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ARTICLES

THE ANTIQUATED "SLIGHT EVIDENCE RULE" IN FEDERAL CONSPIRACY CASES

Brent E. Newton*

I. THE SWEEPING DRAGNET OF FEDERAL CONSPIRACY LAW

Few, if any, areas of criminal law raise the specter of convicting the innocent—or the marginally culpable—more than federal conspiracy law.¹ The essence of a criminal conspiracy is a simple agreement between two or more persons to commit an offense.² Because by their very nature conspiracies are secretive,

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1. The generic federal conspiracy statute is found in 18 U.S.C. § 371. The statute provides in pertinent part: "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both." *Id.* Other specific conspiracy offenses are found in the federal criminal code. *See, e.g.*, 21 U.S.C. § 846 (drug conspiracy statute).

2. *E.g.*, *United States v. Bayer*, 331 U.S. 532, 542 (1947). "It is well settled that the essential elements of the crime of conspiracy are: (1) that the defendant agreed with at least one other person to commit an offense; (2) the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy; and (3) during the existence of the conspiracy, at least one of the overt acts set forth in the indictment was committed by one or more of the members of the conspiracy in

they are rarely proved with direct evidence and, instead, typically must be proved with circumstantial evidence. For that reason, courts have been quite liberal in permitting conspiracy convictions based solely on circumstantial evidence.³

The danger to a defendant charged with conspiracy is not only that he or she will be held criminally liable for the offense of conspiracy itself, but also that he or she will be vicariously liable for any substantive offense committed by another conspirator “in furtherance of” the conspiracy.⁴ This “powerfully broad”⁵ doctrine of vicarious liability—known as the *Pinkerton* doctrine⁶—extends to offenses in which a defendant did not participate or of which the defendant did not have any actual knowledge.⁷ For this reason, many leading jurists have criticized the sweeping “dragnet” created by *Pinkerton*.⁸ Nevertheless, it remains the law and has been a common tool used by prosecutors for many decades to secure convictions.

furtherance of the objectives of the conspiracy.” *United States v. Salameh*, 152 F.3d 88, 145 (2d Cir. 1998).

3. *E.g.*, *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994).

4. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946). Although the statutory maximum punishment for a conspiracy conviction under 18 U.S.C. § 371 is five years in prison, a defendant convicted of a substantive offense under *Pinkerton*'s vicarious liability doctrine is subject to the imprisonment range set forth in the substantive statute. *See, e.g.*, *United States v. Willis*, 102 F.3d 1078, 1083-85 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2517 (1997) (under *Pinkerton*, upholding life sentence for armed bank robbery conviction where evidence only showed that the defendant had conspired with others to commit bank larceny and that the defendant had no role in using firearm in escape from bank).

5. *United States v. Rodriguez*, 831 F.2d 162, 168 (7th Cir. 1987).

6. *E.g.*, *United States v. Thompson*, 122 F.3d 304, 307 (5th Cir. 1997).

7. *See, e.g.*, *United States v. Goines*, 988 F.2d 750, 759-60 (7th Cir. 1993) (“Minor members of a conspiracy run the risk of prosecution for every crime committed in furtherance of the conspiracy, even crimes in which they did not directly participate.”); *United States v. Schultz*, 855 F.2d 1217, 1221 (6th Cir. 1988) (“It is not necessary to prove that the defendant was aware of each act of his co-conspirators in furtherance of the conspiracy [in order to be held liable under *Pinkerton*].”).

8. *E.g.*, *Krulewitch v. United States*, 336 U.S. 440, 445-58 (1949) (Jackson, J., concurring, joined by Frankfurter & Murphy, JJ.).

