PROSECUTION and DEFENSE of CRIMINAL CONSPIRACY CASES

PAUL MARCUS

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PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES

by
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CHAPTER 1

EARLY DEVELOPMENT OF CONSPIRACY LAW

§ 1.02 Early American Conspiracy Law

[1] The Cases

PAGE 1-14

- N. 2 See also, United States v. Cryan, 490 F. Supp. 1234 (D.N.J. 1980).
- N. 4 For a discussion of American conspiracy law in the 19th Century, see, Jasch v. Wyoming, 563 P.2d 1327 (1977).

§ 1.04 Purposes of the Crime of Conspiracy

[2] The Inchoate Offense

PAGE 1-19

 $^{\rm N.~10}$ As stated in United States v. Alvarez, 610 F.2d 1250, 1253–4 (5th Cir. 1980):

Aside from the absence of a general federal statute against attempts, proof of an attempt, even in instances where statutory warrant exists, is difficult. It requires conduct that is a substantial step toward commission of a crime, usually the commencement of a crime by an act directly dangerous to interests protected by law.

See also, United States v. Manley, 632 F.2d 978, 987 (2nd Cir. 1980).

PAGE 1-20

N. 12 As stated by the Florida Supreme Court:

We recognize that the charge of conspiracy is an excellent tool in combating organized crime, but the use of this charge has been expanded to dragnet proportions in some instances. Of course, the law of criminal attempt is sufficient to protect society against the danger of incipient wrongdoers. Also, if several join in the commission of a criminal act, the prosecutor could rely on the basic rule that one who

counsels, commands, induces, procures or aids and abets another in committing a crime is punishable as a principal defendant. These alternatives are available and could be used in lieu of a conspiracy charge.

Goldberg v. Florida, 351 So. 2d 332, 334 (1977).

PAGE 1-21

N. 15 See also, United States v. York, 578 F.2d 1036, 1038 (8th Cir. 1978): To attempt a federal offense is not, of itself, a federal crime. Although there are general statutes proscribing aiding and abetting a crime, 18 U.S.C. § 2, and conspiracy, 18 U.S.C. § 371, attempts are separately dealt with in various criminal statutes dealing with the offense committed. When Congress has deemed an attempt to be criminal, it has

United States v. Manley, 632 F.2d 978, 987 (2nd Cir. 1980):

There is no general federal statute proscribing attempt, and it is therefore actionable only where, as in the present case, a specific criminal statute makes impermissible its attempted as well as actual violation.

[3] Group Danger

specifically so declared

PAGE 1-22

N. 21 See also, People v. Roberts, 404 N.E.2d 278, 284-85 (1980):

The evil of conspiracy to be punished centers around the group activity and combination inherent in such conduct.

PAGE 1-24

N. 27 For a discussion of white collar crime and conspiracy, see, Hermann, "Conspiracy, The Business Enterprise, White Collar Crime and Federal Prosecution: A Primer for Practice," 9 Creighton L. Rev. 647 (1976).

PAGE 1-25

N. 34 Concern regarding the conspiracy charge was expressed in United States v. Shoup, 608 F.2d 950, 955-56 (3rd Cir. 1979):

In considering a conspiracy under § 371, a court must be mindful that the statute is a broad one, and that there is a danger that prosecutors may use it arbitrarily to punish activity not properly within the ambit of the federal criminal sanction. Thus, indictments brought under § 371 must be carefully scrutinized.

CHAPTER 2

ELEMENTS OF THE CRIME OF CONSPIRACY

§ 2.02 The Agreement

[1] Agreement, or common actions

PAGE 2-3

- N. 4 United States v. Middlebrooks, 618 F.2d 273, 277 (5th Cir. 1980); United States v. Arredondo-Morales, 624 F.2d 681, 683 (5th Cir. 1980).
- N. 7 United States v. Jabara, 618 F.2d 1319, 1327 (9th Cir. 1980); United States v. Brunetti, 615 F.2d 889, 903 (10th Cir. 1980); United States v. Masiello, 491 F. Supp. 1154, 1163 (D.S. Caro, 1980):

The evidence need not show that the alleged members of the conspiracy entered into any express or formal agreement; or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished.

PAGE 2-4

N. 11 See also, United States v. Harper, 579 F.2d 1235 (10th Cir. 1978); United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978); United States v. Valdovinos, 558 F.2d 531 (9th Cir. 1977); United States v. Frick, 588 F.2d 531 (5th Cir. 1979). United States v. Fox, 613 F.2d 99, 101 (5th Cir. 1980):

Appellants also argue that, apart from these nine statements to which they object, the evidence against them is merely circumstantial. They suggest that a more stringent sufficiency of evidence test should be applied when the conviction is based on, circumstantial, rather than direct, evidence. It is firmly established that the same standard of review is employed when reviewing a conviction whether it is based on direct or circumstantial evidence.

The question is whether the evidence and all reasonable inferences favorable to the Government's position, see Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), are such that the trier of

fact could reasonably infer that appellant was guilty beyond a reasonable doubt.

PAGE 2-5

- N. 15 See also, United States v. Praetorius, 462 F. Supp. 924 (E.D.N.Y. 1978); United States v. Suarez, 608 F.2d 584 (5th Cir. 1979); United States v. Lichenstein, 610 F.2d 1272 (5th Cir. 1980).
- N. 18 See also, United States v. Bankston, 603 F.2d 528 (5th Cir. 1979); Ramirez v. Fla., 371 So. 2d 1063 (1979). As stated in United States v. Beck, 615 F.2d 441, 449, n. 9 (7th Cir. 1980):

To prove association, there must be evidence to establish that the defendant shared in the criminal intent of the principal, that is, the state of mind required for the statutory offense must be shown for conviction as an aider and abettor. The defendant, however, need not have the exact intent as the principal. The "community of unlawful intent" does not rise to the level of agreement.

