

5. 353 U.S. 391 (1957). The court also warned it "will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." at 404.

6. 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964).

> We believe the military would be well advised to heed the comments of the eminent jurist and especially his closing sentence. "Few instruments of injustice can equal that of implied or constructive crimes. The most odious of all oppressions are those which mask as justice."[7]

Additionally, most of the criminal law casebooks published since Krulewitch have contained citations and verbatim restatements of Justice Jackson's comments.[8]

This article will briefly examine the crime of criminal conspiracy as a violation of the Uniform Code of Military Justice.[9] Since there has not been a great number of conspiracy cases decided by the United States Court of Military Appeals, considerable emphasis is placed upon federal decisions in this area. Although the general federal conspiracy statute[10] and the military conspiracy statute[11] are not worded exactly the same, they are near enough alike to consider federal treatment of the crime in this article.

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7. Id. at 473, 34 C.M.R. at 253.
8. Goldstein, The Krulewitch Warning: Guilt by Association, 54 Geo. L. J. 133, 134 (1965).
9. 10 U.S.C. Sec. 801-940 (1964) (hereafter called the Code and cited as U.C.M.J.).
10. 18 U.S.C. 371 (1964): "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."
11. U.C.M.J., Art. 81: "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

II. GENERAL

The law of criminal conspiracy makes each conspirator responsible for any criminal act committed by any other conspirator, so long as it is within the scope of the agreement, even if there is no personal participation or assistance in the commission of the prohibited act.[12] Additionally, conspiracy to commit an offense and the offense itself are separate crimes, and the accused may be punished for both.[13] Acquittal of either the conspiracy or the substantive crime does not bar prosecution for the other, because conspiracy is "separate and distinct" from the crime contemplated and the offenses do not merge.[14]

Conspiracy is an offense at common law, guilt being incurred by the agreement itself, there being no necessity for an overt act to complete the crime.[15] It should be noted that there is no federal common law of crimes, an offense not being punishable in United State courts unless allowed by a specific act of Congress. The courts will, however, turn to the common law for general guidance and definition of terms. Most federal courts, including the United States Court of Military Appeals, do just that.[16]

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12. E.g., Nye and Nissen v. United States, 336 U.S. 613 (1949); Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960).

13. Manual for Courts-Martial, United States, 1969, para. 160 (hereafter called the Manual and cited as M.C.M., 1969).

14. E.g., Sealfon v. United States, 332 U.S. 575 (1948); United States v. Yarbrough, 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952).

15. Perkins, Criminal Law, 528-31 (1957); see generally Pollack, Common Law Conspiracy, 35 Geo. L. J. 328 (1947).

16. E.g., Hyde v. United States, 225 U.S. 347, 365-66 (1911); United States v. Kidd, 13 U.S.C.M.A. 184, 187, 32 C.M.R. 184, 187 (1962).

III. ELEMENTS OF THE OFFENSE

The offense of conspiracy in violation of Article 81 of the Code results when there is an agreement between two or more persons to commit an offense under the Code and one or more of these persons does some act to effect the object of that agreement. There are other criminal conspiracies denounced by the United States Code that do not require an overt act,[17] and they should be charged in the military under Article 134 of the Code.

A. THE AGREEMENT

If there is no agreement, of course, there is no conspiracy, for the agreement is the essence of the offense. It is one of its elements[18] and must be pleaded and proved. One is liable in conspiracy only for what he agrees to,[19] thus the prosecution must show that there was knowledge of the unlawful design on the part of the person charged, and that he affirmatively intended to associate himself with it.

> It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. This is of course an error: the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks on a criminal venture of

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17. E.g., 18 U.S.C. 241 (1964) (Conspiracy against rights of citizens); 372 (Conspiracy to impede or injure officer); 2384 (Seditious conspiracy).
18. M.C.M., 1969, para. 160.
19. E.g., United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).

> indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others do in execution of them.[20]

There is little disagreement among the courts and among legal writers that this is the law of conspiracy: one will not be held liable for a criminal conspiracy if the prosecution fails to prove he agreed with others to do the criminal act alleged. The problem involved, nevertheless, in any study of conspiracy, is to determine how much evidence is necessary in order to show that the accused agreed to do the criminal act.

Since conspirators are not apt to reduce their agreement to writing, direct proof of it is seldom available. The agreement may be, and usually is, proved by circumstantial evidence, and courts have fashioned various rules to assist the prosecutor in proving a very difficult point in issue. Initially, the agreement may be a tacit one,[21] the law not requiring proof of a "formal" agreement.[22] "Such an agreement may be inferred from the facts appearing in the evidence."[23] Furthermore, there is not even any

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20. United States v. Audolschek, 102 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.).

21. M.C.M., 1969, para. 140(b).

22. "The agreement in a conspiracy need not be in any particular form nor manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play." M.C.M., 1969, para. 160.

23. United States v. Cudia, 346 F.2d 227, 230-231 (7th Cir. 1965); cert. denied, 382 U.S. 955 (1965); See also United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Anderson, 352 F.2d 500 (6th Cir. 1965), cert. denied, 384 U.S. 955 (1966).

necessity that all of the conspirators be acquainted with each other.[24] This rule was apparently developed to take care of those conspiracies which have become so large and secretive that some people involved in carrying out its objectives may never have met nor communicated with everyone who is involved.[25]

Additionally, one does not have to be in on a conspiracy from the beginning in order to be held liable. He may join it "at any time in its progress and be held responsible for all that may be or has been done."[26] It should be noted here, however, that in so far as the original conspirators are concerned, their taking in of a new partner does not create a new conspiracy, so long as the basic criminal undertaking remains the same.[27]

It has been held that "once the existence of a conspiracy is

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24. E.g., United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); United States v. Aiken, 373 F.2d 294 (2d Cir. 1967), cert. denied, 389 U.S. 833 (1967); Sigers v. United States, 321 F.2d 843 (5th Cir. 1963); United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960); WC-NCM 60-00686, McCauley, 30 C.M.R. 687 (1960), aff'd, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961).

25. E.g., Hernandez v. United States, 300 F.2d 114, 122 (9th Cir. 1962); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951); Marino v. United States, 91 F.2d 691 (9th Cir. 1937), cert. denied, 302 U.S. 764 (1938); United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960).

26. United States v. Manton, 107 F.2d 834, 848 (2d Cir. 1938); See also United States v. Lester, 282 F.2d 750 (3rd Cir. 1960), cert. denied, 364 U.S. 937 (1961); WC-NCM 60-00686, McCauley, 30 C.M.R. 687 (1960), aff'd, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961). So if A. joins a going conspiracy, he is liable for prosecution at the time he joins, even though the overt act has already been committed.

27. "In the situation where a conspiracy has been formed, the joinder thereof by a new member does not create a new conspiracy, /and/ does not change the status of the other conspirators ... " Marino v. United States, 91 F.2d 691, 696 (9th Cir. 1937), cert. denied, 302 U.S. 764 (1938).

established, slight evidence may be sufficient to connect a defendant with it."[28] This holding did affirm, however, that the evidence must establish a case from which the jury could find the defendant guilty beyond reasonable doubt. In spite of an occasional case upholding a conspiracy conviction where proof of the agreement seems relatively meager,[29] it still must be proved beyond reasonable doubt. The courts cannot be expected to ignore the evidence at hand, and if it shows that the crime was committed in such a way that there had to be some agreement or concert of action, then the agreement will be found.

> A conspiracy is an offense which is usually established by a great number of disconnected circumstances which, when taken together, throw light on whether the accused have an understanding or are in common agreement. ... The agreement is generally a matter of inference, deduced from the acts of the persons accused.[30] ...

Thus, in United States v. Amedoe,[31] A., M., and R. were convicted of conspiracy to transport a stolen automobile in interstate commerce when there was no evidence introduced at the trial that A. knew either of the other two, or that they knew him. The evidence did show that A. stole the automobile in New York, put New Jersey license

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28. United States v. Chambers, 382 F.2d 910, 913 (6th Cir. 1967).
29. See, e.g., United States v. Carlucci, 288 F.2d 691 (3rd Cir. 1961), cert. denied, 366 U.S. 961 (1961), (where G. was convicted of conspiracy to export firearms stolen from the federal government primarily upon evidence that the burlap bags used to wrap the weapons were purchased by G., and that G. had had a longtime association with two other conspirators).
30. United States v. Glasser, 116 F.2d 690, 699-700 (7th Cir. 1940), rev'd on other grounds as to one of three defendants, 315 U.S. 60 (1942).
31. 277 F.2d 375 (3d Cir. 1960).

plates on it, parked it in a lot in New York, and delivered the parking ticket to an unidentified person in a tavern in New York. Later, M. and R. delivered the automobile to a buyer in New Jersey. The facts and circumstances in this case satisfied the court that there was an agreement.

