NARCOTICS CONSPIRACY LAW IN NEW YORK

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NARCOTICS CONSPIRACY LAW IN NEW YORK

By Russell Bikoff

I. INTRODUCTION

Conspiracy indictments and trials have been relatively scarce under the New York Penal Law. Nevertheless, such cases are brought in the New York Courts and tend to be complex. This memorandum is intended as an introduction to the law of conspiracies. It deals with issues of criminal liability, admissibility of evidence, and trial practice that commonly arise in the prosecution of conspiracies. Its principal focus is upon the application of the New York Penal Law conspiracy provisions to naroctics crimes.

The basis for the crime of conspiracy is the view that group criminality is more dangerous than crimes committed by individuals and should, if possible, be prevented at its inception. Pittoni, Federal and New York Laws of Conspiracy, 21 Brooklyn L. Rev. 38 (1955).

Since conspiracy is an inchoate crime, the offense is completed by an agreement to commit a crime and the commission of an "overt act," regardless of whether the contemplated crime ever occurs. The "overt act" may be an act of small significance, for instance, making a telephone call. The planned crime is punished in its early stages as conspiracy because the agreement is a concrete, unambiguous act, and psychological expectations are raised by the fact that individuals have formed a group in the course of preparing a crime, thus increasing the likelihood that the object of the conspiracy will be achieved.

The law of conspiracy has historically presented significant problems for the criminal law. At one time, agreements to commit acts which would be lawful if done unilaterally were determined to be criminal if done by groups. The contemporary view, expressed in the New York Penal Law and the Model Penal Code, is that merely "unlawful" or "oppressive" objectives are too vague to be the basis for criminal liability.

There has also been concern that broadly defined conspiracy statutes give an unfair procedural advantage to the prosecution by permitting large numbers of defendants to be tried together. Wechsler, Jones, and Korn, The Treatment

of Inchoate Crimes in the Model Penal Code, 61 Colum. L. Rev. 957, 959 (1961). The risk here is that peripheral figures in the conspiracy, who would not likely be convicted if tried alone, will be improperly subjected to criminal sanctions if tried with a large group of more central participants.

The New York conspiracy statute, Penal Law art. 105 (McKinney 1975) (reproduced in Appendix A), was enacted in substantially its present form in 1965 as part of the recodification and revision of the state's penal law.[1]

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1. The discussion following is based in part upon the Commission Staff notes (Consol. 1967) and Practice Commentary, Hechtman (McKinney 1975), to the conspiracy statute.

The 1965 New York Penal Law made several significant changes in the definition of the crime and its degree structure, which the Penal Law of 1909 presented in two confusing sections. Section 580 of the old law defined the crime of conspiracy, somewhat bafflingly, as a conspiracy to commit a "crime" or one of five other vaguely worded forms of conduct, such as to "cheat and defraud another out of property," "to prevent another from exercising a lawful trade or calling," and "to commit any act injurious to the public health." Under this section conspiracy was a misdemeanor. Section 580-a (McKinney Supp. 1966-67), added in 1959, made it a Class "D" felony to conspire to commit one of six specified felonies (murder, kidnapping, robbery, arson, extortion, or selling narcotics). Section 580-a overlapped with the first part of section 580, which made it an offense to conspire to "commit a crime." Thus, the prosecutor could choose between misdemeanor and felony sections when the defendant's conduct fit into both, as would arson or extortion, for example.

The 1965 Penal Law narrowed the earlier six part definition to one, conspiracy to commit a "crime." The other five forms of the old definition were eliminated because the revisors believed that they were too vague and indefinite for criminal sanction. The 1965 law provided for varied penalties by classifying the crime into four degrees corresponding to the relative grade or seriousness of the object crime. Each degree requires the commission of an overt act. By adding a requirement that the actor intend that the object crime be committed, the revision made the definition of the offense more precise.

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1. (cont'd)

The 1965 revision of the Penal Law also created the crime of conspiracy in the first degree, which made it a Class C felony to conspire to murder or kidnap. Revised Penal Law of 1965, c. 1030, 1965 N.Y. Laws (current version at section 105.15 (McKinney 1975)). This form remained until September 1, 1972, when the definition of conspiracy in the first degree was broadened to cover "conduct constituting a Class A felony." Penal Law Amendments, c. 292, § 2, 1972 N.Y. Laws (McKinney). The conspiracy itself remained a Class C felony. On September 1, 1973 conspiracy in the first degree was elevated to a Class B felony, still applying to conspiracies to commit any Class A felony, and remains so today. Penal Law Amendments, c. 1051, § 5, 1973 N.Y. Laws (McKinney). The major impact of the change in conspiracy in the first degree from a Class C to a Class B felony is on drug crimes subject to Class A felony punishment. (As of 1974, there are six: sections 220.16, 220.18, 220.21, 220.39, 220.41, 220.43). In 1973, as part of the new drug legislation, the legislature enacted and repealed before it became effective a new section (105.17) that would have restricted the definition of conspiracy in the first degree to an agreement to engage in a Class A felony as defined in article two hundred and twenty (drug offenses), rather than all Class A felonies. Under the current statute punishment for conspiracy in the first degree is set at only one degree lower than the object crime, rather than two degrees below as for the lower degrees of conspiracy. Section 105.15, Practice Commentary, Hechtman (McKinney 1975).

Probably because of this history, especially the relatively light punishment until the 1972 and 1973 amendments, there are very few reported conspiracy cases involving narcotics. This paper will thus rely on federal cases from the Second Circuit as they relate to problems unresolved by state law.

New York's Penal Law contains only a general conspiracy statute, unlike the United States Code, which has both general and specific conspiracy statutes,[2] including one for narcotics crimes.

Some indication of the legislative intent behind the conspiracy statute, expecially in connection with narcotics prosecution, comes from the creation of section 580-a in 1959, which made it a felony to conspire to commit six specified object felonies. One reason advanced for upgrading this group of conspiracies from misdemeanors to felonies was to encourage the prosecution of organized crime figures dealing in narcotics:

> It has become apparent that the modern racketeer operates by means of a criminal organization which permits the greatest criminal to be insulated from his agents who physically perform the criminal acts. While the leader of the criminal organization may be guilty as an accomplice of his agent, juries are sometimes reluctant to convict a defendant who was distant in space and time from the criminal act. Such situations occur in the organized sale of narcotics and the organized extortion of honest business men. In order that the leaders of such criminal organizations may be apprehended and their organization destroyed, it is recommended that it be made a felony to participate in a criminal conspiracy to commit such serious felonies. A change of this

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2. 18 U.S.C. § 371 (1970) (general) and 21 U.S.C. § 846 (1970) (narcotics), reproduced in Appendix B.

> nature will provide an important weapon to the forces of law and order for use in the fight against organized crime and racketeering. . . .
>
> Moreover, the experience of federal enforcement officials has demonstrated how effective conspiracy prosecutions can be against some of the overlords in racketeering. At present, a lengthy narcotics prosecution is under way in the federal courts, on a conspiracy theory, with Vito Genevese as one of the defendants. Because conspiracy is only a misdemeanor in the State courts, with resultant limitations in the scope of punishment, long State conspiracy prosecutions are relatively rare.3

II. ELEMENTS OF THE OFFENSE; DEFENSES

A. THE AGREEMENT

The basic element of a conspiracy is the existence of an agreement, which need not be formal and may be proved by circumstantial evidence. See People v. Gross, 51 App. Div. 2d 191 (4th Dept. 1976); 21 Brooklyn L. Rev., supra, at 39. As the Court of Appeals said of one agreement, "defendants, with the education, training, and experience of the defendants in this case, do not conduct conspiracies by making written records of their acts." People v. Connolly, 253 N.Y. 330, 339, 171 N.E. 393, 396 (1930).

1. Proof

Proof of an agreement by circumstantial evidence is sufficient when the evidence excludes to a moral certainty any hypothesis except that the defendants were involved in a

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3. N.Y. State Legislative Annual, 41-42, 46 (SI3319, Pr. 4162, Berkowitz ch. 611 (1959)).

criminal scheme,[4] see People v. Gross, supra. There need not be direct evidence of a meeting at which the defendants mapped out a criminal strategy. Id. If there is evidence of such a meeting, it must show more than a defendant's mere attendance or his knowledge of the conspiracy. In People v. Bauer, 32 App. Div. 2d 463, 305 N.Y.S. 2d 42 (4th Dept. 1969), aff'd mem., 26 N.Y. 2d 915, 310 N.Y.S. 2d 101 (1970), Bauer, a former state senator, and another defendant met with Gmerek, who was under investigation for extortion, to discuss whether Bauer could "fix" the indictment and what the "fix" would cost. In reversing Bauer's conviction for conspiracy to commit bribery and grand larceny, the court held that no agreement among the three was established, because at the meeting Bauer merely spoke of his influence and promised to investigate how much the bribe would cost.