II. THE LOWER COURTS' PERSISTENT APPLICATION OF THE ANTIQUATED "SLIGHT EVIDENCE RULE"

With respect to the quantum of proof necessary to link a defendant to a criminal conspiracy, virtually every United States Court of Appeals, at one time or the other during the past several decades, has applied the "slight evidence rule." That rule provides that, where there is evidence establishing the existence of a conspiracy between at least two other people, the prosecution need only offer "slight evidence" of a defendant's "knowing participation" or "intentional involvement" in the existing conspiracy—that is, the defendant's *mens rea*—to secure the defendant's conviction.⁹ The "slight evidence rule" was created out of thin air by the Fifth Circuit in 1930 in *Tomplain v. United States*.¹⁰ Other circuits adopted it in the following decades.¹¹ "The question of how this doctrine crept into the law is truly a remarkable one . . ." ¹² According to Second Circuit Judge John O. Newman, the slight evidence rule "gained acceptance because of a confusion between the correct rule that only a slight connection between a defendant and a

9. *E.g.*, *United States v. Hester*, 140 F.3d 753, 761 (8th Cir. 1998); *United States v. Morrow*, 914 F.2d 608, 612 (4th Cir. 1990); *United States v. Brown*, 912 F.2d 1040, 1044 (9th Cir. 1990); *United States v. Celcer*, 500 F.2d 345, 346 (5th Cir. 1974); *see generally* John O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 994-95 & nn. 66-69 (1993) (discussing the slight evidence rule).

In some states that have modeled their conspiracy law on the federal doctrine, courts have likewise only required "slight evidence" of a defendant's knowing participation in a conspiracy. *E.g.*, *People v. Danielson*, 21 Cal. Rptr. 469, 473 (Dist. Ct. App. 1962); *State v. Jenner*, 434 N.W.2d 76, 81 (S.D. 1988).

10. 42 F.2d 202, 203 (5th Cir. 1930). The "slight evidence rule" discussed in this article should not be confused with a superficially similar, yet distinct, rule applied by many courts which provides that only "slight evidence" of a defendant's participation in a conspiracy need be offered in order to admit a co-conspirator's out-of-court statement under FED. R. EVID. 801(d)(2)(E). *E.g.*, *United States v. Crespo de Llano*, 838 F.2d 1006, 1016 (9th Cir. 1987). The rule discussed in this article concerns the quantum of evidence necessary to support a conviction, while the other "slight evidence rule" concerns the quantum of evidence necessary to admit an out-of-court statement under the co-conspirator exception to the hearsay rule.

11. *E.g.*, *Nye & Nissen v. United States*, 168 F.2d 846, 852 (9th Cir. 1948), *aff'd on other grounds*, 336 U.S. 613 (1949).

12. *United States v. Austin*, 768 F.2d 302, 303 (10th Cir. 1985) (McKay, J., dissenting).

conspiracy need be shown and the incorrect rule that only slight evidence is needed to prove that connection.”¹³

The slight evidence rule was applied only sporadically from 1930 until 1970, when the use of the rule in the lower federal courts “increased dramatically.”¹⁴ However, by the mid- to late-1970s, the Fifth and Ninth Circuits—the leading proponents of the rule up until that point—stemmed the tide by “banish[ing]” the slight evidence rule in favor of the requirement that the prosecution must offer “substantial evidence” that proves “beyond a reasonable doubt” that a defendant knowingly participated in a conspiracy with others.¹⁵ Such a proof requirement was consistent with the Supreme Court’s repeated holding in the 1970s that the Due Process Clause requires proof of every element of an offense “beyond a reasonable doubt” to uphold a conviction.¹⁶

The First, Third, Fourth, Seventh, and Eleventh Circuits followed suit in the next two decades by rejecting the traditional slight evidence rule.¹⁷ Rather than outright abolishing the rule, some courts have purported to reformulate the slight evidence rule by requiring “substantial evidence” of a defendant’s knowing participation in the conspiracy but upholding convictions based on evidence of a defendant’s “slight”

13. Newman, *supra* note 9, at 994. It is well settled that a defendant is equally guilty of conspiracy even if his or her relative role in the conspiracy, or “connection” thereto, is extremely minor. *See, e.g.*, *United States v. Ellis*, 121 F.3d 908, 922 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 753 (1998). This is because, as noted above, the gist of the offense of conspiracy is an agreement by two or more persons to commit one or more offenses. Because the conspirators’ agreement itself is what the law aims at punishing, it is immaterial what role a particular defendant played in the joint criminal endeavor. Even a defendant with a minor connection to the conspiracy is guilty, so long as he or she knowingly and intentionally joined the conspiracy.