If the agreement is to commit more than one crime, there is still only one conspiracy,[32] as if A. and B. make an agreement to commit a burglary and a rape, there is only one conspiracy. The United States Supreme Court applied this rule in Braverman v. United States[33] in overturning a conviction on several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue Law, when the evidence showed but one agreement.

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. 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.[34]

B. INTENT

In the majority of prosecutions the law is most concerned with the act that has been committed. The intent, of course, is a factor that must be established before the accused may be held criminally responsible for the act, but the act is the thing. Conversely, criminal conspiracy is primarily concerned with the intent ele-

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32. E.g., Braverman v. United States, 317 U.S. 49 (1942); United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966); United States v. Kidd, 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962).
33. 317 U.S. 49 (1942).
34. Id. at 53.

ment,[35] and this becomes apparent when one considers the nature of the crime. There is certainly a danger to society when one person harbors an intent to commit a crime, and the danger is increased when two people have the same intent. But no crime is committed unless these two people get together and form some sort of confederation, or partnership, for accomplishing their criminal purpose. It is this confederacy of criminal purpose that increases the danger to society to such an extent that it becomes a crime, because this combination is considerably more difficult to control than the efforts of a single wrongdoer.

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is 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 punishment when discovered.[36]

It appears, then, that the danger of the "combined intent" is what criminal prosecution of conspiracies primarily deals with.

Perkins says that, "Conspiracy is one of those crimes requiring a so-called 'specific intent.'"[37] To establish a criminal conspiracy

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35. See generally Harno, Intent in Criminal Conspiracy, 89 Univ. Pa. L. Rev. 624 (1941).

36. Pinkerton v. United States, 328 U.S. 640, 644 (1946), quoting United States v. Rabinowich, 238 U.S. 78, 88 (1914).

37. Perkins, Criminal Law, 544 (1957); see also Goldstein, The Krulewitch Warning: Guilt by Association, 54 Geo. L. J. 133 (1965): "Criminal conspiracy involves more than general mens rea: it requires specific intent. The conspirator must (1) intend to combine with others for (2) an intended unlawful purpose ..." at 142-43.

the government must not only prove an agreement--and that the accused specifically intended to enter into the agreement[38]--but must also prove that the "combined intent" flowing from that agreement was criminal and specific. All this means is that, if A. and B. hold a grudge against C. and agree to do him some harm, but have not yet decided what to do or how to do it, then no crime has been committed. Although the combined intent is criminal, it is not specific.

There are two intents in a conspiracy: an intent to agree and an intent to do some criminal act; and if the object of the conspiracy requires specific intent, the prosecution must also show this. "/C/onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."[39] So if A. and B. are charged with conspiracy to assault a superior commissioned officer, the prosecution must show that they knew the intended victim was

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38. Rent v. United States, 209 F.2d 893 (5th Cir. 1954): "To support the charge of conspiracy, the intent to conspire must be shown." at 896; quoting Macreath v. United States, 103 F.2d 495, 496 (5th Cir. 1939).

39. Ingram v. United States, 360 U.S. 672, 678 (1959), quoting with approval from, Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920, 939 (1959). (Conviction of two alleged conspirators for conspiracy to evade and defeat payment of federal taxes imposed on lottery operations was reversed when the evidence showed they were not personally liable for the tax and there was no evidence that they knew the tax had not been paid by those who did owe it.); accord, United States v. Chase, 372 F.2d 453 (4th Cir. 1967), cert. denied, 387 U.S. 907 (1967); Jefferson v. United States, 340 F.2d 193 (9th Cir. 1965), cert. denied, 381 U.S. 928 (1965); United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

a superior commissioned officer.[40] This point was well illustrated in Jefferson v. United States[41] in a charge of conspiracy to deal in illegally imported drugs, knowing them to have been illegally imported. In this case, the trial judge instructed the jury that if any of the alleged conspirators had knowledge that the drugs had been imported contrary to law, such knowledge was to be imputed to the other defendants. In holding this instruction to be prejudicially defective and reversing the case, the court said:

> Since /the/ substantive offense of dealing with such drugs ... requires proof of specific knowledge by the defendant that the drug was illegally imported, the same specific knowledge is also an essential element of the conspiracy to commit such substantive offenses.[42]

Also, in United States v. Bufalino,[43] in reversing a conviction of conspiracy to commit perjury and obstruct justice by giving false and evasive testimony, the court said:

> Evidence of the same intent or knowledge would be required to convict conspirators as to convict those charged with the substantive offense ... Thus, even had the government proved that an agreement had been entered into, it would further have to prove that the conspirators intended to lie under oath or that they envisaged proceedings where they would be called upon to testify under oath.[44]

One may not escape guilt, however, by ignoring the natural con-

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40. It would appear, however, from the holding in Nassif v. United States, 370 F.2d 147 (8th Cir. 1966), discussed at p. 13 infra, that if A's and B's scheme were broad enough, the prosecution might not be required to prove such knowledge.
41. 340 F.2d 193 (9th Cir. 1965).
42. Id. at 197.
43. 285 F.2d 408 (2d Cir. 1960).
44. Id. at 416; This case arose from an investigation of the so called "Apalachin Meeting" which took place in upstate New York in 1957. Twenty seven defendants were charged and twenty convicted.

sequences of his agreement and intended crime, and courts have been known to imply the necessary intent when the scheme was broad enough. This was done in Nassif v. United States[45] where the charge was conspiracy to steal goods out of interstate commerce. While holding that knowledge of the interstate character of the goods constitutes a prerequisite of proof, the court further held that where the scheme is to steal goods wherever they may be found, and in fact, goods are stolen from interstate commerce, then the scope of the conspiracy can be broad enough to imply the necessary intent.[46]

C. THE OVERT ACT

Conspiracy is punishable under Article 81 of the Code only "if one or more of the conspirators does an act to effect the object of the conspiracy."[47] There is no requirement that the overt act itself be a crime. It may, in fact, be a relatively minor act,[48] so long as it is "a manifestation that the conspiracy is being executed."[49]

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45. 370 F.2d 147 (8th Cir. 1966).

46. In this case, the following instruction given by the trial judge was approved: "/I/f the alleged agreement between the parties, which allegedly constituted the conspiracy was so broad that it incompassed a plan to steal merchandise wherever available, or wherever located, and so broad that it would include goods in interstate commerce, then if the agreement has been established beyond a reasonable doubt by the evidence, you may find that one of the objects of the conspiracy was to steal merchandise from interstate commerce." Id. at 153.

47. The general federal conspiracy statute, 18 U.S.C. 371 (1964), also requires an overt act.

48. E.g., Braverman v. United States, 317 U.S. 49 (1942); United States v. Choat, 17 U.S.C.M.A. 187, 21 C.M.R. 313 (1956) (it can be an entirely innocent act) (at 317). See also 15a C.J.S., Conspiracy, Sec. 88(b) (1967), "It is not necessary that the overt act or acts should appear on their face to have been acts which would have necessarily aided in the commission of the crime."

49. M.C.M., 1969, para. 160.

There is a difference in the overt act required in a criminal attempt charge and that necessary to support a criminal conspiracy. In the attempt case, the overt act must go beyond mere preparation,[50] but in a conspiracy, the act does not have to advance the criminal purpose to any dangerous degree toward completion. It may be merely "one step in the direction of carrying it out."[51] Justice Holmes in Hyde v. United States,[52] noted the difference in the two overt act requirements:

> But combination, intention, and overt act may all be present without amounting to a criminal attempt,--as if all that were done should be an agreement to kill a man 50 miles away, and the purchase of a pistol for that purpose. There must be a dangerous proximity to success. But when that exists, the overt act is the essence of the offense. On the other hand, the essence of the conspiracy is being combined for an unlawful purpose; and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it in any degree.[53]

The United States Court of Military Appeals has addressed itself to the consideration of what constitutes an overt act in a case involving conspiracy to commit larceny[54] where the overt act alleged was that one of the conspirators "did procure a crowbar with which to break and enter the Ship's Store." Rejecting the

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50. M.C.M., 1969, para. 159.
51. In Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968) the following instruction was approved: "The crime of conspiracy is committed as soon as the conspiracy is formed, and at least one overt act, that is, at least one step in the direction of carrying it out is performed by one of the members of the conspiracy." at 988.
52. 225 U.S. 347 (1911).
53. Id. at 387.
54. United States v. Choat, 17 U.S.C.M.A. 187, 21 C.M.R. 313 (1956).

accused's contention that this alleged no more than preparation and was not directed toward the completion of the act, the court held that the allegation was sufficient, saying: "The overt act need not itself be a crime; on the contrary, it can be an entirely innocent act. ... All that is required is that the overt act be a 'manifestation that the conspiracy be at work.'"[55] The conviction was upheld when the court concluded that the court-martial could have found from the evidence that the procurement of the crowbar was a manifestation of the conspiracy alleged.