2. Prior Acts

Prior acts, including criminal acts, are frequently admissible to prove either knowledge of the conspiracy or, circumstantially, the agreement itself. In Connolly, supra, involving a conspiracy to defraud New York City by rigging public contracts, the Court of Appeals held that evidence of transactions in numerous individual bank accounts of the defendant and an unindicted co-conspirator was admissible to show the defendant's motive of enrichment. The defendant had accepted kickbacks from a building supplier, which he attempted to conceal by not passing the money through his bank accounts. A narcotics conspiracy case, People v. Jenner, 36 App. Div. 2d 663, 318 N.Y.S. 2d 115 (3rd Dept.), rev'd on other grounds, 29 N.Y. 2d 695, 325 N.Y.S. 2d 652 (1971), held that evidence of the defendant's prior use of drugs was admissible to prove his intent and knowledge under People v. Molineux, 168 N.Y. 264,

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4. Once the existence of a conspiracy is established, it is another thing to prove how many individuals are within its scope. In United States v. Sisca, 503 F. 2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974), the defendant's active participation in a narcotics conspiracy was proved by evidence that she was a co-owner with her husband, also a defendant, of a house in which narcotics were found and that she was present while others came and went carrying heroin. The problem here is not whether there are multiple conspiracies but whether a certain person is part of an admittedly single conspiracy. For a discussion of single versus multiple conspiracies, see p. 21 infra.

61 N.E. 286 (1901). Testimony about purchases of narcotics that occurred prior to the start of a narcotics conspiracy was held admissible in the government's case-in-chief to show the background and development of the conspiracy. United States v. Torres, 519 F. 2d 723 (2d Cir.), cert. denied, 423 U.S. 1019 (1975).

3. Unilateral Conspiracies

Penal Law section 105.30 (McKinney 1975), reproduced in Appendix A, may be read to define the crime unilaterally, to permit the conviction of a single defendant who alone has criminal intent to enter into an unlawful agreement.[5] A contrary view is that the Penal Law Commission did not intend to change the old rule requiring the existence of at least two actual conspirators before either could be convicted. Sobel, The Anticipatory Offenses in the New Penal Law, 32 Brooklyn L. Rev. 257, 264 (1966). The Practice Commentary to section 105.30 does not suggest an answer, saying only that the section makes it immaterial whether any of the defendant's co-conspirators are not guilty owing to "criminal irresponsibility or other legal incapacity or exemption."

The problem arises in narcotics conspiracy cases when a defendant agrees to sell drugs to an undercover, who in the normal course lacks criminal intent, or when co-conspirators withdraw, leaving only one conspirator. An illustration of the latter situation is provided by Bauer, supra, where the person facing charges of extortion (Gmerek) met with the defendants, Bauer and Sroka, to seek their help in "fixing" his indictment, and the defendants purportedly agreed. Gmerek later informed the District Attorney of this meeting and continued planning with Bauer and Sroka at the District Attorney's direction. The court overturned the conspiracy convictions. Finding that defendant Sroka had not agreed and that Gmerek had withdrawn, it held that Bauer could not be convicted of conspiracy alone. Gmerek lacked the intent to enter into the conspiracy to bribe, because after his cooperation with the authorities had begun, he ceased to rely on Bauer's representations of his influence as a former state senator.

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5. In this context, the problem is not one of intent, because it assumes that the lone defendant has the necessary criminal intent and deals only with the number of parties required for the agreement.

Cases prior to the 1965 enactment of section 105.30 uniformly held that one defendant alone could not be convicted of conspiracy, because the crime required the agreement of two or more individuals. People v. Bauer, supra; People v. Johnson, 18 App. Div. 2d 1017, 239 N.Y.S. 2d 184 (2d Dept. 1963), aff'd mem., 13 N.Y. 2d 1149, 247 N.Y.S. 2d 140 (1964); People v. Chaplin, 8 App. Div. 2d 286, 187 N.Y.S. 2d 730 (3rd Dept. 1959).

Two recent cases construing section 105.30 are directly in conflict. People v. Cardosanto, 84 Misc. 2d 275, 375 N.Y.S. 2d 834 (Sup. Ct. N.Y.Co. 1975), held that section 105.30 does not provide a defense to a conspiracy charge where the undercover police officers who "conspired" with the defendant lacked criminal intent. The statutory language indicates that "it is no defense" that a co-conspirator cannot be found guilty owing to "other factors precluding the mental state required for the commission of conspiracy or the object crime." People v. Teeter, 86 Misc. 2d 532, 382 N.Y.S. 2d 938 (Sup. Ct. Monroe Co. 1976), discussed this question in dictum, after holding that a payment from the defendants to the undercovers, whom the jury found not to be co-conspirators, constituted an overt act. The court stated that section 105.30 does not apply in the case of an agreement with an undercover, a person who has "full possession of his mental faculties and a full awareness of the situation," because if it did, then one person with intent could be guilty of conspiracy in the first degree. Convicting a single person of conspiracy, however, is objectionable, because it would raise to a class B felony the conduct of agreeing with an undercover, which actually constitutes the class D felony of solicitation (Penal Law section 100.10 (McKinney 1975)). Although Teeter explicitly rejected Cardosanto, it ignored the statutory language relied on in the latter case.

B. INTENT TO COMMIT THE OBJECT CRIME

The New York conspiracy statute contains the requirement that there be an intent to commit acts constituting at least a crime. This requirement, which was not found in the old Penal Law, limits liability for inchoate criminal conduct and prevents the unintended elevation of an offense to a higher degree, Note, The Proposed Penal Law of New York, 64 Colum L. Rev. 1469, 1517 (1964), since the acts that the defendant must intend become progressively narrower with each higher degree of conspiracy. Thus, conspiracy in the first degree requires an intent to commit conduct constituting a class A felony.

The so-called Powell rule, People v. Powell, 63 N.Y. 88 (1875), requiring motivation by a "corrupt and evil purpose,"

functioned to limit liability under the old Penal Law, but serves no useful purpose under the current statute. Even under the old law the rule only applied when the object of the conspiracy was malum prohibitum (proscribed by law), People v. Chaplin, supra. When the unlawful act was malum in se (morally wrong), as for example robbery, the inference of criminal intent was for the jury, and the mere agreement to commit such an act usually provided the necessary criminal intent. Id. The current statute, limiting conspiracy to agreement to commit a crime, does away with the malum prohibitum category of conduct and the need for the Powell rule.

Unlike New York, the federal cases make clear that the corresponding federal statute requires a specific intent. In United States v. Feola, 420 U.S. 671, 95 S. Ct. 1255 (1974), the Court stated that convictions under the general federal conspiracy statute, 18 U.S.C. § 371 (1970), require at least the degree of criminal intent necessary for the substantive offense. In that case the Court overruled United States v. Crimmins, 123 F. 2d 271 (2d Cir. 1941), long-followed in the Second Circuit, which had held that a defendant could not be convicted of conspiracy to transport stolen securities in interstate commerce unless the government proved that the defendant understood it to be part of the agreement that the securities should move in interstate commerce. The Crimmins rule required this "antifederal intent" for a conviction under the general federal conspiracy statute, although not for the substantive federal offense, which usually does not include it as an element. Feola, arising out of an attempted robbery of federal narcotics agents, held that conspiracy to assault a federal officer (see 18 U.S.C. § 111 (1970), defining the substantive offense) requires no more than whatever mens rea is specified for the substantive offense of assaulting a federal officer. The Court held that section 111 does not make knowledge that the victim of the assault is a federal officer a part of the mens rea; rather, the federal officer requirement is "jurisdictional,"[6] and the conspiracy convictions of the defendants could stand absent proof of the

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6. The Court cautioned, however, that knowledge may be important to establish federal jurisdiction of the conspiracy. Federal jurisdiction is established when facts tie the "proscribed conduct to the area of concern delineated by the statute." 420 U.S. at 695. When the agreement is not consummated, the Court continued, it must be shown whether the agreement alone constitutes a sufficient threat to the federal officer as to give rise to federal jurisdiction. This will normally be found unless the agreement is so unspecific about its target that it is not possible to conclude that a federal officer would have been attacked; thus, there is an insufficient threat to federal personnel and functions for federal jurisdiction.

defendants' "antifederal intent." The Court reasoned that the conspirators' agreement is no less dangerous because of the absence of knowledge of a fact not needed to establish criminal intent; nor, as an inchoate crime, is the agreement less blameworthy or less dangerous solely because the participants do not know which body of law they intend to violate. However, the Court cautioned that although Crimmins was incorrectly decided (since the substantive offense of receipt of stolen securities had a mens rea, like the offense of assault in section 111, lacking antifederal intent), the Crimmins rule may apply to conduct made criminal without regard to intent, i.e., strict liability crimes.

When specific intent is a requirement, the jury should be instructed that they must find actual knowledge. United States v. Cangiano, 491 F. 2d 906 (2d Cir.), cert. denied, 419 U.S. 904 (1974). When a conspiracy count alleges several criminal objectives -- e.g., to commit murder and sell narcotics -- and the proof of specific intent is insufficient for some of the objectives, a conviction may still stand so long as the proof suffices to show that at least one criminal objective was intended. See United States v. Papadakis, 510 F. 2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975). In Papadakis the proof of intent was sufficient for two of the criminal objectives charged in the conspiracy count, obstruction of justice and narcotics offenses, but was not sufficient for a third object, obstruction of a criminal investigation.