14. *United States v. Malatesta*, 590 F.2d 1379, 1382 n.1 (5th Cir. 1979) (en banc).

15. *Id.* at 1381-82; *United States v. Dunn*, 564 F.2d 348, 356-57 (9th Cir. 1977).

16. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *In re Winship*, 397 U.S. 358, 364 (1970).

17. *United States v. Toler*, 144 F.3d 1423, 1427 (11th Cir. 1998); *United States v. Burgos*, 94 F.3d 849, 861-62 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1087 (1997); *United States v. Durrive*, 902 F.2d 1221, 1225-29 (7th Cir. 1990); *see also United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984) (explaining reference to slight evidence rule in *United States v. Smith*, 726 F.2d 852, 866 (1st Cir. 1984)); *United States v. Samuels*, 741 F.2d 570, 573 (3d Cir. 1984) (overruling, in a *sub silentio* manner, a prior line of Third Circuit cases applying the slight evidence rule, *e.g.*, *United States v. Schoenhut*, 576 F.2d 1010, 1027 (3d Cir. 1978)).

involvement in the conspiracy.¹⁸ However, such a reformulation effectively abolished the traditional slight evidence rule insofar as the reformulated rule requires substantial proof of a defendant's *mens rea*, even if the defendant's relative role in the conspiracy—his *actus reus*—was extremely minor. Because the gravamen of a criminal conspiracy is a "meeting of the minds" to break the law,¹⁹ a defendant's degree of participation in furtherance of the conspiracy is not particularly important.²⁰

The Second, Sixth, Eighth, and Tenth Circuits have never abolished or reformulated, and regularly continue to apply, the traditional slight evidence rule in conspiracy cases.²¹ Curiously, these circuits have never even addressed the frequently-voiced criticisms of the rule.²² The Eighth Circuit has taken the lead in applying the slight evidence rule in dozens of conspiracy cases decided in the last few years.²³

Perhaps more troubling than these four circuits' failure to abolish the antiquated slight evidence rule is the inexplicable reappearance of the traditional rule by other circuits that had previously claimed to have abolished the rule. During the last decade, panels of the First, Fifth and Ninth Circuits have seemingly ignored their circuits' prior decisions abolishing the

18. *Toler*, 144 F.3d at 1427-28.

19. *United States v. Richardson*, 86 F.3d 1537, 1546 (10th Cir. 1996).

20. It is well settled that, so long as any single member of a conspiracy undertakes even one "overt act" in support of the conspirators' agreement, the conviction of all members of the conspiracy will be upheld even if none of the other co-conspirators engaged in any acts in furtherance of the conspiracy. *Braverman v. United States*, 317 U.S. 49, 53 (1942). In federal drug conspiracy cases, *see* 21 U.S.C. § 846, the prosecution need not present any proof of an overt act. *United States v. Shabani*, 513 U.S. 10 (1994).

21. *E.g.*, *United States v. Salameh*, 152 F.3d 88, 145 (2d Cir. 1998); *United States v. Alaniz*, 148 F.3d 929, 933 (8th Cir. 1998); *United States v. Kincaide*, 145 F.3d 771, 781 (6th Cir. 1998); *United States v. Dickey*, 736 F.2d 571, 583 (10th Cir. 1984). No reported decision of the District of Columbia Circuit has ever mentioned the slight evidence rule.