The overt act must be some act other than the act of agreeing. It must be something more than evidence of the agreement or of the conspiracy and must be separate and entirely apart from it.[56] In United States v. Kauffman[57] in a case alleging conspiracy to deliver national defense information to representatives of East Germany, one overt act alleged was that the accused received and accepted the name and address of "Klara Weiss." When the evidence showed that this took place at the time the alleged agreement was formed and was the address through which the information was to be communicated, the court held that this was part of the agreement, not separate from it, and was insufficient to constitute an overt act in furtherance of the alleged agreement.

The reason for this rule, as applied in Kauffman, should be apparent. If the overt act could be part of the agreement, and not

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55. Id. at 191, 21 C.M.R. 317.
56. M.C.M., 1969, para. 160.
57. 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).

separate and apart from it, then there would be no need for requiring an overt act in criminal conspiracies. The usually announced function of the overt act is simply to show that the conspiracy is at work, "and is neither a project still resting in the minds of the conspirators nor a fully completed operation no longer in existence."[58] If the prosecution were allowed to prove, as overt acts, things that were really part of the agreement, there would be no showing that the conspiracy was at work and not still resting in the minds of the conspirators.

Acts committed after the termination of the conspiracy will not, of course, qualify as an overt act, because once the conspiracy has ended, no acts by any of the parties involved will be done to effect the object of the conspiracy, nor will they show that the conspiracy is still at work. The conspiracy is not necessarily ended however when the substantive offense has been committed, and overt acts have been found after property was stolen when the conspirators were attempting to dispose of or hide the fruits of their crime.[59] In this regard, probably the best description of when a conspiracy ends, is contained in McDonald v. United States:[60]

> Whenever the unlawful object of the conspiracy has reached that stage of consummation, whereat the several conspir-

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58. Yates v. United States, 354 U.S. 298, 334, (1956).

59. E.g., Bellande v. United States, 25 F.2d 1 (5th Cir. 1928), cert. denied, 277 U.S. 607 (1928)(where two defendants on the day of the robbery committed an overt act by removing stolen mail bags from a spot where they had been hidden); N.C.M. 66-1258, Calvino, 37 C.M.R. 730 (1967)(where one accused met and guided a truck containing the stolen property into an alley).

60. 89 F.2d 128 (8th Cir. 1937), cert. denied, 301 U.S. 697 (1937).

> ators having taken in spendable form their several agreed parts of the spoils, may go their several ways, without the necessity of further acts or consultations, about the conspiracy, with each other or among themselves, the conspiracy has ended.[61]

The requirement of an overt act to be proved in a criminal conspiracy charge has in reality not materially increased the difficulty of obtaining a conviction.[62] Any act, if done to effect the object or purpose of the conspiracy is sufficient, and, "the courts somehow discover an overt act in the slightest action on the part of the conspirators."[63] Attending a lawful meeting,[64] making a telephone call,[65] and an interview in a lawyers office[66] have all been found to be overt acts. The accused doesn't have to commit the act himself or know when it is committed to be held liable.[67] But the act must be committed by one of his co-conspirators and cannot be committed by an innocent party. The language of the statutes indicate this,[68] and this rule was held to be applicable in Herman v. United States.[69] In this case, conspiracy by four persons to

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61. Id. at 134.
62. An interesting thing to note here is that conspiracy to kill the President or Vice President of the United States, in violation of 18 U.S.C. 1751 (1964), requires an overt act, whereas conspiracy to defraud the Tennessee Valley Authority, in violation of 18 U.S.C. 831(t) (1964), does not. Surely Congress did not, by requiring no overt act in the T.V.A. conspiracy, intend that it be easier to prove than the other.
63. Pollack, Common Law Conspiracy, 35 Geo. L. J. 328, 338 (1947).
64. Yates v. United States, 354 U.S. 298 (1956).
65. Smith v. United States, 92 F.2d 460 (9th Cir. 1937).
66. Kaplan v. United States, 7 F.2d 594 (2d Cir. 1925), cert. denied, 269 U.S. 582 (1925).
67. M.C.M., 1969, para. 160; United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960).
68. See, e.g., 18 U.S.C. 371 (1964) and U.C.M.J., Art. 81.
69. 289 F.2d 362 (5th Cir. 1961).

ship goods in interstate commerce, the overt act alleged was that S. and R. received the goods. When S. and R. were found not guilty of the conspiracy, the Court of Appeals dismissed guilty findings against the other two alleged conspirators, holding that even though the alleged act might have occurred, it was not done by one of the conspirators.

As a matter of practice, it really doesn't make much difference whether the particular statute under which one is prosecuted requires an overt act or not. Overt acts are usually alleged and proved even when not required,[70] and "few conspiracy indictments seem to be brought until after a substantive offense has been committed."[71] The reason for alleging overt acts when not required appears to be threefold: (1) to bring the conspiracy within the Statute of Limitations, (2) to show that the conspiracy is still in effect, and (3) in federal prosecutions, to show venue. It is submitted here that if there is just a bare agreement, with no overt act, the police will have a hard time finding out anything about the planned crime; and even if they do, perhaps through a conspirator who has changed his mind, no arrests will be made until some act is done to further the conspiracy. And even though the conspiracy involved may not require the proof of an overt act, the prosecution should allege

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70. See, e.g., Ewing v. United States, 386 F.2d 10 (9th Cir. 1967); cert. denied, 390 U.S. 991 (1968); Leyvas v. United States, 371 F.2d 714 (9th Cir. 1967); United States v. Armone, 363 F.2d 385 (2d Cir. 1966), cert. denied, 385 U.S. 957 (1966).

71. Developments in The Law -- Criminal Conspiracy, 72 Harv. L. Rev. 920, 949 (1959).

at least one. Moreover, the allegation of only one overt act will not prevent the prosecution from proving many, because the government is not limited to the overt acts pleaded but may introduce evidence of any act of the conspirators, during the conspiracy, for the purpose of proving it.[72]

Some recent decisions have gone one step further than this, holding that the government is not only free to introduce evidence of overt acts not pleaded, but may also, in effect, substitute proof of an unalleged act for one alleged. In Brulay v. United States[73] a conviction was upheld on proof of an overt act not alleged in the indictment, the court finding that there was not a fatal variance and that no substantial rights of the accused were affected;[74] and in United States v. Armone[75] the opinion was expressed that the substitution of proof of an unalleged overt act for one alleged is not a fatal variance, and, at most justifies a request for continuence because of surprise.[76]

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72. E.g., Reese v. United States, 353 F.2d 732 (5th Cir. 1965); Finley v. United States, 271 F.2d 777 (5th Cir. 1959); cert. denied, 362 U.S. 979 (1960); Kolbrenner v. United States, 11 F.2d 754 (5th Cir. 1926), cert. denied, 271 U.S. 677 (1926).

73. 383 F.2d 345 (9th Cir. 1967), cert. denied, 389 U.S. 986 (1967).

74. In this case the charge was conspiracy to smuggle amphetamine tablets with two overt acts alleged: (1) that Brulay, on January 7, 1966, left his residence in an automobile, and (2) that he transported the tablets, on January 26, 1966, from his garage to another place. The act proved was that, on January 28, 1966, he drove an automobile containing the tablets.

75. 363 F.2d 385 (2d Cir. 1966), cert. denied, 385 U.S. 957 (1966).

76. This same opinion had been expressed by the court earlier in United States v. Negro, 164 F.2d 168 (2d Cir. 1947). It is suggested that in neither case was it necessary for the court to express this opinion, in view of the fact that both cases charged violations of 21 U.S.C. 174, which does not require proof of an overt act.

The United States Court of Military Appeals, in United States v. Reid,[77] reversed a conspiracy conviction for failure of proof of the alleged overt act and refused the government's suggestion that the case be returned to the Board of Review for the possible substitution of another overt act, saying that the same overt act alleged must be proved. One authority cited for this conclusion was a case which has now been overruled.[78] In Reid, the charge was conspiracy to sell promotion examinations, the alleged overt act being the selling of the examinations. When the Board of Review found there was no sale, the Court reversed, not discussing variance.