C. THE OVERT ACT

1. Nature of the Requirement

Penal Law section 105.20 (McKinney 1975) requires that an overt act be "alleged and proved to have been committed by one of conspirators in furtherance of the conspiracy." Since the statute specifies "one" of the conspirators, it is evidently not necessary for each conspirator to be involved in any or all of the overt acts. In a conspiracy indictment, therefore, the words "acting in concert" should not appear. When pleaded, the overt acts should be described in factual terms, much like a bill of particulars, specifying the time, place, and manner of the acts undertaken by the conspirators.

In contrast to the old Penal Law, which made the overt act an element of the offense (except for three specified felonies), it is not clear whether the current overt act requirement states an element of the offense or merely an

evidentiary requirement. 64 Colum. L. Rev., supra, at 1516. In either case, the overt act requirement functions to avoid imposing liability for a mere agreement to commit a crime; it may also permit a party to abandon the agreement before an act in furtherance of it is done, thereby avoiding liability, 21 Brooklyn L. Rev., supra, at 41.[7] As the statute indicates, there need only be one overt act committed by one of the conspirators; it follows that a co-conspirator may be convicted although an overt act alleged to involve him is not proved. United States v. Piampiano, 271 F. 2d 273 (2d Cir. 1959). An overt act need not be a crime in itself, but it must be done with the ultimate purpose of committing the object crime. People v. Smith, 196 Misc. 304, 91 N.Y.S. 2d 490 (Kings Co. Ct. 1949), modified, 277 App. Div. 794, 97 N.Y.S. 2d 896 (2d Dept.), aff'd mem., 301 N.Y. 763, 95 N.E. 2d 820 (1950). Conspiracy can be established by proof of an overt act other than the one alleged in the indictment, so long as one of the overt acts in the indictment is proved, People v. Ferguson, 55 Misc. 2d 823, 286 N.Y.S. 2d 924 (Sup. Ct. Queens Co. 1968), but it is not necessary to prove all the overt acts alleged, People v. Tavormina, 257 N.Y. 84, 177 N.E. 317 (1931). Nor must the overt acts constitute the object crime. Id. When a trial judge mistakenly excludes an alleged overt act, such as a meeting among co-conspirators excluded because of a variance in proof regarding the location of the meeting, evidence of that act is admissible because it is relevant to the conspiracy charge. United States v. Aviles, 274 F. 2d 179 (2d Cir. 1960).

The statutory requirement that an overt act be "in furtherance" of the conspiracy excludes acts among conspirators that seal the agreement and includes acts subsequent to and independent of the agreement that are performed to further its object. People v. DeCabia, 10 Misc. 2d 923, 172 N.Y.S. 2d 1004 (Nassau Co. Ct. 1958), aff'd, 8 App. Div. 2d 825, 190 N.Y.S. 2d 142 (2d Dept.), aff'd mem., 7 N.Y. 2d 822. Payments to a co-conspirator for his own benefit are not overt acts, as distinguished from payments to be transferred to a non-conspirator for his services. People v. Teeter, supra. But a payment to police officers whom the jury finds are not co-conspirators is an overt act. Id. An act done after the agreement is abandoned is not an overt act. People v. Bauer, supra.

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7. See discussion p. 14 infra.

The Second Circuit has indicated, "clearly, a charge of conspiracy to violate the narcotics laws could be proved by evidence that one of the overt acts was a 'discussion' among the co-conspirators," United States ex rel Epton v. Nenna, 446 F. 2d 363 (2d Cir.), cert. denied, 404 U.S. 948 (1971).[8] A conversation, speech, may be an act, because "much talk is 'action' with direct legal consequences;e.g., people 'decide,' 'promise,' and 'reject.'" United States v. Armone, 363 F. 2d 385, 401 (2d Cir. 1966), cert. denied, Viscardi v. United States 385 U.S. 957 and Pacelli v. United States, 385 U.S. 957. Other decisions hold that telephone conversations may be overt acts, see, e.g., Singer v. United States, 208 F. 2d 477, 480 (6th Cir. 1953); Bartoli v. United States, 192 F. 2d 130, 132 (4th Cir. 1951); Smith v. United States, 92 F. 2d 460, 461 (9th Cir. 1937).

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8. For this proposition the court relied upon New York State Broadcasters' Association v. United States, 414 F. 2d 990, 996-7 (2d Cir. 1969), cert. denied, 396 U.S. 1061, 90 S. Ct. 752 (1970), in which the court upheld, against First Amendment challenge, the criminal penalties of section 316 of the Communications Act of 1934, 18 U.S.C. § 1304, which prohibits commercial radio broadcasts of "information concerning any lottery." After "strictly construing" the statute to prohibit the broadcasting of advertisements and information that directly promotes a particular lottery," the court concluded that, as construed, the statute did not inhibit the full expression of ideas by reason of overbreadth. The statute was not primarily concerned with the realm of ideas of all, but with "speech closely allied with the putting into effect of prohibited conduct."

> Clearly an advertisement listing the names and addresses of sellers of narcotics. . .could constitutionally be banned. Of course, we do not suggest that lotteries. . .and uncontrolled sale of narcotics are equally deserving of condemnation, but Congress has the power to have a "view" as to these types of conduct and to take steps to inhibit each. (414 F. 2d at 997).

The precise time of the "discussion" between co-conspirators may be important, as is demonstrated in People ex rel Conte v. Flood, 53 Misc. 2d 109, 277 N.Y.S. 2d 697 (Sup. Ct. Nassau Co. 1966).

In that case, the court held that certain conversations could not be construed as an overt act because they were not alleged with specificity and because they occurred in the "forming and planning" stage of the conspiracy. The court cited no authority for this proposition, nor did it explain when a conspiracy moves from its planning stage to its execution.

If the speech charged as an overt act is public, there may be a First Amendment issue raised.[9] In United States ex rel Epton v. Nenna, supra, the court reasoned that it is not the "speech" that is the object of a prosecution for conspiracy, but rather the agreement, and it is irrelevant whether the overt act is constitutionally protected speech. Although the court was primarily concerned with an overt act based on the defendant's remarks to an audience of fifty people, other overt acts consisted of statements the defendant made to an undercover officer, concerning the defendant's efforts to plan a demonstration during the 1964 riots in Harlem.

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9. This case, much litigated in state and federal courts, originated as a state prosecution of the defendant for conspiracy to riot and to advocate criminal anarchy, and related substantive crimes. His conviction of all counts except the charge of riot, which was dismissed at trial, was affirmed in People v. Epton, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9 (1967), aff'g 27 App. Div. 2d 645, 276 N.Y.S. 2d 847 (mem. 1st Dept. 1966). After reinterpreting the criminal anarchy statute to comport with the First Amendment, necessary when a conviction relies on evidence of speech, the Court of Appeals found a clear and present danger that the defendant's words and actions would intensify or rekindle the rioting in Harlem. Then, applying the same First Amendment test to the conspiracy to riot count, the court found the evidence sufficient to show a clear and present danger of riot.

2. Overt Acts Constituting Object Crime or Other Offense

Some confusion arises when the overt acts constitute either the object crime or other substantive offenses of the conspirators. In both cases it is possible for an indictment to charge conspiracy alone, or with the other offenses, and it is helpful to distinguish between these two possibilities.

The courts have rejected the view that conspiracy "merges" into the object crime and cannot be charged once the object is attained. Instead, the prosecutor has discretion to charge either the inchoate or the substantive offense or both. People v. Glubo, 5 N.Y. 2d 461, 186 N.Y.S. 2d 26 (1959); People v. Tavormina, supra; People v. Cadle, 202 Misc. 415, 114 N.Y.S. 2d 451 (Monroe Co. Ct. 1952). Similarly, when non-target substantive crimes have been committed, the conspiracy does not merge into the crimes specified as overt acts; consequently, conspiracy may be charged alone or with substantive counts. Tavormina. Courts may find merger, however, where the object crime requires the mutual cooperation of the co-defendants, e.g., adultery or bribery. If the object is accomplished conspiracy may not be charged. People v. Potwora,[10] 44 App. Div. 2d 207, 354 N.Y.S. 2d 492 (4th Dept. 1974). For example, when two parties commit the crime of adultery, the defendants may be charged with the substantive offense, but not with conspiracy to commit adultery. Another case holds that the fact that defendants have engaged in the overt acts alleged, and could have been convicted of substantive offenses had these been charged, is not sufficient to prove their participation in a conspiracy. People v. Winter, 288 N.Y. 418, 43 N.E. 2d 470 (1942). In Winter, although the defendants engaged in acts constituting

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10. See also Annot., "Conspiracy to commit adultery or other offenses which can only be committed by the concerted action of the parties to it," 104 A.L.R. 1430 (1936).

the crime of soliciting, this was not proof of their participation in a conspiracy to violate a statute making it criminal for lawyers to solicit. The court required proof of the defendants' knowing participation in the conspiracy for a conviction on that charge.