22. One judge each on the Second and Tenth Circuits has leveled criticism at the slight evidence rule: Second Circuit Judge John Newman, *supra* note 9, at 994; and Tenth Circuit Judge Monroe McKay, *United States v. Austin*, 768 F.2d 302, 303 (10th Cir. 1985) (McKay, J., dissenting). However, no majority opinion in either circuit has ever discussed the obvious problems with the slight evidence rule.

23. A Westlaw search ("slight evidence" /10 conspir!) reveals nearly 100 such cases decided by the Eighth Circuit during the last two decades—the majority in the last few years.

slight evidence rule and have continued to apply the traditional rule in conspiracy cases.²⁴

The First Circuit's treatment of the rule demonstrates how difficult it may be for an appellate court to adopt a new position or doctrine and to ensure its application in practice. For example, in *United States v. Marsh*, the court addressed the concept of "slight evidence" at length, rejecting the notion that a lesser standard of proof should be applied in evaluating sufficiency of evidence claims in conspiracy cases.²⁵ The court concluded:

In other words, if the government proves beyond a reasonable doubt at least a slight, though willing and knowing, connection between a defendant and a conspiracy, an appellate court will affirm the defendant's conviction for participation in that conspiracy. It perhaps should be called the "slight connection" rule instead of the "slight evidence" rule. This, indeed, is the sense in which we have used the rule in what we think is the only occasion we have had to invoke it. *United States v. Smith*, 726 F.2d 852, 866 (1st Cir. 1984) (en banc) (holding that the government had adequately demonstrated the connection of various defendants to a heroin distribution scheme).²⁶

However, in *United States v. Cassiere*,²⁷ discussing sufficiency of the evidence of conspiracy, the court cited *Smith* and observed, "Moreover, once the evidence establishes the existence of a conspiracy, *lesser evidence* may suffice to show a defendant's connection with the overall conspiracy."²⁸ *Cassiere* casts doubt on the message sent by the *Marsh* court in expressly

24. *E.g.*, *United States v. Paul*, 142 F.3d 836, 840 (5th Cir. 1998); *United States v. Mulderig*, 120 F.3d 534, 547 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1510 (1998); *United States v. Wilson*, 116 F.3d 1066, 1075, *reh. en banc granted on other grounds*, 123 F.3d 213 (5th Cir. 1997); *United States v. Krenning*, 93 F.3d 1257, 1265 (5th Cir. 1996); *United States v. Leahy*, 82 F.3d 624, 633-34 (5th Cir. 1996); *United States v. Cassiere*, 4 F.3d 1006 (1st Cir. 1993); *United States v. Martin*, 4 F.3d 757, 760 (9th Cir. 1993) (quoting *United States v. Brown*, 912 F.3d 1040, 1044 (9th Cir. 1990)); *United States v. Ramirez*, 983 F.2d 1079 (table), 1993 WL 6601, at *2 (9th Cir. Jan. 15, 1993); *United States v. Diaz-Garcia*, 931 F.2d 61 (table), 1991 WL 66276, at *2 (9th Cir. Apr. 30, 1991); *United States v. Martin*, 567 F.2d 849, 851 (9th Cir. 1977).

25. *United States v. Marsh*, 747 F.2d 7, 11-13 (1st Cir. 1984).

26. *Id.* at 13.

27. 4 F.3d 1006 (1st Cir. 1993).

28. *Id.* at 1016 (emphasis added).

rejecting the argument that a lesser standard of proof—slight evidence—applies to the review of sufficiency issues in conspiracy cases.