The opinion is expressed here that the better method of handling variances between acts alleged and those proved is to consider if the variance has prejudiced the accused. In Strauss v. United States,[79] in a charge of conspiracy to transfer and conceal assets of a bankrupt corporation, the overt act alleged was that G. wrote checks to B. for $80,225.69 between 8 November 1957 and 27 March 1958. The proof was, however, that the checks were drawn between 2 June 1957 and 29 August 1957 and totaled $86,879.91. In affirming the conviction, the court stated: "We do not believe that this variance in proof under the circumstances prejudiced appellant ... Substantial similarity between the facts alleged in the overt act

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77. 12 U.S.C.M.A. 497, 31 C.M.R. 83 (1961).
78. Fredricks v. United States, 292 Fed. 856 (9th Cir. 1923), overruled in Brulay v. United States, 383 F.2d 345 (9th Cir. 1967), cert. denied, 389 U.S. 986 (1967).
79. 311 F.2d 926 (5th Cir. 1963), cert. denied, 373 U.S. 910 (1963).

and those proved is all that is required."[80] Variances between the allegations and the proof do not generally require reversal when the accused has not been misled to the extent that he has been unable to prepare for trial, and he is fully protected against another prosecution for the same offense.[81] This rule is sound and justified and should be applicable in proving an overt act as well as proving any other fact alleged.

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80. Id. at 932.
81. See, e.g., United States v. Hopf, 1 U.S.C.M.A. 584, 5 C.M.R. 12 (1952).

IV. PERSONS LIABLE

"A conspiracy is a partnership in criminal purposes,"[82] and as in any other partnership, there must be more than one partner. Consequently, one cannot be convicted of a criminal conspiracy unless it is shown that there was someone else who entered into the agreement with him,[83] and this other person must have the mental capacity to make such an agreement.[84] Also there can be no conspiracy with a government informer who merely feigns participation and secretly intends to frustrate the conspiracy.[85] To put it briefly, "a person cannot conspire with himself."[86]

This rule is rather plainly stated in the Manual,[87] and is

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82. United States v. Kissell, 218 U.S. 601, 608 (1910)(J. Holmes).

83. E.g., Romontio v. United States, 400 F.2d 618 (10th Cir. 1968); United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966); United States v. Kidd, 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962); United States v. Nathan, 12 U.S.C.M.A. 398, 30 C.M.R. 398 (1961).

84. See Wharton's Criminal Law, Vol. 2, 12th Ed., Sec. 1657 (1932) "Certainly if one defendant is incompetent to conspire, no one can be convicted of conspiracy with him alone." See also A.C.M.-8212, Cascio, 16 C.M.R. 799 (1954) for an interesting discussion of this issue.

85. E.g., Sears v. United States, 343 F.2d 139 (5th Cir. 1965); United States v. Labossiere, 13 U.S.C.M.A. 337, 32 C.M.R. 337 (1962).

86. United States v. Kidd, 13 U.S.C.M.A. 184, 188, 32 C.M.R. 184, 188, (1962); United States v. Nathan, 12 U.S.C.M.A. 398, 30 C.M.R. 398 (1961).

87. "If all the persons with whom the accused is alleged to have conspired are tried and found not guilty of the same conspiracy, the accused cannot properly be convicted of that conspiracy. If after the trial and conviction of the accused all the persons with thom he was alleged to have conspired have been found not guilty, the conviction of the accused may not stand. The accused may properly be convicted of conspiracy, however, if the evidence establishes that a conspiracy existed between the accused and other alleged conspirators, named or described in the specification, who have not been and or not later tried and acquitted." M.C.M., 1969, para. 160.

simply a restatement of the law as viewed by the United States Court of Military Appeals. As was stated by the Court in United States v. Kidd:[88]

> It seems equally clear that in Federal law, the acquittal on the merits or discharge under circumstances amounting to acquittal, of the one remaining co-conspirator, or all of the other alleged conspirators, results in the acquittal of the remaining one. The restrictive nature of the rule should be emphasized. The acquittal must be on the merits and not a mere termination of prosecution not amounting to an acquittal. Further it must be an acquittal of all the other alleged conspirators; if there be an allegation of unknown conspirators or other unacquitted alleged co-conspirators and evidence to show a combination with them, the rule does not apply.[89]

In this case, Kidd was charged with conspiring with one Wright to commit extortion. Wright was also charged with the conspiracy, but different overt acts were alleged. The Court was not deterred in their holding, however, since there was only one conspiracy, a single agreement to commit all the overt acts.[90] When Kidd was convicted though, Wright had not yet been tried, his acquittal coming later, but the Court declined to make any distinction that would depend upon the order in which the accused were tried.[91] Judge Quinn, in a concurring opinion, concluded, "In view of the judicial determination that Wright did not conspire with the accused, the conspiracy charge, which alleges an

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88. 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962).
89. Id. at 188, 32 C.M.R. 188. The court concluded by saying: "There is a striking unanimity in the Federal courts on this question. ... If there be conflict in the Federal cases they have not been brought to our attention nor have we discovered the same."
90. The same result was reached in United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966).
91. See also United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966).

agreement only between Wright and the accused becomes a legal impossibility."[92]

It is not necessary to prosecute all the conspirators, however. Had Wright never been tried, Kidd's conviction would have been valid, because one is not immune from prosecution if his co-conspirators escape. Even if one's co-conspirator is immune from prosecution,[93] the remaining one will not be excused. If the law were otherwise, the military would, in many instances, be prohibited from prosecuting a conspiracy case when the only remaining co-conspirator was discharged from the service[94] or was dead. Moreover, one may be convicted of conspiracy to commit an offense for which he, himself, could not be charged,[95] or which is impossible of commission.[96]

The acquittal of all the other defendants charged with the accused will not establish his innocence if there are others alleged to be his co-conspirators,[97] and this is true even if the

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92. United States v. Kidd, 13 U.S.C.M.A. 184, 193, 32 C.M.R. 184, 193 (1962).

93. As in Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938), cert. denied, 307 U.S. 642 (1939), where the accused's co-conspirator had diplomatic immunity.

94. See M.C.M., 1969, para. 11, concerning termination of jurisdiction because of discharge.

95. See, e.g., WC NCM 59-00552, Johnson, 28 C.M.R. 629 (1959), where a Navy Board of Review affirmed a conviction of a marine sargeant conspiring to maim himself by having a friend sever his thumb with an axe.

96. United States v. Thomas, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962), where two sailors were convicted of conspiracy to commit rape when the victim was dead. The sailors were under the impression she was merely drunk and passed out.

97. See, e.g., Jenkins v. United States, 263 F.2d 710 (5th Cir. 1958).

others are alleged as persons unknown,[98] presuming, of course, that the evidence shows these others were part of the conspiracy. If there are no others alleged as co-conspirators, even though the evidence at trial shows there were such others, the acquittal of the accused's alleged co-conspirators will result in his acquittal.[99]

What all of this means in actual practice can best be illustrated by an example. Suppose A., B., and C. are parties to a conspiracy, and suppose further that A. and B. are charged with the conspiracy and C. is not charged, though he is alleged to be a co-conspirator. An acquittal of A. will have no effect upon B's conviction if the evidence at B's trial showed that C. was a party to the conspiracy, and the same result would apply if C. were unknown but was alleged as a person unknown. If, however, C. was not alleged to be one of the conspirators, an acquittal of A. would result in B's acquittal, even if the evidence at B's trial showed that C. was a party.

As was discussed earlier in this article, the thing that makes conspiracy punishable as a crime is the increased danger to society that results from group action, or a "combined intent." Yet there are offenses which require a "combined intent," which cannot be committed except by two people. Some offenses falling

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98. E.g., Cross v. United States, 392 F.2d 360 (8th Cir. 1968); Rosencrans v. United States, 378 F.2d 561 (5th Cir. 1967).

99. E.g., United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966).

into this category are: adultery, bigamy, incest, dueling, receiving stolen goods, prohibited sale of contraband, and bribery. Since the concert of action in these cases do not increase the danger to society, it has generally been held that the agreement, between the parties involved, to commit these crimes do not constitute a conspiracy.[100] The addition of a third party to this agreement, however, does constitute a conspiracy.