Other rules apply when separate counts for substantive crimes are included in the indictment. The United States Supreme Court has held that criminal acts charged as overt acts in a conspiracy count may also be charged and proved as substantive offenses. Since the agreement is separate from the overt act, there is no obstacle of double punishment, Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180 (1946); United States v. Rosario, 148 F. Supp. 634 (S.D.N.Y. 1953), and cumulative sentences may be imposed upon conviction of conspiracy and substantive counts, United States v. Landi, 240 F. 2d 238 (2d Cir. 1957). The result appears to be the same under New York Penal Law section 70.25, mandating concurrent sentences for offenses committed through a "single act." See People ex rel Gallo v. Warden of Greenhaven State Prison, 32 A.D. 2d 1051, 303 N.Y.S. 2d 752 (1969) (consecutive sentences for conspiracy to commit extortion and attempted extortion).

D. DEFENSES

Penal Law section 40.10 (1) and (4) (McKinney 1975), reproduced in Appendix C, provides the affirmative defense of renunciation to offenses involving group criminality. This defense requires "a voluntary and complete renunciation of his /the defendant's/ criminal purpose." As with all affirmative defenses, the defendant bears the burden of its proof by a preponderance of the evidence. Penal Law § 25.00 (2).

Paragraph (1) of section 40.10 applies to accomplice liability for substantive offenses under Penal Law section 20.00 (McKinney 1975), reproduced in Appendix C, and requires that the defendant withdraw before the crime is committed and that he make a "substantial effort to prevent the commission" of the crime. In contrast, paragraph (4) applies to conspiracy and solicitation prosecutions and requires that, in addition to his withdrawal, the defendant prevent the object crime. The section 40.10 (4) requirement is stricter (actual prevention of the object, as opposed to a substantial effort), because the conspiracy, an inchoate crime, has already been committed and may be charged in any

event without the object being attained.[11] In other words, if a defendant were allowed a complete defense to conspiracy by making merely a substantial effort to prevent the commission of the object crime, he would escape punishment for conceiving, planning, and setting in motion a crime that actually occurred. The theory behind making conspiracy a separate, punishable offense for mere planning of crime, however, requires that this defendant be punished even though he withdrew from the conspiracy. In contrast, where the defendant actually prevents the object, his culpability is purged by his subsequent act, thereby making punishment less justifiable.

Aside from these statutory affirmative defenses, mere withdrawal may be sufficient to avoid liability for conspiracy if the withdrawal occurs before the commission of the overt act. This defense is based on the assumption that the overt act requirement is designed to ensure that mere talk (the agreement alone) is not punished. It has been suggested, however, that section 105.20 makes this defense unavailable by eliminating the overt act as an element of the offense and making it only an evidentiary requirement.[12] 64 Colum. L. Rev., supra, at 1516.

While section 40.10 (1) explicitly applies when the defendant is liable as an accessory to a substantive crime under section 20.00, it does not necessarily apply when his liability for the substantive crime is based on a conspiracy theory.[13] Indeed, the words "an offense. . .in which the defendants' guilt depends upon his criminal liability for the conduct of another person pursuant to section 20.00" appear to exclude the defense when conspiracy (section 105.00) is involved. Nevertheless, the Court of Appeals, in People v. Ozarowski, 38 N.Y. 2d 481, 381 N.Y.S. 2d 438 (1976), discussed this defense in a case in which the defendants' liability for an assault committed by one of their number was based upon participation in an underlying conspiracy, not section 20.00. In Ozarowski, the assault took place after some of the defendants left the scene

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11.

OFFENSE CHARGED	AFFIRMATIVE DEFENSE	CONDUCT REQUIRED TO ESTABLISH DEFENSE
Conspiracy (or solicitation)	§ 40.10 (4)	Prevent object
Substantive offense committed by another (§ 20.00 liability or conspiracy)	§§ 40.10 (1)	Substantial effort

12. See discussion p. 9-10 supra.

13. See discussion p. 17-21 infra.

in search of a candy store.[14] The court found that the section 40.10 (1) defense was not established, since the defendants merely withdrew from the conspiracy without making a substantial effort to prevent the assault. In considering the defense, the court ignored the restrictive phrase "pursuant to section 20.00," apparently presuming the defense applicable when substantive liability arises out of participation in a conspiracy. This seems a sensible response to what was probably an oversight in draftsmanship. If section 40.10 (1) did not apply to substantive liability resting on a conspiracy, as it applies to section 20.00, a similar defense would have to be made available because of the essential similarity of the two theories of substantive liability.[15]

III. SCOPE OF LIABILITY FOR ACTS AND CRIMES OF CO-CONSPIRATORS

A. VICARIOUS LIABILITY

Criminal and non-criminal acts of co-conspirators in furtherance of a conspiracy can be imputed to a defendant, through the theory of agency, to establish vicarious liability for conspiracy itself, for substantive offenses,[16] or for purposes of jurisdiction and venue under Penal Law section 105.25 (McKinney 1975), reproduced in Appendix A.

In United States v. Overton, 470 F. 2d 761 (2d Cir.), cert. denied, 411 U.S. 909 (1972), criminal acts of a co-conspirator were permitted to establish an overt act and the existence and scope of the conspiracy. The court held that threats made by the co-conspirator, punishable under a federal statute making it a felony to interfere in interstate commerce, were admissible against the other two defendants to prove the existence of a conspiracy to violate a federal labor statute. These defendants were responsible for their co-conspirator's threats, charged as overt acts, whether or not they knew of

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14. For a further discussion of facts, see p. 18 infra.

15. See discussion on substantive liability p. 17-21 infra.

16. Id.

them. People v. Smith, supra, holding to the contrary, did not allow unlawful acts of one defendant to be used against the others as evidence of a conspiracy unless an agreement (between the first defendant and the others) was proved. The court found in Smith that there was "no proof whatsoever" of an agreement between the defendants, nor any conduct from which an agreement could be inferred. But cf. People v. Gross, p. 4, supra (stating that acts and statements of one conspirator are not admissible against the others, unless they are in furtherance of a conspiracy proved beyond a reasonable doubt, and finding the conspiracy established by sufficient circumstantial evidence).

In People v. Connolly, supra, non-criminal acts of an unindicted co-conspirator were admissible to prove the conspiracy. The court said that it is not necessary to prove the conspiracy before evidence of specific acts may be admitted; it is sufficient if the prima facie case implicates the co-conspirator with the defendant.[17]

Vicarious liability was invoked in People v. Sher, 68 Misc. 2d 917, 329 N.Y.S. 2d 2 (Greene Co. Ct. 1972) to establish an overt act for venue purposes. In Sher, the court held that non-criminal acts of an original co-conspirator were binding on the defendants, who later joined the conspiracy, to permit the defendants to be tried in a county in which they never acted personally.

Even where conspiracy is not charged, acts and declarations of "co-conspirators" in a joint enterprise are admissible against all the members. People v. Luciano, 277 N.Y. 355, 14 N.E. 2d 433, cert denied, 305 U.S. 620 (1938). The defendant in this case was charged as a principal with various prostitution offenses arising out of his activities in running a large prostitution enterprise. The court held sufficient the evidence supporting his conviction, although much of it was supplied by the acts and statements of his co-conspirators, which the court said were properly admitted, See discussion p. 17-21 infra.

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17. See discussion on the order of proof for statements of co-conspirators introduced under the exception to the hearsay rule, p. 30 infra. Acts of co-conspirators do not present the same difficulties that statements do, because with statements there is the risk that hearsay will be used to connect a defendant to the conspiracy.

B. SUBSTANTIVE CRIMES:
SPECIFIC INTENT REQUIREMENT

In the federal courts, it is possible to impose substantive criminal liability on a defendant for the acts of his co-conspirators where his mental culpability amounts to less than a specific intent. The rule, stated in Pinkerton v. United States, supra, is that a criminal act of one conspirator is attributable to all (and all are criminally liable for it), provided that the act is in furtherance of and within the scope of the conspiracy, or reasonably foreseeable as a necessary or natural consequence of the agreement. Pinkerton involved two brothers charged with violations of the Internal Revenue Code for dealing illegally in whiskey. One was convicted on nine counts of substantive offenses and one count of conspiracy. The second was convicted on six counts and the conspiracy, although there was no evidence that he committed the substantive crimes (he was in prison). Each substantive count was in pursuance of the goal of the conspiracy and corresponded to an overt act charged in the conspiracy count.

Learned Hand wrote, in United States v. Crimmins, supra, that substantive liability for the acts of co-conspirators is restricted by the "condition that acts so imputed must be in execution of /the/ venture as all understand it. . . ." Nor is it permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have gone beyond what was reasonably understood. Id. Of this last rule, the Supreme Court has said that most of the Courts of Appeals have avoided it by the "simple expedient" of inferring the requisite knowledge from the scope of the criminal venture. United States v. Feola, supra, at 689.

The New York rule is more strict. Neither knowledge nor knowing aid is sufficient for vicarious liability in conspiracy.[18] Rather, it appears that under New York law a conspiracy defendant cannot be held liable for a crime committed by his co-conspirator unless the evidence of the conspiracy shows that he formed the mens rea required for the substantive crime and that the crime was committed in furtherance of the conspiracy. This differs from the federal Pinkerton rule, apparently never cited in New York cases, which does not demand such a mens rea.

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18. See discussion p. 19 infra.