Similarly, the Eleventh Circuit claimed to have abolished the slight evidence rule in 1992 in *United States v. Clavis*,²⁹ but numerous subsequent decisions ignored *Clavis* and resurrected the traditional slight evidence rule.³⁰ Very recently, however, another panel of the Eleventh Circuit once again has abolished the slight evidence rule, citing *Clavis* and the Fifth Circuit's 1979 en banc decision in *Malatesta*.³¹

The Fifth Circuit's resurrection of the slight evidence rule has been the most remarkable, considering that a unanimous en banc court expressly "banished" the rule in 1979 in *Malatesta*. The first such post-*Malatesta* case was *United States v. Massey*,³² in which the court held that "once the existence of a conspiracy and the defendant's participation in it are both established, slight evidence of the defendant's knowledge of the scheme may be sufficient to sustain the jury's finding that he or she was a member."³³ Not since 1987 has a Fifth Circuit panel even cited the court's en banc decision in *Malatesta* for the proposition that "substantial evidence" is necessary to prove that a defendant was a knowing participant in a conspiracy.³⁴

Those circuits which have abolished the slight evidence rule have done so based on the modern axiom of criminal law that requires that each element of an offense to be proven

29. 977 F.2d 538, 539 (11th Cir. 1992).

30. *E.g.*, *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997); *United States v. Harris*, 20 F.3d 445, 452 (11th Cir. 1994).

31. *United States v. Toler*, 144 F.3d 1423, 1427 (11th Cir. 1998).

32. 827 F.2d 995, 1002 (5th Cir. 1987).

33. *Id.* at 1003 (quoting *United States v. Malatesta*, 583 F.2d 748, 756 (5th Cir. 1978)). The panel in *Massey* cited the panel decision in *Malatesta*, reported at 583 F.2d 748, as "settled law" and failed to note that the panel decision was later vacated and reversed by the en banc court. A subsequent Fifth Circuit panel similarly relied on two pre-*Malatesta* panel decisions applying the slight evidence rule. *United States v. Duncan*, 919 F.2d 981, 991 (5th Cir. 1990) (citations omitted). *Duncan*, in turn, has been cited as settled authority by numerous Fifth Circuit panels. *E.g.*, *Mulderig*, 120 F.3d at 547.

34. *United States v. Davis*, 810 F.2d 474, 476 (5th Cir. 1987). Remarkably, in *United States v. Westbrook*, 119 F.3d 1176 (5th Cir. 1997), a Fifth Circuit panel cited the court's en banc decision in *Malatesta* for a separate proposition of law regarding sufficiency review in conspiracy cases but then cited an inconsistent post-*Malatesta* panel decision in support of its application of the slight evidence rule. *Id.* at 1189-90.

“beyond a reasonable doubt,”³⁵ as well as on the Supreme Court’s repeated statement that, at least in federal criminal cases, each element of an offense must be proven by “substantial evidence.”³⁶ The most cogent criticisms of the slight evidence rule are found in Fifth Circuit Judge Coleman’s concurring opinion in *United States v. Malatesta*³⁷ and Seventh Circuit Judge Easterbrook’s concurring opinion in *United States v. Martinez de Ortiz*³⁸—whose respective positions were eventually adopted by the en banc Fifth and Seventh Circuits.³⁹ Judge Easterbrook, warning of the sweeping dragnet of federal conspiracy law, correctly concluded that the slight evidence rule cannot “be reconciled with the reasonable-doubt standard”:

“Conspiracy” is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. Prosecutors have many legitimate advantages in the criminal process. Defendants’ great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. [The slight evidence rule] reduce[s] the power of that requirement.⁴⁰

III. THE SUPREME COURT’S HEIGHTENED REQUIREMENT OF PROOF OF A DEFENDANT’S *MENS REA* IN CONSPIRACY CASES

The Supreme Court has never addressed the slight evidence rule. However, the Court’s own cases addressing the federal conspiracy doctrine are flatly inconsistent with the traditional slight evidence rule. To mitigate the draconian effect of federal conspiracy law, the Supreme Court for many decades has required a heightened standard of proof of a defendant’s *mens rea* in conspiracy cases:

35. *In re Winship*, 397 U.S. 358, 364 (1970).