At common law, husband and wife were one and could not be guilty of conspiracy.[101] This apparently remained the rule, at least in federal courts,[102] until the United States Supreme Court decided United States v. Dege,[103] where it was held error to dismiss an indictment of a husband and wife for conspiring with each other to illicitly bring goods into the United States with intent to defraud it.[104]

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100. Perkins, Criminal Law, 535 (1957).
101. Id. at 797.
102. See Developments in the Law--Criminal Conspiracy, 72 Harv. L. Rev. 920, 949-51 (1959).
103. 364 U.S. 51 (1960).
104. Mr. Justice Frankfurter said for the majority: "Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of two assumptions: either that responsibility of husband and wife for joint participation in a criminal enterprise would make for marital disharmony, or that a wife would be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing participant. The former assumption is unnourished by sense; the latter implies a view of American womanhood offensive to the ethos of our society." Id. at 52-53.

V. EVIDENTIARY CONSIDERATIONS

As an exception to the hearsay rule,[105]

> a statement, including non-verbal conduct amounting to a statement, made by one conspirator during the conspiracy and in pursuance of it is admissible in evidence for the purpose of proving the truth of the matters stated against those of his co-conspirators who were parties to the conspiracy at the time the statement was made or who became parties to the conspiracy thereafter.[106]

The reason for allowing this exception to the hearsay rule seems to be on the principles of agency,[107] the view being that since the conspirators are partners in a criminal enterprise, they should be held responsible for the acts and declarations of their partners so long as it is directed toward accomplishing the criminal purpose. Judge Learned Hand has said in this regard:

> When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all.[108]

This agency principle of conspiracy makes an accused subject to liability for many acts and declarations by his co-conspirators,

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105. M.C.M., 1969, para. 139.

106. M.C.M., 1969, para. 14C.(b).

107. Wharton's Criminal Evidence, Vol. 2, 11th ed., Sec. 699; but see Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1166 (1954), where it is suggested that the reason for allowing this exception to the hearsay rule is not on the principles of agency. "The reason is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence. Conspirator's declarations are admitted out of necessity."

108. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926), cert. denied, 273 U.S. 702 (1926).

even though he may have been completely unaware of them or their conduct.

In determining the admissibility of evidence in conspiracy trials, courts have shown "a lenient attitude toward the prosecution and have allowed juries to convict on an extremely low minimum of evidence."[109] The apparent reason for this is that conspiracy is hard to prove. The prosecutor's job in a conspiracy trial is primarily to prove a meeting of the minds, an agreement, and conspirators are seldom thoughtful enough to reduce the agreement to a writing. "Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine."[110]

The United States Supreme Court has stated:

> Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.[111]

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109. Note, 62 Harv. L. Rev. 276, 278 (1949); see also Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920, 984 (1959); "The courts have established less stringent standards of relevance for the admission of circumstantial evidence in conspiracy trials than for other crimes." See generally Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159 (1954).

110. Radin v. United States, 189 Fed. 568, 570 (2d Cir. 1911); cert. denied, 220 U.S. 623 (1911). Marrash v. United States, 168 Fed. 225, 229 (2d Cir. 1909).

111. Blumenthal v. United States, 332 U.S. 539, 557 (1947).

In order for these statements or acts of one's co-conspirator to be admissible, however, they must be made during the conspiracy and in furtherance of it. A conspiracy begins with an agreement and statements of a conspirator made before the agreement is reached are inadmissible hearsay.[112] Since the illegal agreement is in the future, such declarations are merely predictions and are not accurate enough to be relevant. In United States v. LaBossiere,[113] in a case involving conspiracy to commit larceny, four soldiers who became government informers and were not part of the conspiracy, were allowed to testify, over objection, that the accused's alleged co-conspirator, Taylor, had approached them about a plan to enter into a supply yard and steal certain government property. Taylor told them that the accused was one of his confederates. A meeting was later held and the details worked out that evening. In reversing the case, the United States Court of Military Appeals said:

> In sum, then, we necessarily find, under the circumstances here depicted, that Taylor's conversations with Hubbard, Hoffman, Potter, and Meekins—apart from those made at the evening meeting—constituted declarations made in forming the charged conspiracy rather than during its actual existence and were, as defense contended at the trial, inadmissible hearsay.[114]

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112. See, e.g., Collenger v. United States, 50 F.2d 345 (7th Cir. 1931) cert. denied, 284 U.S. 654 (1931), "It is elementary that a statement of a conspirator, in order to bind the co-conspirator, must be a atatement not made in the formation of the conspiracy, but after the conspiracy is formed, and in furtherance of its objectives." at 348.

113. 13 U.S.C.M.A. 337, 32 C.M.R. 337 (1962).

114. Id. at 340, 32 C.M.R. 340.

Declarations made after the conspiracy has ended are not admissible, either. Presumably, the termination of the conspiracy ends the agency relationship that authorizes considering acts and statements of co-conspirators in the first place. Moreover, if the conspiracy has ended, one's statements could not be "in furtherance of it." As stated by the United States Supreme Court:

> There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended. This is the teaching of Krulewitch v. United States, 336 U.S. 440, 93 L. ed., 790, 69 S. Ct. 716, and Fiswick v. United States, 329 U.S. 211, 91 L. ed., 196, 67 S. Ct. 224, both supra.[115]

Efforts are sometimes made by prosecutors to admit post conspiratal statements under the theory that there was a subsidiary conspiracy to conceal the primary conspiracy. In Krulewitch v. United States,[116] an admission made by one conspirator more than one month after the alleged conspiracy had ended was admitted on the theory that the implied subsidiary conspiracy to conceal the main conspiracy was a part of the main conspiracy. The Supreme Court rejected this, holding that once the purpose of the primary conspiracy has been attained, these statements of the alleged co-conspirators are not admissible.

In Grunewald v. United States[117] the same result was reached in a case involving conspiracy to "fix" certain tax cases when the government introduced evidence concerning the subsequent activities

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115. Lutwak v. United States, 344 U.S. 604, 617-18 (1953).
116. 336 U.S. 440 (1949).
117. 353 U.S. 391 (1957).

of the conspirators to conceal some of the irregularities in the disposition of the tax cases, and hearsay declarations of the co-conspirators. The court said in this case that

> /T/he acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended--a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord.[118]

The Court explained its ruling however by saying:

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.[119]

The United States Court of Military Appeals has faced this problem in several cases,[120] but United States v. Beverly[121] and United States v. Salisbury[122] are probably the most noteworthy. Both cases involved a completed larceny, and in both cases the conspiracy was completed. In Salisbury, evidence concerning acts of two of the accused's co-conspirators in preparing a false document showing a transfer of the stolen property and the sudden "discovery" of the proper sum of money to account for the missing property was admitted. In Beverly testimony was allowed at the trial from a third

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118. Grunewald v. United States, 353 U.S. 391, 406 (1957).
119. Id. at 405.
120. E.g., United States v. Beverly, 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964); United States v. Salisbury, 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); United States v. Miasel, 8 U.S.C.M.A. 374, 24 C.M.R. 184 (1957).
121. 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964).
122. 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963).

party that he assisted the two accused in moving the stolen property from one hiding place to another, and that they told him they had stolen the property in concert with another person.

These cases may, at first hand, appear to be difficult to distinguish, in that the court approved the admission of the evidence in Salisbury but did not approve it in Beverly. But a distinction must be made between the "acts" of a co-conspirator, and the "statements" of a co-conspirator. The evidence allowed in Salisbury was the "acts" of co-conspirators and not statements. "Acts ... which are not intended to be a means of expression and which are relevant to prove the existence of a conspiracy may be received in evidence without regard to whether the combination was ended prior to their commission."[123] Such acts, of course, so long as they are not intended to be means of expression, are not covered by the rule against hearsay, anyhow, because these acts are not hearsay. Relevancy is the only consideration.

> Here the acts of /the co-conspirators/ during the attempt to resolve the shortage were highly relevant to establish the nature of their combination and, as such, were admissible in evidence without regard to whether the conspiracy had terminated.[124]

This same distinction has been made by the United States Supreme Court.[125]

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123. Id. at 174, 33 C.M.R. 386.

124. United States v. Salisbury, 14 U.S.C.M.A. 171, 175, 33 C.M.R. 383, 387 (1963).

125. Lutwak v. United States, 344 U.S. 604 (1953)(Conspiracy to defraud the federal government by contracting sham marriages and arranging the illegal entry of alien "war brides." Evidence of uncontested divorces and separation of the couples after the conspiracy had terminated was allowed.).

In Beverly, it was not the "acts" of a co-conspirator, but his "statements" which the court disapproved of. The testimony of the third party about what the two accused told him was clearly hearsay, and since made after the alleged conspiracy had terminated, was not admissible except against the party who made the statement, and could not be used against his alleged co-conspirator.