The nature of the specific intent requirement is discussed in a 1976 Court of Appeals case, People v. Ozarowski, supra. The facts of this case include an assault, by a youth wielding a baseball bat, on an employee of a Nathan's restaurant in Yonkers that caused severe injury to the victim.

Six of the seven defendants had gathered at an apartment to plan a trip to the restaurant in order to settle a dispute with the employees there. En route they met three other youths, who were indicted separately, and then picked up the seventh defendant as planned. Shortly after the group arrived at the restaurant, an employee went behind the building to empty garbage. Then Chester Ozarowski, indicted in the connected case and the brother of one of the defendants in this case, struck the employee on the head with a baseball bat. Each of the seven defendants in this case was convicted of conspiracy in the third degree, two counts of assault in the second degree, three counts of possession of a dangerous weapon, and one count of criminal trespass in the third degree.

The degree of conspiracy charged made it necessary that the goal of the conspiracy be a felony (see section 105.05 of the Penal Law), and the court found the evidence sufficient to show that the goal was felonious assault (see article 120 of the Penal Law). According to the court, the evidence indicated that each defendant formed a specific intent that one person in their group should commit "serious physical injury" (the intent element in felonious assault) during the anticipated fight. Their concerted effort to start a fight, and their awareness prior to the assault that Chester and several others carried bats, justified the conclusion that nothing less than serious injury was intended.

In upholding the conviction of each defendant on the substantive counts of assault, possession of a dangerous weapon, and criminal trespass, the court found that the People had met their burden of proving that each defendant formed an intent to commit these crimes. Citing U.S. Supreme Court cases, the court stated that "the inference of intent under the conspiracy doctrine presents special problems." Also, the court distinguished felony-murder cases, in which an intent to commit the predicate felony renders all participants responsible for the resulting murder.

Regarding the assault second-degree counts in particular (section 120.05 (1) and (2) of the Penal Law), the court stated that it must be shown from evidence of the conspiracy itself that each defendant formed a specific intent to do "serious physical injury," as well as an intent to do "physical injury" by means of a dangerous instrument (see section 10.00 (9) and (10) of the Penal Law). On this question, it continued, Chester's acts are not determinative of the others' intent. The issue was not what Chester intended when he hit

the victim, but rather whether his act was one intended by all the others and one performed "in furtherance" of the conspiracy. The court affirmed the assault convictions for each of the seven defendants, finding the evidence sufficient to infer that each intended an assault as part of the conspiracy. Cf. People v. Weiss, 290 N.Y. 160, 48 N.E. 2d 306 (1943) (two defendants' murder convictions for a killing done by a third person must rest on a conspiracy to kill the victim and upon knowledge of the first two that the killer had a dangerous weapon to be used to kill; held: evidence insufficient to prove such a conspiracy).

People v. Agron, 10 N.Y. 2d 130, 218 N.Y.S. 2d 625 (1961), another Court of Appeals case, illustrates the specific intent requirement. There, defendants Agron and Hernandez, along with five others, were convicted of two counts of murder in the first degree and one count of attempted murder for an attack on a group of teenagers in a neighborhood park in New York City. Only Agron committed the fatal stabbings. The issue on appeal was whether the defendants formed a conspiracy to kill the teenagers, which would make all of them responsible for the murders committed by Agron. The Court of Appeals held that the evidence showed only a conspiracy to assault and was not sufficient to establish a conspiracy to murder. As to defendant Hernandez, the prosecution failed to prove a separate, premeditated intent to kill, so that his murder conviction had to be overturned in the absence of a felony-murder theory.[19]

C. SUBSTANTIVE CRIMES: CONSPIRACY VERSUS ACCOMPLICE LIABILITY

A defendant may be convicted for an offense committed by another, not only when he and the other person are part of a conspiracy, but also when under section 20.00 of the Penal Law (accessorial liability) he acts "with the mental culpa-

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19. The felony-murder theory, when available, permits all defendants who have conspired to commit a predicate felony (burglary, robbery, escape, arson, or kidnapping) to be convicted for a murder committed by one co-conspirator in the course of attempting or committing that felony. People v. Collins, 234 N.Y. 355, 137 N.E. 753 (1922). The felony-murder doctrine is an exception to the rule requiring specific intent on the part of a defendant to find him vicariously liable for a substantive crime of his co-conspirator.

bility required for the commission" of the offense and "solicits, requests, commands, importunes, or intentionally aids" the other person. The legislative history of this section, created in the 1965 revision of the Penal Law, does not indicate any relationship between it and conspiracy on the question of vicarious liability. Section 20.00 follows the theme of the old Penal Law section 6, which defined a "principal" in a crime, but does not use common law terms to state the law of the old section. Practice Commentary art. 20, Hechtman (McKinney 1975).

The mens rea required by these two theories bear some similarity. Although intent may be inferred from knowledge of a conspiracy, there is no liability for substantive offenses under a conspiracy theory without specific intent, or under section 20.00 without "mental culpability."[20] In cases of a defendant's mere "knowing aid" to the commission of a crime, sections 115.00 and 115.05 of the Penal Law impose liability for the separate, lesser crime of "criminal facilitation."

Federal cases indicate that substantive liability for a crime, even one other than the object crime, committed by a conspirator is based on the defendant's entrance into the conspiracy regardless of his state of mind regarding that crime, provided it is within the scope of the conspiracy or reasonably foreseeable. See Pinkerton, supra.[20a]

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20. See notes 11 and 15 supra and accompanying text on the effect charging one theory instead of the other has on statutory renunciation defenses.

20a. Even federal law, however, does not rely exclusively on conspiracy for imposing vicarious substantive liability. The United States Supreme Court has held, in Nye & Nissen v. United States, 336 U.S. 613 (1949), that liability for substantive crimes may be based on "aiding and abetting" whether or not there is a conspiracy. There, a corporation, Nye & Nissen, and its president were charged with conspiracy and six counts of substantive offenses for filing false invoices with a federal agency. The issue was whether Pinkerton, supra, permitted the conviction of the corporate president on the substantive counts. The Court held Pinkerton inapplicable, but said that the president was liable on an "aiding and abetting" theory, which permitted vicarious liability for crimes outside the scope of the conspiracy. Pinkerton applies, according to the Court, only when the acts charged in the substantive counts fit within the scope of the agreement. Although there was no direct evidence tying the president to the false invoices, the Court found circumstantial evidence sufficient to support the defendant's conviction as an "aider and abetter."

The New York conspiracy statute does not mention vicarious liability for substantive crimes, yet the cases, Ozarowski, Agron, and Weiss, supra, appear to impose vicarious liability on a conspiracy theory. Nor do the cases distinguish between object and other crimes. The fact of a conspiracy may lead to placing liability on a defendant for the substantive crime that is the object of the agreement, but what of a substantive crime of a co-conspirator, in furtherance of the plan, that the defendant has not agreed to? In the absence of an authoritative answer from the courts, the better view is that (1) a defendant is liable for the crime of his co-conspirator if he has the intent required for that substantive crime and the co-conspirator commits that crime "in furtherance" of the conspiracy; and (2) a defendant is liable for the crime of his co-conspirator not committed "in furtherance" of the conspiracy only if he is liable under section 20.00. Although not defined in the cases, the term "in furtherance" appears to refer to crimes that, by an objective standard, are closely related to the original plan of the conspiracy.

IV. TRIAL ISSUES

A. SINGLE vs. MULTIPLE CONSPIRACY

An important consideration, at least in federal prosecutions, is whether particular evidence indicates a single conspiracy or multiple conspiracies. This issue presupposes the existence of conspiratorial conduct and primarily involves the question of whether knowledge of the scope of a conspiracy can be imputed to a particular defendant or a group of defendants.

The question of single or multiple conspiracies arises in various contexts and the result often depends on the purpose of the inquiry. 61 Colum L. Rev., supra, at 980. Sometimes the prosecutor will argue that several independent conspiracies are involved, to defeat a defendant's claim of double jeopardy or to justify cumulative sentences. Note, Federal Treatment of Multiple Conspiracies, 57 Colum L. Rev. 387 (1957). At other times, the prosecution will argue for

the existence of a single conspiracy, in order to use the co-conspirator hearsay exception (which may increase the quantity of evidence admitted against each defendant as the scope of the conspiracy is enlarged), or for reasons of trial economy. Id. at 387, 397.

1. Chain Conspiracy

Most conspiracies assume the form of either a "chain" or a "wheel." A chain involves the linkage of individuals or groups at different stages of a distribution process, while a wheel involves the linkage of figures at the rim to a central figure at the "hub." In narcotics cases the conspiracy is more likely to take the form of a chain, because narcotics is a "commodity," requiring distribution. The typical narcotics chain conspiracy is an integrated operation employing a number of parties: exporter (foreign), importer (U.S.), processor, distributor (wholesaler), middleman, retailer, and the ultimate purchaser. Of course, a given conspiracy may involve only several links of the chain. A wheel conspiracy, on the other hand, may involve only a single middleman and a number of unconnected retailers.

Regardless of type, to resolve the single versus multiple issue it is necessary to define the conspiracy alleged. This is done by specifying its vertical and horizontal scope. Vertical scope in a chain conspiracy involves the problem of producing enough evidence against a defendant at any given level, such as a middleman, to impute to him knowledge of the existence of a distribution process. Horizontal scope in a chain differs, involving the imputation of knowledge of the existence of other participants on the same level.

