

## FRAUD AND DRUG CONSPIRACIES

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### A. Drug Conspiracies

18 U.S.C. § 846 makes it unlawful for any person to conspire to commit a drug offense. The elements of a conspiracy to commit a substantive offense under 18 U.S.C. § 371 must allege a specific drug offense. Unfortunately, the Supreme Court, in United States v. Shabani, 115 S.Ct. 382 (1994), abolished the requirement held by some circuits that the government must prove an overt act in order to prove the conspiracy. This is why conspiracy charges are found in many drug cases, fraud cases and money laundering cases. Attempting to commit conspiracy is **identical**, in most circumstances, to a full conspiracy. An attempt to conspire requires intent to commit a specific crime and is a substantial step in furtherance of that crime. Thus, if you are charged with attempt, that substantial step becomes a factor that is not evident in simple drug conspiracy cases. Intent can be inferred from a defendant's conduct and surrounding circumstances. Therefore, an attempt can be circumstantial. See United States v. Still, 850 F.2d 607 (9th Cir. 1988) and United States v. Buffington, 815 F.2d 1292 (9th Cir. 1987). In Buffington, the mere possession of materials to do a robbery, two visits to the intended target, driving near the bank, staring at the bank, and the defendants standing armed

with their attention toward the bank were sufficient inferences of an act of intent pursuant to 18 U.S.C. § 2113(a). The term "substantial steps" is defined in United States v. Cruz-Jiminez, 977 F.2d 95 (3rd Cir. 1992) and United States v. Smith, 962 F.2d 923, 930 (9th Cir. 1992). A substantial step must strongly corroborate the intent, and such evidence can be used to establish that intent. Cruz-Jiminez at 111-02. An attempt is established when coupled with objective evidence of the defendant's conduct. United States v. Fletcher, 945 F.2d 725 (4th Cir. 1991).

The substantial step element is important because some circuits have different views on what is required for a substantial step. For example, in the Cruz-Jiminez case the Third Circuit pointed out that some circuits require that the "substantial step" be an unequivocal act that strongly corroborates the criminal intent, yet other circuits require only a substantial step that merely corroborates criminal intent but need not be unequivocal. See Cruz-Jiminez at 102 and United States v. Still, 850 F.2d 607 (9th Cir. 1988); accord United States v. Pennell, 737 F.2d 521 (6th Cir. 1984).

There are two alternative conspiracy theories in the United States Code under 18 U.S.C. § 371: (1) conspiracy to commit a crime against the United States, and (2) conspiracy to defraud the United States or agency thereof. Each of these two

alternative conspiracies has different elements. A conspiracy to commit a crime against the United States requires "(a) an agreement to commit a crime, (b) one or more overt acts in furtherance of the crime, (c) the intent to carry out a substantive offense, and (d) an individual must conspire with at least one bona fide co-conspirator." Circumstantial evidence is often used to show the existence of a conspiratorial agreement. See United States v. Arutunoff, 1 F.3d 1112 (10th Cir. 1993). Inferences of an agreement may be drawn "if there be concert of action, of the parties working together understandingly, with a single design for the accomplishment of a common purpose." United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980) and United States v. Montoya-Ortiz, 7 F.3d 1171 (5th Cir. 1993). It should also be noted, however, that a specific conspiracy offense must be examined for any particular characteristics. Circumstantial evidence that merely proves an association between two people, even if the one person knows the intent of the other to commit a crime, is not sufficient to prove a conspiracy based on an agreement. United States v. Giunta, 925 F.2d 758 (4th Cir. 1991). An agreement requires a meeting of the minds to achieve a common, unlawful objective. 871 F.2d 491, 494 n.1. (5th Cir. 1981).

An act toward the completion of the agreement is required for conspiracy. "Additionally, each overt act taken to affect

the illegal purpose of the conspiracy need not be illegal in itself." United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988); United States v. Tarvers, 833 F.2d 1068, 1075 (1st Cir. 1987); and United States v. Turkish, 623 F.2d 769, 771 (2nd Cir. 1980).

Be mindful of the **Pinkerton Rule**. In Pinkerton v. United States, 66 S.Ct. 1180 (1946), the Supreme Court held that criminal acts committed by one co-conspirator may be attributed to the other conspirators. The criminal act must be a furtherance of the objective of the conspiracy and reasonably foreseeable by the other conspirators. Pinkerton at 1184. Thus, an act by one co-conspirator that is not reasonably foreseeable as a necessary or natural consequence of the "unlawful agreement" cannot be attributed to the other conspirators. *Id.* For example, co-conspirators may be held liable for other co-conspirators' use of firearms in relation to a drug transaction. This is very common in federal criminal cases. United States v. Edwards, 36 F.3d 639, 644 (7th Cir. 1994) and United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991).<sup>1</sup>

There are limitations to a co-conspirator's liability for other substantive crimes committed by another conspirator. "Due process constrains the application of Pinkerton where the

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<sup>1</sup> Cases should be shepardized to see whether anything has been overturned in the circuit in which you are prosecuted, but generally, these are the standards which have been established for quite some time and are still applicable today.

relationship between the defendant and the substantive offense is slight." Castenada at 766 citing United States v. Chorman, 910 F.2d 102, 112 (4th Cir. 1990). Even where there is a recognized nexus between drugs and guns there is no presumption of foreseeability. United States v. Gonzalez, 918 F.2d 1129, 1136 (3rd Cir. 1990).