The existance of a conspiracy may not be established solely by evidence of hearsay declarations of an alleged co-conspirator.[126] Although the trial judge has a great deal of discretion in allowing evidence to be introduced out of sequence,[127] the general rule is that each accused must be connected with the alleged conspiracy by evidence independent of the statements of co-conspirators before these statements are admissible against him.[128] In other words, when there is enough evidence in the record to establish the conspiracy, evidence of what one conspirator said, during the conspiracy and in furtherance of it, is admissible against the other conspirator.

> /S/uch declarations are admissible over the objection of an alleged co-conspirator, who was not presented when they were made, only if there is proof aliunde that he is connected with the conspiracy ... otherwise hearsay would lift itself by its own bootstrap to the level of competent evidence.[129]

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126. E.g., Tripp v. United States, 295 F.2d 418 (10th Cir. 1961).

127. E.g., United States v. Halpin, 374 F.2d 493 (7th Cir. 1967), cert. denied, 386 U.S. 1032 (1967); Parks v. United States, 368 F.2d 781 (5th Cir. 1966).

128. E.g., White v. United States 394 F.2d 49 (9th Cir. 1968); United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); Cane v. United States, 390 F.2d 58 (8th Cir. 1968), cert. denied, 392 U.S. 906 (1968).

129. Glasser v. United States, 315 U.S. 60, 74-75 (1942).

In determining the admissibility of statements of co-conspirators, it is the trial judge who determines if there is enough evidence in the record to show that the conspiracy existed and whether the statement was made in pursuance of it. One federal decision has indicated that the trial judge should then instruct the jury that they can consider such statements of a co-conspirator only if they initially find beyond a reasonable doubt that a conspiracy existed.[130] The weight of authority seems to be otherwise,[131] however, and no cases have been found holding it error for the judge to refuse such an instruction.

The first detailed discussion of this point in the federal cases was by Judge Learned Hand in United States v. Dennis.[132] In this case the trial judge did issue such a limiting instruction, and in commenting upon this, Judge Hand said:

> It is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged. ... The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only if they too have decided a

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130. United States v. Kahn, 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015 (1967).

131. See United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966); Orser v. United States, 362 F.2d 580 (5th Cir. 1966); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

132. 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).

> preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for layman, and for that matter for most judges, to keep their minds in the isolated compartments that this requires.[133]

Judge Hand's comments were dicta, but the issue was squarely faced in Carbo v. United States[134] where some underworld figures were charged with conspiracy to commit extortion and the interstate transmission of threats to secure managerial control of Don Jordan, a welterweight fighter. A substantial part of the proof consisted of hearsay testimony about what various of the co-conspirators had said about their fellow conspirators, and the accused requested a limiting instruction concerning this testimony.[135] In affirming the trial judge's refusal to give the limiting instruction, the court, in a well reasoned opinion, said:

> The situation is rendered confusing by the fact that the admissibility of this evidence ... depends upon a disputed preliminary question of fact which coincides with the ultimate jury question of the merits. The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question ... is to be resolved by the jury or by the judge. ... /I/f by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgement beyond a reasonable doubt, there is no occasion to resort to the declarations at all. The district court in effect will have told the jury, "You may not

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133. Id. at 230-31.

134. 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953. (1964).

135. The requested instruction was, "If you do not find, on independant proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy ... all such evidence must be ignored as to him." Id. at 735. It should be noted that this requested instruction did not require belief beyond a reasonable doubt.

> consider this evidence unless you first find the defendant guilty." [T]o accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury in reaching its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.[136]

The court further held that giving the question to the jury to be decided on the basis of a prima facie case rather than beyond reasonable doubt would not be the answer, because it might cause confusion.

> The jury is already concerned with the evidence weighing standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declarations from all other, but as well to apply to the independent evidence the entirely different evidence weighing standards required of a prima facie case, is to expect the impossible.[137]

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136. Id. at 736.
137. Id. at 737.

VI. JOINT TRIALS

Conspiracy is a joint offense in that it "is one committed by two or more persons acting together in pursuance of a common intent."[138] Thus the government may charge the participants jointly, and "the advantage of a joint charge is that all the accused will be tried at one trial, thereby saving time, labor, and expense. ... /But/ this must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic."[139] The advantage in this situation is generally for the prosecution and not for the defense, since the fate of the accused may very well depend upon his ability to dissociate himself from his alleged co-conspirators rather than upon the merits of his own case. It would seem therefore that the defense should normally seek a severance.[140] The assertion has been made, in fact, that, "In every case where there are multiple defendants, a motion for severance and separate trial as to each defendant should be made."[141]

The accused has no absolute right to have his case tried separately, however, and whether a severance should be granted is

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138. M.C.M., 1969, para. 26 (d).
139. Id; See also Fed. R. Crim. P., 8(b) and 14.
140. See M.C.M. 1969, para 69(d); "The motion should be granted in any case if good cause is shown; but when the essence of the offense is a combination between the parties--conspiracy, for instance--the law officer or special court-martial may properly be more exacting than in other cases as to whether the facts established in support of the motion constitute good cause."
141. Handbook on Criminal Procedure in the U. S. District Court, a Project of the Federal Defender's Program of San Diego, (1967), Sec. 7.1.

within the discretion of the trial judge.[142] "It is well settled that such motions /to sever/ are addressed to the sound discretion of the trial judge and his decision thereon will not be reversed in the absence of an affirmative showing of an abuse of discretion."[143] Typical reasons given by courts for being reluctant to grant severances in conspiracy trials are:

> /T/he number of participants in a criminal conspiracy is not a matter of the prosecutor's choosing. If those who conspire to violate the law dislike a trial with so many defendants, they should reduce the scope of their conspiracy and lessen the field of its operation, or better still, abandon the enterprise before they enter upon it.[144]

and:

> A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.[145]

The United States Court of Military Appeals announced the rule in one of their early cases that the bare assertion of prejudice

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142. E.g., Schaffer v. United States, 362 U.S. 511 (1960); United States v. Kahn, 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015 (1967); United States v. Godel, 361 F.2d 21 (4th Cir. 1966), cert. denied, 385 U.S. 838 (1966); United States v. Evans, 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952).

143. United States v. Barrow, 363 F.2d 62, 67 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967); See also United States v. Vida, 370 F.2d 759 (6th Cir. 1967), cert. denied, 387 U.S. 910 (1967)(No abuse found even when some accused have a larger share in the scheme's illegality); United States v. Abrams, 357 F.2d 539 (2d Cir. 1966) cert. denied, 384 U.S. 1001 (1966)(Discretion should not be interfered with where the charge against all defendants may be proved by same evidence and results from same series of acts); United States v. Payne, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961).

144. Capriola v. United States, 61 F.2d 5, 13 (7th Cir. 1932), cert. denied, 287 U.S. 671 (1933).

145. United States v. Fradkin, 81 F.2d 56, 59 (2d Cir. 1935), cert. denied, 297 U.S. 270 (1936).

will not suffice as a basis for severance. United States v. Evans[146] was a joint trial for rape where the defense moved for a severance contending that there were antagonistic defenses between the two accused, and declined to specify where the defenses were antagonistic. In affirming the law officer's refusal to sever the trial, the court said:

> Where ... a joint offense is charged, a joint trial is customary and proper practice. ... In such a situation separate trial is a privilege, not a right. ... The burden rests on him who seeks severance to show the risks of prejudice to his defense through joint trial. As a privilege, too, it is a matter resting largely within the discretion of the trial judge.[147]

Starting with the premise, then, that the burden is upon him seeking severance to show "good cause" for it, some examination of the cases is necessary in order to determine what is "good cause" and what is not. The United States Court of Military Appeals has held in two cases that it was not error to try an accused in a joint trial with a co-accused who pleaded guilty.[148]

The Manual[149] mentions three of the more common grounds for granting a motion to sever: (1) that one accused desires to use the testimony of another accused in his defense; (2) that some of the accused have antagonistic defenses; and (3) that evidence as to one accused will prejudice the defense of another.