2. Second Circuit Approach

There are no New York cases on the issue of multiplicity, but for those considering instituting conspiracy prosecutions, probably no question is more important. Nothing prevents state prosecutors from bringing, like their federal counterparts, multi-defendant conspiracy cases of impressive size if they believe that such cases provide tactical advantages. New York evidentiary and procedural rules have discouraged

this practice, however.[21] More liberal standards in the federal courts facilitate the prosecution of large conspiracies and account for the great frequency with which the multiplicity issue appears before the federal appellate courts.[22] The Second Circuit has devised several approaches to both the horizontal and vertical scope problems, which would be useful in a New York case presenting the multiplicity issue.

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21. There are at least two differences between state and federal law that have made federal prosecutions more common:

a. Unlike New York, federal law does not require corroboration of the testimony of co-conspirators. See New York Crim. Proc. Law §60.22 (1)(McKinney 1975), reproduced in note 29 infra. The New York requirement makes it difficult to prosecute historical conspiracies, which precede the cooperation of accomplices or use of undercover officers or wiretaps, because the necessary corroboration often cannot be found.

b. Federal joinder under F. R. Cr. P. 8 (b) permits substantive and conspiracy counts against different defendants to be joined in the same indictment, unlike New York joinder, Crim. Proc. Law §200.40 (1) (McKinney 1975), reproduced in note 24 infra. The effect of the New York joinder rule is that cases must be split where the conspiracy and substantive counts involve different groups of defendants, while in federal prosecutions these counts may be joined in a single case.

22. The Second Circuit has warned prosecutors not to bring a single conspiracy case when the acts "more reasonably show two or more conspiracies, perhaps with a link at the top." The court said that such cases save little time and create problems at both the trial and appellate levels, such as large trial records for the appellate judges. United States v. Sperling, 506 F. 2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

The test for multiplicity where the problem is one of vertical scope, proving that a defendant knows he is part of a distribution process, is by analogy to the structure of legitimate business. In United States v. Bynum, 485 F. 2d 490 (2d Cir. 1973), vacated 417 U.S. 903 (1974), aff'd on rehearing, 513 F. 2d 533, cert. denied, 423 U.S. 952 (1975), the court described the conspiracy as operating like a vertically integrated, loose-knit business combination, and it found that the "mutual dependence" of each level of the operation on the others was known and appreciated by each member. Two of the defendants, the middlemen, had actual knowledge; their suppliers had to know that they would resell; likewise, the distributors had to know that suppliers were involved. The court indicated that there was no need for each defendant to have known and worked directly with all the others, since each knew that others were involved, and that they themselves were part of a larger operation. Accord, Sperling, note 22 supra. Compare the language in United States v. Bertolotti, 529 F. 2d 149 (2d Cir. 1975), finding no single conspiracy, to the effect that the operations engaged in by two defendants cannot be attributed to even a "loose-knit" organization. In that case there was no evidence that the two were conducting "a regular business on a steady basis." The facts involved a series of three thefts by conspirators Rossi and Coralluzzo, and a subsequent sale by them to four buyers. The buyers in the consummated sale were joined as members of the conspiracy with three associates of the pair, who assisted in distributing narcotics obtained in one of the thefts. Characterizing these events as "bizarre," the court said, "The scope of the operation was defined only by Rossi's resourcefulness in devising new methods to make money." Id. at 155. The presence of Rossi and Coralluzzo, linking the four events charged as the conspiracy, was a kind of nexus that has never been considered sufficient to find a single conspiracy.

Another test for vertical scope is quantity. In United States v. Magnano, 543 F. 2d 431 (2d Cir. 1976), the court held that the defendant suppliers were part of a single conspiracy, because they had sold large enough amounts to distributors, 140 pounds of narcotics, for them to know the vertical nature of the conspiracy. Additionally, the court held the "single transaction" rule inapposite. Under that rule a single, isolated act does not per se support the inference that the defendant has knowledge of the scope of the conspiracy. Here the single act of two of the suppliers was a sale to core members of the conspiracy, three distributors who linked the defendant suppliers with the retailer, and was large enough to justify the inference of knowledge. Accord, Sperling, supra.

When the problem is one of horizontal scope, the tests for multiplicity are similar. Again, Bynum, supra, is instructive. Here there were three related groups in the alleged conspiracy. At the top of the network were the suppliers, who were held to be members of a single conspiracy. All were closely connected, and even though some may not have known the identity of others, the inference could be drawn that each knew that his supplies were only a small part of the narcotics that the middlemen processed and sold. All intentionally had a close arrangement with a solvent, ongoing operation, the middlemen's partnership, which conducted a steady business with many suppliers. As for the distributors, one step down from the middlemen, there was ample proof of their participation in the single conspiracy charged. Among all of them the relationship was continuing, intimate, and pursuant to a common scheme or plan. But see Bertolotti, supra.

United States v. Mallah, 503 F. 2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975), put the structural test in a simple metaphor, where the problem was the linkage of two distribution chains in a single conspiracy. Pointing to common direction from core conspirators, commingling of assets, mutual dependence, and common business offices, the court said, "As in a firm with a real estate department and an insurance department, the fact that partners bring in two kinds of business (heroin and cocaine) on the basis of their different skills and connections does not affect the fact that they are partners in a more general venture." The jury could find that each defendant must have known that he was in a scheme with many buyers and sellers of heroin and cocaine, and that they all were part of the same "firm."

A quantity test has also been used to tie together independent suppliers as part of a chain conspiracy. In Magnano, supra, the court indicated that the quantities sold by the suppliers, each of whom dealt directly with at least one of three distributors, permitted the inference that each supplier must have known the others existed. This inference was buttressed by evidence that three of the suppliers who were in a partnership had actual knowledge of the other two. Another case, United States v. Leong, 536 F. 2d 993 (2d Cir. 1976), held as part of a single conspiracy two distributors, one buying heroin from a New York City importer for distribution in Vancouver, the other buying from the same importer and another in Vancouver for distribution in San Francisco. Even though they did not know all the suppliers and distributors, it was reasonable to infer that each knew his supply was only part of the overall amount imported into New York City and Vancouver. The court concluded that when large quantities of narcotics are distributed, each major buyer must be presumed to know that he is part of a wide ranging venture, the success of which depends on the performance of others not known to him.

In contrast, United States v. Miley, 513 F. 2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975), held that two groups of suppliers were not to be linked through a common buyer, because the buyer's activities were not of such a scale that required each group to have knowledge of the involvement of the other. A similar result was reached in United States v. Chong, 544 F. 2d 58 (2d Cir. 1976), involving two groups of suppliers making one sale each to undercover police on different dates and in different locations in Manhattan. The court found separate conspiracies, stating that the test of Bynum and Sperling, supra, -- size of the operation, permitting an inference of knowledge on the part of each group of suppliers that it has only a share -- was not met. Here the operations were on a small scale, since there were only two sales of one and a half pounds of heroin each, and there was no "large scale transaction or interrelationship between smaller transactions."

Cases linking middlemen in the same conspiracy follow the pattern described thus far, but employ the structural test alone. United States v. Tramunti, 513 F. 2d 1087 (2d Cir.), cert. denied, 423 U.S. 832 (1975), found sufficient proof of mutual dependence to indicate a single business venture. The two spheres of operations were linked by sales to common distributors, as well as by cooperation, trust, and a mutual source of supply. United States v. Panebianco, 543 F. 2d 447 (2d Cir. 1976), following Tramunti, held sufficient as proof of a single conspiracy evidence that both groups of middlemen relied on the same supplier, shared two common customers, and exchanged heroin with each other in times of short supply.

It should be emphasized that these cases from the Second Circuit provide no more than a set of factors for determining when multiple conspiracies exist, not hard and fast rules. Any analysis of the problem will depend mostly on the facts of the particular case.

3. Prejudice

Whenever a court finds, on a defendant's claim, that misjoinder or variance (between the charge of a single conspiracy and proof of multiple conspiracies) has occurred, it must then resolve the issue of prejudice. Again, the Second Circuit cases are helpful because that court has had a greater opportunity than the New York courts to confront the issue. [23]

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23. The one New York joinder case on this issue, People v. Luciano, p.16 supra, holding that no prejudice occurred, deals with joinder of crimes, not parties, See also N.Y. Crim. Proc. Law §§ 200.20 (2) (a) and 40.10 (2) (b) (McKinney 1971) (permitting joinder of offenses that are part of the same "criminal transaction" and defining that term to include "groups of acts" that are "so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture").