36. *E.g.*, *Glasser v. United States*, 315 U.S. 60, 80 (1942).

37. 583 F.2d 748, 760-64 (5th Cir. 1978) (Coleman, J., concurring) (panel decision).

38. 883 F.2d 515, 523-24 (7th Cir. 1989), *reh’g granted and opinion vacated*, 897 F.2d 220 (7th Cir. 1990) (Easterbrook, J., concurring).

39. *United States v. Malatesta*, 590 F.2d 1379, 1380 (5th Cir. 1979) (en banc); *United States v. Durrive*, 902 F.2d 1221, 1221 n.* (7th Cir. 1990) (noting that all of the judges of the en banc Seventh Circuit had approved of abolition of the slight evidence rule).

40. *United States v. Martinez de Ortiz*, 883 F.2d 515, 524-25 (7th Cir. 1989) (Easterbrook, J., concurring) (citations omitted).

Without the knowledge [of an illegal scheme created by other persons], [a defendant's] intent [to accomplish a conspiracy's criminal objectives] cannot exist. . . . *Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.⁴¹

The Court has also charged federal courts of appeals with the responsibility of "scrutiniz[ing] the record for evidence [of a defendant's criminal *mens rea*] with special care in a conspiracy case."⁴² An irreconcilable conflict exists between the slight evidence rule and the Supreme Court's commands in *Direct Sales Company*, *Ingram*, and *Anderson*.

The Supreme Court has made it clear that "[t]he primary responsibility for reviewing the sufficiency of the evidence [belongs to] the Court[s] of Appeals," not the high Court.⁴³ Thus, a criminal defendant has little, if any, chance of having the Supreme Court grant certiorari and engage in a case-specific review of the evidence supporting his or her conviction, even if the lower courts fundamentally erred in finding constitutionally sufficient evidence.

The Supreme Court's delegation of appellate sufficiency review to the federal courts of appeals in criminal cases raises great concern in the context of conspiracy cases and the slight evidence rule. Considering the large number of modern cases in which the courts of appeals have invoked the traditional slight evidence rule, it is fair to assume that myriad defendants—no doubt, some of them innocent—have been wrongly deprived of their liberty by appellate courts applying the antiquated rule.

41. *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) (citations omitted) (emphasis added). See also *Ingram v. United States*, 360 U.S. 672, 680 (1959) (emphasis added) (quoting *Direct Sales*); accord *Anderson v. United States*, 417 U.S. 211, 224 (1974) (citing *Direct Sales* and *Ingram*).

42. *Anderson*, 417 U.S. at 224. The Supreme Court has long recognized "the importance of appellate review to a correct adjudication of [a criminal defendant's] guilt or innocence" in criminal cases generally. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). In particular, "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). Sufficiency review by an appellate court is one of the most important "safeguards against jury irrationality." *United States v. Powell*, 469 U.S. 57, 67 (1984).

43. *Hamling v. United States*, 418 U.S. 87, 124 (1974).

Similarly, countless district courts, in ruling on defendants' motions for judgments of acquittal under rule 29 of the Federal Rules of Criminal Procedure, undoubtedly have wrongly applied the slight evidence rule in denying such motions.

Accordingly, the Supreme Court has an obligation to grant certiorari in an appropriate case and, for once and for all, abolish the slight evidence rule. The wide division among virtually all of the United States Courts of Appeals as well as the numerous intra-circuit conflicts present ample justification for a grant of certiorari on this issue.⁴⁴ A defendant should not be convicted of conspiracy—or, under the *Pinkerton* doctrine, convicted of any substantive offense committed by another member of the conspiracy—unless the prosecution has offered substantial evidence, that is proof beyond a reasonable doubt, of the defendant's knowing and intentional participation in the conspiracy.

44. SUP. CT. R. 10(a) provides that a division among the United States Courts of Appeals on a particular issue is a traditional basis for a grant of certiorari.