The first ground mentioned above, that the accused desires to

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146. 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952).
147. Id. at 136-36. See also United States v. Kahn, 366 F.2d 259 (2d Cir. 1966), cert. denied, 385 U.S. 948 (1966).
148. United States v. Oliver, 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963); United States v. Baca, 14 U.S.C.M.A. 76, 33 C.M.R. 288 (1963).
149. M.C.M., 1969, para. 69(d).

use the testimony of another accused in his defense, was successfully asserted in United States v. Echeles.[150] The charges were for suborning perjury and conspiracy to do so, and the facts giving rise to the indictment arose in a previous case where E., a lawyer, represented A. in a narcotics case. In the trial of the prior case, C. and S. gave false alibi testimony that A. was somewhere else when the offense was committed. In rebuttal, the government called C. who admitted the falsity of his testimony and said that "the lawyer" had told him to do it. A. then got on the stand and said the whole thing was his idea and that his lawyer, E., had nothing to do with it. At the trial of the conspiracy case, a joint trial of E., A., and C., E. moved for a severance claiming that he would be prejudiced by not being allowed to call A. as a witness on his behalf. It was held to be error for the trial judge not to not grant a severance in this case, since the court could see the obvious importance of A's testimony and could also see what this testimony would be.

The holding in this case should be compared, however, with that in United States v. Kahn[151] where an opposite result was reached, and Echeles was, in effect, limited to its facts, the facts being that there was evidence in the record showing that A. would have testified and what that testimony would be. Absent

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150. 352 F.2d 892 (7th Cir. 1965).
151. 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015 (1967).

such a showing, severance will not be granted.[152]

In regard to the second common ground mentioned in the Manual for granting a motion to sever, that of antagonistic defenses among accused, no case has been found where a trial judge's ruling in denying severance on this ground alone was held to be improper. The United States Court of Military Appeals has noted that antagonistic defenses among co-accused are not uncommon and has held that the existence of a conflict does not require granting a severance.[153] It would seem that the assignment of separate defense counsel for each accused would obviate the necessity for separate trials in most of these type cases. However, there is authority to the effect that, if the conflicting interests of the co-accused generate to the point that the attorney for one accused must comment on the silence of the other accused, a severance should be granted.[154]

In DeLuna v. United States,[155] a narcotics case where DeLuna

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152. United States v. Kahn, 366 F.2d 259 (2d Cir. 1966), cert. denied, 385 U.S. 948 (1966). "/K/ and /S/ contend that the denial of their motions for severance unfairly restricted their right to call witnesses. Their position appears to be that their joint trial made it less likely that /S/ would give exculpatory evidence for /K/, since at a joint trial, if /S/ testified at all, he would waive the right not to answer questions about the crime charged ... whereas at a separate trial of /K/, /S/ could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous ... at least in the absence of anything in this record indicating that the codefendant would have given exculpatory evidence." at 263-264.

153. United States v. Oliver, 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963).

154. DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962).

155. Id.

and Gomez were occupants of a car from which police saw narcotics being thrown, Gomez testified he was innocent and knew nothing about the narcotics. He said that DeLuna gave him the package to throw out the window when he saw the police and that he did so, not knowing what the package contained. DeLuna did not testify. In his argument to the jury, Gomez's attorney stressed the point that DeLuna had been unwilling to take the stand and that an honest man would not have been afraid to testify. Gomez was found not guilty and DeLuna, guilty. In reversing the conviction of DeLuna, and holding that the trial judge committed error in not granting a motion to sever, the court said: "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."[156]

The holding in DeLuna sets forth an interesting proposition of law and, if followed, would provide a valuable weapon in the hands of an accused who desired to be tried separately from his co-accused. Other Circuit Courts have not followed DeLuna, however; the general reason given is that a lawyer representing one defendant has no more right to comment on the silence of a co-defendant than does the prosecution, and the trial judge should not allow it.[157]

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156. Id. at 140.

157. E.g., United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); United States v. Kahn, 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015 (1967); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); Kolod v. United States, 371 F.2d 983 (10th Cir. 1967), cert. denied, 389 U.S. 834 (1967); Hayes v. United States, 329 F.2d 209 (8th Cir. 1964), cert. denied, 377 U.S. 980 (1964).

Most of these holdings indicate that if an accused can show "real prejudice" by not being allowed to comment on the silence of a co-accused, then a severance might be proper, but none of these holdings found such prejudice.

The third ground, mentioned in the Manual, for granting a motion to sever, that evidence as to one accused will prejudice the defense of another, has resulted in the greatest recent change in the law. In Bruton v. United States,[158] the Supreme Court held that it was error to use, in a joint trial, the confession of one accused if it inculpates another accused. In this case, B. and E. were tried jointly for robbery and a witness testified that E. orally confessed to him that E. and B. committed the robbery. Under the authority of Delli Paoli v. United States,[159] this testimony was allowed, with an instruction by the trial judge that it was competent evidence against E. only and must be disregarded in determining B's guilt or innocence. In overruling Delli Paoli, the court rejected the proposition that the jury could be relied upon to ignore E's confession when considering the case against B., and held that the admission of this confession violated B's "right of cross-examination secured by the confrontation clause of the Sixth Amendment."[160] In Roberts v. Russell,[161] a habeas corpus proceeding attacking a robbery conviction in a state court on the ground

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158. 391 U.S. 123 (1968).
159. 352 U.S. 232 (1957).
160. Bruton v. United States, 391 U.S. 123, 126 (1968).
161. 392 U.S. 293 (1968).

that an extrajudicial confession of a co-defendant inculpating the accused was admitted in evidence at their joint trial, the court took Bruton one step further and held that it was to be applied retroactively.

The United States Court of Military Appeals has indicated that they will follow Bruton, properly limited, however, to finding error only when the alleged co-conspirator does not testify and is not available for cross examination.[162] It is apparent then that in any joint offense, including conspiracy, if one of the accused has confessed, and his confession implicates another accused, the government must either grant a severance or not use the confession. It should be noted, however, that the holding in Bruton has only to do with extrajudicial statements of one accused that are not admissible against the other accused, and has no effect upon the use of such statements when they are admissible against the other accused. Therefore, since the out of court statements of one conspirator, made during the life of the conspiracy and in furtherance of it, are admissible against the other conspirator under a well recognized exception to the hearsay rule, the holding in Bruton will have no effect on the use of such statements.[163]

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162. United States v. Gooding, No. 20,720 (U.S.C.M.A., March 21, 1969).

163. "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence ... the problem arising only because the statement was ... admissible against the declarant Evans. ... There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the confrontation clause." Bruton v. United States, 391 U.S. 123, 128 (1968).

In United States v. Kahn[164] there is an excellent summary of the law on joint trials of conspirators. In this case, the court said, in affirming the lower court's denial of severance:

> Severance of offenses and defendants is discretionary with the trial court. ... Of course, such discretion is subject to correction if abused. ... Generally, where the indictment charges a conspiracy ... the rule is that persons jointly indicted should be tried together ... /and/ severance should not be granted except for the most cogent reasons. ... Not to be forgotten among the considerations affecting the exercise of the trial court's discretion is the possible prejudice to the Government which might result from a separate trial.[165]

> Thus ... it is necessary to determine whether a joint trial infringes a defendant's right to a fundamentally fair trial. ... This determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant.[166]

In military practice, an enlisted accused may always obtain a trial separate from his co-accused by simply requesting that enlisted persons be appointed to serve on his court,[167] presuming, of course, the other accused do not do likewise. It is sometimes forgotten, however, that the government has a legitimate interest in having co-conspirators tried jointly. It is certainly less expensive and less burdensome on the courts to try all conspirators in one trial. Additionally, multiple trials may cause witnesses to be less willing to testify, knowing they will be required to

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164. 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015 (1967).
165. Id. at 838.
166. Id. at 839.
167. U.C.M.J., Art. 25(c)(1); M.C.M., 1969, para. 36 (c)(2).

appear in several different trials. Finally, separate trials are more inclined to result in inconsistent verdicts, necessitating a reversal of a previous, and otherwise proper, conviction.[168]

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168. See, e.g., United States v. Kidd, 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962).

VII. WITHDRAWAL

"If a party to a conspiracy abandons or withdraws from the agreement to commit the offense before the commission of an overt acy by any conspirator, he is not guilty of conspiracy under Article 81."[169] Very few would quarrel with the above statement as being a fair pronouncement of the law, particularly in view of the fact that an overt act is required before there has been a violation of Article 81. However, if one is prosecuted under a statute not requiring an overt act for the crime to be completed, it would seem that withdrawal after the agreement was struck would not prevent the accused from being found guilty of conspiracy, for in this instance, there would be a violation when the agreement was made.[170] Once the crime is committed, withdrawal or abandonment will not erase the crime.

Withdrawal will aid the accused in other ways, however, for when he successfully withdraws, the Statute of Limitations will begin to run in his favor.[171] Additionally, since his withdrawal ends the conspiracy in so far as he is concerned, later statements and acts by his former co-conspirators will not be admissible against him,[172] for they would not be made or done in furtherance of a conspiracy in which he was involved.