The federal tests of prejudice would be applicable in state cases with one important qualification: the greater strictness of the state joinder rule, as compared to the federal rule, may lead to a conclusion of prejudice in a state case while no such finding would be made in a federal court in the same circumstance.[24]

Several Second Circuit cases, Miley, Magnano, and Chong, supra, provide a set of factors whose analysis may help resolve the prejudice question. At issue is whether the defendant has been so prejudiced by the variance that his substantial rights have been affected. For example, when the variance is substantial, a determination of the guilt of a particular defendant may be difficult for a jury, due to the inevitable spillover effect of the evidence presented in the case. Relevant factors include the number of defendants and unindicted co-conspirators, the complexity of the case, the number of separate conspiracies, and the length of the trial. Important, too, is whether inflammatory items of proof relating to, or hearsay statements made by, the defendants held to belong to the other conspiracies are introduced against a particular defendant. The characters of the defendant and his co-conspirators deserve consideration. Did the defendant play a major or minor role in narcotics trafficking? Was the jury's view of him colored by their knowledge of the role, perhaps as top-echelon conspirators,

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24. State joinder:

"Two or more defendants may be jointly charged in a single indictment provided that all such defendants are jointly charged with every offense alleged therein...." N.Y. Crim. Proc. Law §200.40 (1) (McKinney 1971).

Federal joinder:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
>
> F. R. Cr. P. 8 (b).

of the other defendants? Finally, miscellaneous factors may prejudice the jury against the defendant, for example, a Pinkerton charge (on substantive liability for overt acts of a conspiracy) against a co-conspirator.

The distinction between federal and New York joinder rules, discussed above, affects the analysis of the prejudice issue whether it is framed as one of joinder or variance. The federal test is the same in both cases: whether prejudice results from a joint trial. Miley, supra. The federal courts often hold that there is no prejudice because the separate conspiracies could in any event be tried together under their liberal joinder rules. In contrast, state courts cannot try separate conspiracies together when different sets of defendants are involved.[25] An attempt to join such separate conspiracies at the start of a trial would violate section 200.40 (1) of the Criminal Procedure Law,[26] which requires that each defendant named in the indictment be charged with every offense. This statute appears to compel a finding of prejudice when there is misjoinder at any state. When the prejudice issue is defined in terms of variance, the question is whether the statutory violation ipso facto should be the basis for a finding of prejudice. The likely answer is yes, because a determination of prejudice from a joint trial should not be made to depend on how the defendant frames the issue. Consequently, a factual determination of prejudice, using factors gleaned from Second Circuit cases, will be necessary in New York cases only when separate conspiracies are formed by the same group of defendants. When conspiracies are not identical in their composition, the violation of section 200.40 (1) of the Criminal Procedure Law, whether related to misjoinder or variance, should be a basis for finding prejudicial error.

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25. Compare this situation to one in which only one defendant (or a single set of defendants) is charged with a single conspiracy, but variance is found because there are two conspiracies. Then the federal and New York analyses are identical: No prejudice, in the absence of other factors, because both conspiracies could have been joined in the same indictment if they are either connected, or of similar character, or part of a common scheme. See U.S. v. Sir Kue Chin, 534 F. 2d 1032 (2d Cir. 1976).

26. See note 24 supra.

B. CO-CONSPIRATOR HEARSAY EXCEPTION

1. Requirements

When a conspiracy exists, hearsay may be received on the theory that a co-conspirator's admission is an admission imputable to other co-conspirators. Before the hearsay statements may be received two requirements must be satisfied: 1) that the statement be made "in furtherance" of the conspiracy, and 2) that it be made while the conspiracy is "pending" (before its objective is accomplished). Thus, narration of past events once the crime has been completed, or has failed, are not admissible. People v. Vacarro, 288 N.Y. 170, 42 N.E. 2d 972 (1942); People v. Ryan, 263 N.Y. 298, 189 N.E. 225 (1934). People v. Dunbar Contracting, 165 App. Div. 59, 151 N.Y.S. 164 (2nd Dept. 1914), aff'd, 215 N.Y. 416 (1915), is illustrative. There, a prosecution for conspiracy to defraud New York State was charged. A state official testified that he received a letter and phone call from defendant A, who was seeking the appointment of defendant B as head of a road project. The court held that this testimony was admissible, because it concerned the acts and declarations of a co-conspirator.

A corollary to the rule is that a co-conspirator's statement is admissible even when conspiracy is not charged in the indictment, as long as the judge charges the jury that it must find that a conspiracy exists. People v. Luciano, p. 16 supra; People v. Pontani, 33 App. Div. 2d 688, 306 N.Y.S. 2d 240 (2d Dept. 1969); People v. Bonsignore, 21 App. Div. 2d 309, 250 N.Y.S. 2d 345 (4th Dept. 1964); People v. Alvarez,[27] 88 Misc. 2d 709 (Sup. Ct. N.Y. Co. 1976).

2. Sixth Amendment

The co-conspirator hearsay exception does not violate the Sixth Amendment confrontation right of the defendant against whom the hearsay is offered. The Court of Appeals decision in People v. Rastelli, 37 N.Y. 2d 240, 371 N.Y.S. 2d 911 (1975), cert. denied, 423 U.S.995 (1975), noting that the rule was longstanding, relied upon Dutton v. Evans, 400 U.S. 74 (1970). In that case, the Supreme Court held that a Georgia statute, broader than the New York rule, did not violate the confrontation clause. The statute in Dutton

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27. See this case, decided in the Special Narcotics Courts, for its collection of other New York and federal cases on this point and the Pinkerton issue.

allowed into evidence statements of a co-conspirator made in the concealment phase of a conspiracy. After holding that the absence from the statute of the "in course of" and "in furtherance" requirements found in the federal rules of evidence was not a constitutional infirmity, the Supreme Court considered the Sixth Amendment issue. The majority concluded that the defendant had adequate opportunity to cross-examine the witness about whether the co-conspirator's statement was actually made, and that the other indicia of reliability of the statement were so great that cross-examination of the co-conspirator would not have shown unreliability. Weakening defendant's claim that he was denied confrontation was the fact that although the co-conspirator was not present, the defendant, who was charged solely with murder, made no effort to call him as a witness.

3. Order of Proof

An important issue of trial procedure is whether hearsay evidence may be introduced before there is proof tying the defendant and the declarant together as co-conspirators. If the hearsay may come first, then a kind of bootstrapping occurs. As Justice Jackson argued in Krulewitch v. United States, 336 U.S. 440 (1949) (concurring opinion), the conspiracy is often proved by evidence that is admissible only on the assumption that a conspiracy exists. The accused 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 persuade the jury of the existence of the conspiracy itself." He added, "The naive assumption that prejudicial effects can be overcome by instructions to the jury (citations omitted), all practicing lawyers know to be unmitigated fiction." Judge Learned Hand once proposed that the judge rule on admissibility and leave the evidenee for the jury without an instruction, because it is practically impossible for laymen and most judges to keep their minds in the "isolated compartments" that the instruction requires. United States v. Dennis, 183 F. 2d 201 (2d Cir.), aff'd, 341 U.S. 494 (1950). "This conclusion permits the jury to act upon hearsay, because they may be satisfied of the joint undertaking only because of the declaration; but it often happens that hearsay is competent, and this is the only practicable way to deal with the question." Id.

As these remarks suggest, the order of proof problem really involves two separate questions: 1) May hearsay be introduced before there has been proof of conspiracy? 2) If it may, what is the best way to minimize the danger that hearsay will be used to prove the conspiracy? New York cases give conflicting answers to the first question and do not provide any satisfactory answer to the second.

Preliminarily, it is clear that hearsay cannot be used to prove the conspiracy. Sabatini v. Kirwan, 42 App. Div. 2d 1022, 348 N.Y.S. 2d 379 (3rd Dept. 1973). On the question of the proper order of admission, Sabatini requires that the existence of the conspiracy be established before the hearsay is received.[28] That case held that hearsay declarations of a co-conspirator did not constitute substantial evidence in an administrative proceeding to suspend a police officer. Conflicting with Sabatini, and permitting hearsay to be admitted first, is People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915). Becker is a murder-conspiracy case in which the defendant, a police lieutenant who headed the New York City gambling squad, was charged with the murder of Rosenthal, a gambler who had threatened to expose the defendant as his partner. Shapiro, a chauffeur who drove the hired gunmen to the scene of the murder, testified that one of them remarked that Becker "had the cops fixed." The Court of Appeals held that Shapiro's testimony was properly admitted, even though proof of the conspiracy was not produced until later, because the order in which evidence is admitted is within the discretion of the trial judge (emphasis added). Nor was it necessary that conspiracy be charged, so long as the judge instructed the jury that the statement could be used only if it found that a conspiracy existed. Recent cases confirm the vitality of the view that a trial judge has discretion to permit the introduction of evidence out of its usual order, particularly in furtherance of justice. People v. Olsen, 34 N.Y. 2d 349, 357 N.Y.S. 2d 487 (1974); People v. Reaves, 30 App. Div. 2d 828, 292 N.Y.S. 2d 296 (2d Dept. 1968), aff'd, 26 N.Y. 2d 421, 310 N.Y.S. 2d 104 (1970). Thus, a trial court may be able to accept the hearsay before the proof of the conspiracy by varying the "usual order."