There also may be multiple conspiracies involved that can keep you from being convicted of a single conspiracy.

#### **B. Conspiracies to Defraud the United States**

Federal conspiracy crimes to defraud the United States require proof of the following elements: (a) an agreement between two or more people, (b) to obstruct the lawful function of the government, (c) by deceit or dishonesty, and (d) at least one overt act in furtherance of that conspiracy. When you are charged with a crime of fraud against the United States it can be any of the following: mail fraud, fire fraud, securities fraud, bank fraud, honest services fraud, mortgage fraud, loan fraud, tax fraud and bankruptcy fraud.

Many of the above referenced fraud cases also encompass money laundering where the government accuses the person who has committed the fraud of taking the money from the fraud and using it to their own benefit. Fraud cases are complicated and an experienced attorney can make a difference. Going to trial or pleading guilty are difficult choices, but when it comes to

federal fraud crimes and money laundering cases it is essential to make the right choice based on the evidence, the facts, and what is in the best interest of the client.

Federal conspiracy to defraud means that an obstruction of a lawful function of the United States or agency occurs by "deceit, craft, or trickery, or at least by means that are dishonest." Hammerschmidt v. United States, 44 S.Ct. 511, 512 (1924). This case has not been overturned and continues to be the foundation in discussing federal fraud cases. Deceit or dishonesty includes elements of conspiracy to lie to the government, to bribe the government, to fail to disclose information, or to deceive others in the obtainment of funds to benefit themselves.

Federal crimes of mail fraud and wire fraud are two of the most significant federal criminal acts in the modern age. Federal mail and wire fraud come from the processing of the fraudulent act through the mail services or via a computer. Most of these types of crimes are federal because the wire and the mail have federal jurisdiction. In 1994 Congress changed the language to prove mail fraud by requiring that proof does not have to be done through the traditional post office mailing services. Now, mail fraud can be accomplished through the use of interstate carriers such as FedEx, UPS, etc.

All federal fraud offenses share three common elements: (1) an act or conduct, (2) an intent to deceive or cheat, and (3) an intent to bring about a gain or benefit or cause a loss to another. For example:

A. Federal bankruptcy fraud is the concealment of assets, false oaths and claims, and bribery pursuant to 18 U.S.C. § 152.

B. Claims and services in matters affecting government are conspiracies to defraud the government in respect to claims in violation of 18 U.S.C. § 286, false, fictitious and fraudulent claims are violations of 18 U.S.C. § 287, false claims for postal losses, 18 U.S.C. § 288 and false claims for pensions, 18 U.S.C. § 289.

C. Federal crimes of fraud and False Statements

1. Statements of entries generally, 18 U.S.C. § 1001

2. Possession of papers to defraud the United States, 18 U.S.C. §1002.

3. Loan and Credit Applications, renewals and discounts, crop insurance, 18 U.S.C. § 1014.

4. Fraud and related activity in connection with identification documents (Identity Theft), 18 U.S.C. § 1028.

5. Major Fraud against the United States, 18 U.S.C. § 1031.

D. Mail Fraud and Bank Fraud

1. Frauds and swindles, 18 U.S.C. § 1341 (i.e. Ponzi Schemes)
2. Fraud by wire, radio or television, 18 U.S.C. § 1343
3. Bank Fraud, 18 U.S.C. § 1344.

Federal fraud offenses share many common elements.

Defenses for fraud cases are factual innocence based on documents, mistaken identity, alibi, diminished capacity, good faith reliance on professionals, and lack of intent. Plea bargaining is also a way to mitigate the outcome of your case.

The most common defense is lack of intent. Fraud is a specific intent crime, and the government must prove a defendant acted with the purpose of fraudulently obtaining a gain or benefit or bringing about a loss. The defense of good faith is the second most beneficial defense in a fraud case. A particularly good faith offense is reliance on the advice of a professional whether it be an attorney, an accountant, or other individual who directed you to do something that you thought was legal as a result of that direction.

Hiring a good attorney who understands federal law and criminal defense in fraud or other types of federal crime cases will help you navigate the troubled waters of the criminal justice system in federal court.