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169. M.C.M., 1969, para. 160.
170. See Orear v. United States, 261 Fed. 257 (5th Cir. 1919).
171. E.g., Grunewald v. United States, 353 U.S. 391 (1957); Fiswick v. United States, 329 U.S. 211 (1946); Hyde v. United States, 225 U.S. 347 (1912).
172. M.C.M., 1969, para. 160.

Suppose A. is a member of a criminal conspiracy and desires to end his relationship with it. What must he do?

> An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connections with the conspiracy.[173]

Thus, mere inaction on the part of A. will not be an effective withdrawal. This rule was first announced and explained by the United States Supreme Court in Hyde v. United States[174] where the court pointed out that there was a difference between a conspiracy having a distinct period of accomplishment and one that is to be continuous. In holding if the conspiracy continues, the relationship of the conspirators also continue, the Court said:

> This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but make its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly this is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law..... /A/s he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending. ...[175]

The kind of "affirmative action" that will be enough to constitute a withdrawal is not clear from the few federal decisions on the subject. It is clear, however, that the imprisonment of a

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173. Id.
174. 225 U.S. 247 (1912).
175. Id. at 369-70.

conspirator does not necessarily show his withdrawal.[176] In United States v. Agueci[177] where a continuing conspiracy to violate federal narcotics laws was charged, the facts showed that one of the alleged conspirators, V., surrendered himself to the United States attorney on another charge and was jailed. V. claimed that this was a withdrawal on his part, and that as a result, statements of alleged co-conspirators made after his surrender were not admissible against him and he should have been granted a severance. In rejecting V's assertion, the court held:

> The law is clear ... that while arrest or incarceration may constitute a withdrawal from a conspiracy, it does not follow that in every instance it must. ... Here, not only was there no conclusive evidence of /V's/ affirmative withdrawal from the conspiracy ... but there was positive evidence that /V./ had in fact designated ... others to look after his interest in the conspiracy after his incarceration. Since /V./ was to get a share in the profits made on sales by these co-conspirators, there is little question but that he continued to have a stake in the success of the venture.[178]

This holding, like most other decisions on this issue, did not specify what acts of the accused were necessary to constitute a withdrawal, but dismissed the issue on the ground that there was no showing of a withdrawal. Implicit in this decision also is the proposition that the defendant has the burden of establishing

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176. E.g., United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963); Poliafico v. United States, 237 F.2d 97 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).

177. 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963).

178. Id. at 839.

his withdrawal from the conspiracy.[179]

By entering into a conspiracy and agreeing to carry on some course of criminal conduct with others, the accused has indicated to his fellow conspirators, and led them to believe, that they have his allegiance and they can depend upon him to continue the criminal plan. It would seem, therefore, that an accused may not successfully withdraw from a conspiracy unless he notifies his cohorts and lets them know they can no longer depend upon his assistance. "It is fair to say ... that the most commonly accepted test of abandonment by an individual ... is his giving of notice to the other conspirators that he no longer intends to take part in the scheme."[180] This may be more difficult to do than one would think if the conspiracy involved was so vast that the accused was acquainted with only some of the alleged conspirators. No federal decision has been found directly on point on this issue, indicating how far the accused must go in notifying his co-conspirators. It would appear to be sufficient, however, if "the defendant reasonably expected his withdrawal to be communicated to the rest of his associates by those whom he informed; to require him personally to contact all members seems too harsh."[181]

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179. See also United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964); United States v. Cianchetti, 315 F.2d 584, 589 (2d Cir. 1963); United States v. Dubrin, 93 F.2d 499, 504 (2d Cir. 1937), cert. denied, 303 U.S. 646 (1938).

180. Wechsler, Jones, and Korn, The Treatment of Inchoate Crimes in the Model Penal Code, 61 Columbia L. Rev. 957, 1015 (1961); See also Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920, 958 (1959).

181. Developments in the Law-Criminal Conspiracy, 72 Harv. L. Rev. 920, 958 (1959).

Giving of notice to fellow conspirators was held not to be sufficient to constitute a withdrawal in Eldridge v. United States.[182] This case involved a charge of conspiracy to embezzle money and make false entries to conceal the embezzlement. Eldridge testified that he notified his co-conspirators that he was through and would have nothing further to do with the shortage. The embezzlement and concealment was continued by the others, and more than three years later, all were indicted. Eldridge then claimed that he had effectively withdrawn from the conspiracy, so the Statute of Limitations had run in his favor. The trial judge submitted to the jury the question of Eldridge's withdrawal from the conspiracy as far as participation in further embezzlements was concerned, but would not submit the question of withdrawal from the conspiracy to falsify the books in order to conceal the embezzlement. In affirming the conviction, the court held that, in this case, notification was not enough. For his withdrawal to be an effective one, Eldridge must have also successfully dissuaded his fellow conspirators to cease concealing their crime, in other words, expose the crime.

> A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse. The first abstraction from this bank set in motion a chain of inescapable consequences, if the conspiracy was to succeed. To withdraw, the chain must be interrupted; and that is not done by advising his associates to confess. Eldridge must have known that his associates must continue to conceal the shortages unless they, too, were willing to confess and take the consequences. ... We hold therefore, that Eldridge did not manifest an

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182. 62 F.2d 449 (10th Cir. 1932).

> intent, in the conversation with his confederate, that the shortage should be revealed and their crime confessed; but if he did so intend, a manifestation of that laudable purpose to his co-conspirator was not an effective method of disclosure or an adequate confession of guilt.[183]

So in addition to notifying his confederates, as Eldridge did in this case, he must also have confessed his crime, in order to effectively withdraw from the conspiracy to conceal the embezzlement. This seems to be an extremely harsh rule, not designed to encourage a withdrawal from a conspiracy.

The Model Penal Code gives the accused an option as to how to terminate a conspiracy by abandoning it. He may either advise "those with whom he conspired of his abandonment or /inform/ the law enforcement authorities of the existence of the conspiracy and of his participation therein."[184] This appears to be the proper recognition of the defense of withdrawal or abandonment.[185]

The issue of withdrawal from a criminal conspiracy has not been directly faced by the United States Court of Military Appeals. In United States v. Miasel,[186] however, the court discussed withdrawal in affirming a Board of Review decision that had reversed a finding of guilt of assault with intent to commit sodomy. The evidence in this case showed that the accused had acted in concert

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183. Id. at 451-52.
184. Model Penal Code, Sec. 503 (7), (Proposed Official Draft, 1962).
185. It should be noted here that the term "withdrawal" and "abandonment" has been used interchangably. There appears to be no distinction made by the courts between these terms, and M.C.M., 1969 para. 160, certainly makes none.
186. 8 U.S.C.M.A. 374, 24 C.M.R. 184 (1957).

with others pursuant to a common plan or enterprise, but had terminated his participation in the group's conduct before any sodomy was committed. It was held to be error for evidence of the sodomy to be admitted against the accused. In discussing withdrawal, the court held that the rules of admissibility of evidence against co-actors are substantially the same as those involving co-conspirators. And once a conspiracy has ended, either through accomplishing the objective or withdrawing, subsequent acts or statements of one of the conspirators are admissible only against him and not a party who has withdrawn. Therefore, the Court held, the Board was correct in holding that admissibility of the acts of sodomy by the accused's co-actors, committed after he had withdrawn, was prejudicial error.

The court did not spend much time discussing what "affirmative acts" on the part of the accused were necessary in order for them to constitute a withdrawal, the Court accepting the Board's determination of fact that the accused had withdrawn. The Court did state, however, that "A withdrawal from a conspiracy may be shown by any evidence indicating conduct 'wholly inconsistent with the theory of continuing adherence'..... /I/n order to withdraw from a conspiracy 'affirmative action is required.'"[187]

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187. Id. at 378-79, 24 C.M.R. 188-89.

VIII. CONCLUSION

It cannot be successfully denied that the law of criminal conspiracy does contain features that gives the prosecution an undue advantage over the defense. The warning in Krulewitch by the late Mr. Justice Jackson has served to alert jurists as to the dangers involved, however, and the United States Supreme Court's holding in Bruton has removed one of the prosecution's greatest advantages. As was discussed earlier in this article the United States Court of Military Appeals has alined itself with the Jackson warning in Krulewitch and will follow the holding in Bruton.

The danger presented to society by the combination of two or more persons for some criminal purpose cannot be ignored, but the existence of such a danger does not justify the improper use of a charge of criminal conspiracy. It is therefore incumbent upon all Judge Advocates, particularly prosecutors and judges, to be alert to the possible misuses of criminal conspiracy charges. Only in this way may justice result for both society and the accused.

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