The Second Circuit, unlike New York, has developed clear rules on both aspects of the hearsay problem. Generally, in federal practice, hearsay is admissible regardless of whether conspiracy is charged, so long as the necessary conditions are satisfied: The declaration is made during and in furtherance of a conspiracy, and there is non-

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28. See also Annot., "Necessity and sufficiency of independant evidence of conspiracy to allow admission of extrajudicial statements of a co-conspirator," 46 A.L.R. 3d 1148, 1158, 1161 (1973).

hearsay evidence connecting the defendant to the conspiracy. United States v. Sansone, 231 F. 2d 888 (2d Cir.), cert. denied, 351 U.S. 987 (1956); United States v. Pugliese, 153 F. 2d 497 (2d Cir. 1945). The hearsay may be introduced before there is proof of conspiracy, because the order in which evidence is adduced is never important. Pugliese, supra.

To prevent the use of hearsay to link defendant to a conspiracy, the Second Circuit has devised a "fair preponderance" test and a procedure for applying it at trial. See United States v. Geaney, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). These replace an instruction that the jury should consider the hearsay only if it first finds prima facie proof of the existence of a conspiracy. Such an instruction is unnecessary, since the judge should not give the jury a chance to second-guess his decision to admit the hearsay, United States v. Ragland, 375 F. 2d 471 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968); Dennis, supra. Rather, the trial judge must determine after all the evidence is in whether the prosecutor has established that the defendant against whom the hearsay is offered has participated in the conspiracy. The judge makes his threshold determination by a "fair preponderance" of the evidence independent of the hearsay. If he finds the defendant to be a participant in the conspiracy, he then allows all the evidence, including hearsay, to go to the jury for a determination of guilt beyond a reasonable doubt. But if the judge finds that the defendant does not belong to the conspiracy, then he must instruct the jury to disregard the hearsay, or if it is so extensive that an instruction would not help, declare a mistrial upon the defendant's motion. If a defendant is convicted with the help of hearsay, the issue on appeal is whether the trial judge had reasonable grounds to be satisfied of the conspiracy's existence on the basis of the non-hearsay evidence. Geaney, supra. Cases holding that the non-hearsay evidence is sufficient to show the defendant's participation in a narcotics conspiracy, so that hearsay may be admitted, have been decided primarily on their particular facts. See United States v. Chong, supra; United States v. Torres, 519 F. 2d 723 (2d Cir.) cert. denied, 423 U.S. 1019 (1975); United States v. Calabro, 449 F. 2d 885 (2d Cir. 1971), cert. denied, 404 U.S. 1047, 405 U.S. 928 (1972). The Geaney test is satisfied by a lower standard of proof than that needed to send a conspiracy charge to the jury. Calabro, supra.

C. CORROBORATION OF CO-CONSPIRATOR TESTIMONY

New York Crim. Proc. Law § 60.22 (1) (McKinney 1971)[29] prevents a conviction upon testimony of an "accomplice" unless there is "corroborative evidence tending to connect the defendant" with the crime. The broad definition of "accomplice" as one who may "reasonably be considered to have participated" in the offense, and the purpose of the accomplice doctrine,[30] should include most co-conspirators. When it does, the trial judge must instruct the jury that accomplice testimony requires corroboration, and failure to do so is reversible error. People v. DiSessa, 42 App. Div. 2d 952, 348 N.Y.S. 2d 149 (1st Dept. 1973).

The corroborative evidence is sufficient if it "tends" to connect the defendant with the conspiracy.[31] People v. Ozarowski, supra; See also People v. Henderson, 298 N.Y. 462, 84 N.E. 2d 779 (1949) ("fair tendency"). Several conspiracy cases have held corroborative evidence sufficient under the test. See People v. Crabtree, 34 App. Div. 2d 1024, 310 N.Y.S. 2d 899 (3rd Dept. 1970); People v. Laman, 273 App. Div. 377, 78 N.Y.S. 2d 83 (3rd Dept. 1968).. The

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29. Corroboration of accomplice testimony

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

2. An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:

a. The offense charged; or
b. An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

Crim. Proc. Law §60.22.

The purpose is
30. /to preclude "conviction solely upon the testimony of persons who are in some way implicated in, and presently subject to, prosecution for the general conduct or factual transaction on trial." (emphasis in original). Section 60.22, Practice Commentary, Denzer.

31. This test of corroboration evidence is the same for all crimes. See, e.g., People v. Ohlstein, 54 App. Div. 2d 109 (1st Dept. 1976) (holding insufficient corroboration where the defendant was charged with murder in the second degree).

fact that corroborative evidence is equally consistent with the defendant's innocence is not important, because the evidence need only "fairly connect the defendant with the crime so the jury can be reasonably satisfied that the accomplice is telling the truth." Crabtree, supra.

Even when corroboration is sufficient for a conspiracy count, an indictment charging the overt acts as separate substantive offenses requires corroboration for the substantive counts as well. People v. Malizia, 4 N.Y. 2d 22, 171 N.Y.S. 2d 844 (1958), modifying 4 App. Div. 2d 106, 163 N.Y.S. 2d 255 (1st Dept. 1957).[32] Malizia deserves attention, because it also illustrates the intricacies of basing substantive counts on overt acts alleged in the conspiracy count. The defendant was convicted of sale of heroin (count 1) and of conspiracy to sell and to possess with intent to sell (count 4). The conspiracy alleged among the overt acts a November 3 sale, which was also the subject of the sale count, and a second attempted sale on November 11 at the time of the defendant's arrest. Other overt acts in the conspiracy count were drug related meetings, which occurred at various times over the three months of the conspiracy, between the defendant Malizia and Malone, a co-conspirator who testified at trial. The trial judge charged the jury that if it found conspiracy, then Malone was a co-conspirator as a matter of law and corroboration of his testimony was required for the conspiracy count. He failed to give the corroboration instruction for the sale count.

The Appellate Division, after first holding sufficient the corroboration of the conspiracy count, held that corroboration is not required for a substantive count that is based on an overt act of a corroborated conspiracy.

The Court of Appeals affirmed the conviction for conspiracy but dismissed the sale count, finding corroboration necessary for the sale. The court first found that Malone was an accomplice to the conspiracy, since he received heroin from the defendant on consignment in ten transactions, including the one on November 3. The testimony showed that their transactions were part of a joint venture between Malone and the defendant. Since Malone was an accomplice to the conspiracy, he was an accomplice as well to the sale count based on the November 3 sale. Then the court found that there was no corroboration tending to connect the defendant with the sale charged in the substantive count.

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32. This case also held that corroboration of the conspiracy count need only connect the defendant with one of the overt acts charged.

Discovery by the police of heroin in Malone's apartment, which Malone testified he had bought from the defendant on November 3, was not corroboration, because only Malone's testimony identified the defendant as the supplier.

In contrast to Malizia, and not even cited there, is People v. Henderson, supra, in which the defendant was convicted of conspiracy, bribery, and illegally taking fees in a kick-back scheme. The defendant, employed as a sealer of weights and measures by a city, was accused of accepting short-weight deliveries of fuel to the city in exchange for payments from truckers. The trial court charged the jury that if it found that Henderson was not involved in a conspiracy to bribe, there was no corroboration of the accomplices' testimony regarding the payments themselves and it could not convict on the substantive counts; but if the jury found a conspiracy and corroborative evidence tending to connect the defendant with it, then the defendant was liable for acts flowing from that conspiracy and no corroboration was required for the substantive crimes. The Court of Appeals held that the original plan was relevant to show that the subsequent acts which were contemplated had in fact occurred, although it would not indisputably establish them. The existence of "so practicable and concrete" a plan provided, without more, an adequate basis for the jury to find that the defendant participated in the later acts which his accomplices attributed to him.

Unlike the New York rule requiring corroboration, federal law permits a defendant to be convicted on an accomplice's testimony alone.

APPENDIX A

N.Y. CONSPIRACY STATUTE, N.Y. PENAL LAW (McKINNEY 1975)

§105.00 Conspiracy in the fourth degree

A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more pesons to engage in or cause the performance of such conduct.

Conspiracy in the fourth degree is a class B misdemeanor.

§105.05 Conspiracy in the third degree

A person is guilty of conspiracy in the third degree, when, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the third degree is a class A misdemeanor.

§105.10 Conspiracy in the second degree

A person is guilty of conspiracy in the second degree when, with intent that conduct constituting a class B or class C felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the second degree is a class E felony.

§105.15 Conspiracy in the first degree

A person is guilty of conspiracy in the first degree when, with intent that conduct constituting a class A felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the first degree is a class B felony

§105.20 Conspiracy; pleading and proof; necessity of overt act

A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy.

APPENDIX A (CONT.)

§105.25 Conspiracy; jurisdiction and venue

1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.

2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisidiction if performed therein.

3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

§105.30 Conspiracy; no defense

It is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or the object conduct or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime.

APPENDIX B

Federal Conspiracy Statutes

General:

18 U.S.C. §371, Conspiracy to commit offense or defraud U.S.

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. (Punishment omitted).

Narcotics:

21 U.S.C. §846, Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX C

NEW YORK STATUTES: RENUNCIATION DEFENSE AND ACCESSORIAL LIABILITY. N.Y. PENAL LAW (McKINNEY 1975).

§40.10 Renunication

1. In any prosecution for an offense, other than an attempt to commit a crime, in which the defendant's guilt depends upon his criminal liability for the conduct of another person pursuant to section 20.00, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof.

4. In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime.

§20.00 Criminal liability for conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.