It is this fact, indeed, that distinguishes aid and abet liability from conspiracy. Conspiracy requires proof of agreement, aiding and abetting does not.

Aiding and abetting has a broader application [than conspiracy]. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy.

See also, United States v. Izzo, 613 F.2d 1205, 1210 (1st Cir. 1980). Contrast with, Williams v. Alabama, 338 So.2d 547, aff d, 383 So.2d 564 (1979).

§ 2.03 The Rule of Consistency

PAGE 2-7

- N. 2 United States v. Molt, 615 F.2d 141, 146 (3rd Cir. 1980).
- N. 3 The Pennsylvania Supreme Court expressly rejected the argument that a conspiracy defendant's conviction could not stand where his only alleged co-conspirator is later acquitted. Commonwealth v. Byrd, 417 A.2d 173 (1980).
- N. 4 See also, United States v. Klein, 560 F.2d 1236 (5th Cir. 1977); N. Caro. v. Wilkins, 238 S.E.2d 659 (1977); Michigan v. Whitmore, 272 N.W.2d 346 (1978). For a good discussion of the general problem, see, Gardner v. Maryland, 396 A.2d 303 (1979); United States v. Artuso, 618 F.2d 192, 197 (2nd Cir. 1980); United States v. Allen, 613 F.2d 1248, 1253 (3rd Cir. 1980).
- N. 5 The naming of unindicted co-conspirators continues to be a serious and recurring problem. See, for instance, the allegations found in the indictment in the major Chicago conspiracy trial, United States v. Alton Box Board Comp., et al, Crim. Action No. 76 Cr. 199, N. Dist. of Ill., Eastern

Division, 1977. For recent decisions in agreement with the *Briggs* holding, see, United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977); Application of Jordan, 439 F. Supp. 199 (W. Va. 1977); State v. Porro, 377 A.2d 909 (N. J. App. 1977), app. dismissed, 391 A.2d 517 (1978); Berman v. Colo. 589 P.2d 508 (1978). For an analysis of the problem, see, Comment, 54 Texas L. Rev. 663 (1976). See also, United States v. Lyman, 592 F.2d 496 (9th Cir. 1978).

PAGE 2-8

N. 6 The grant of immunity to one defendant will not invalidate the other defendant's conspiracy conviction. Gardner v. Md., 408 A.2d 1317 (1979); Michigan v. Berry, 269 N.W.2d 694 (1978); Michigan v. Losey, 296 N.W.2d 601 (1980). For an interesting question involving immunity, see, Trammel v. United States, 100 S.Ct. 906 (1980), where the defendant was convicted on testimony of his wife, an unindicted co-conspirator who was given immunity. For a more recent nolle prosequi case, see, Keith v. Leverette, 254 S.E.2d 700 (1979).

We subscribe to the proposition * * *, that the entry of a nolle prosequi as to all except one of the defendants to a charge of conspiracy will not ordinarily vitiate the conviction of the remaining defendant. Contrary to the position of the relator, we reject the contention that a nolle prosequi is necessarily analogous to an acquittal. In the cases cited by the relator the co-defendants were acquitted of the conspiracy charge, leaving the defendant as the sole perpetrator of conspiracy. * * * Where the record reveals, as it does in the instant case, that a nolle prosequi of conspiracy charges against all but one of those charged was not based on the merits of the charge, the conviction of the remaining defendant will not be invalidated. Only when such defendants are acquitted on the merits of the conspiracy charge will the conviction of the remaining defendant be affected. The conviction in this case is therefore valid.

PAGE 2-9

N. 7 The Fifth Circuit has cast some doubt on the continued viability of the rule:

The apparent basis for the traditional rule is the notion that the acquittal of all but one potential conspirator negates the possibility of an agreement between the sole remaining defendant and one of those acquitted of the conspiracy and thereby denies, by definition, the existence of any conspiracy at all.

[We] have some difficulty with the notion, recited above, upon which the basic rule is premised and, therefore, with the soundness even of that traditional rule. The notion that the acquittal of one's alleged coconspirators concludes the fact of their noncomplicity misapprehends the true nature of an acquittal in the scheme of trial by jury in the

American criminal justice system. It has long been recognized that criminal juries in the United States are free to render "not guilty" verdicts resulting from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors. Consequently, an acquittal is not to be taken as the equivalent of a finding of the fact of innocence; nor does it necessarily even reflect a failure of proof on the part of the prosecution. (Recognition of this principle was fundamental to the Supreme Court's decision in *Standefer* not to extend nonmutual collateral estoppel effects from the acquittal of an alleged principal in crime to the subsequent trial of his alleged aider and abettor. — U.S. at —, 100 S.Ct. at 2007.)

Thus, contrary to the notion underlying the rule in question, a jury's acquittal of some coconspirators should not be taken to negate the fact of their possible criminal complicity with any remaining alleged coconspirators.

Moreover, the premise and resultant rule are antithetical to the general understanding, deriving from the principle of jury prerogative that the apparent logical inconsistency of jury verdicts, even among multiple defendants tried together on essentially the same evidence and charges, provides no basis for attacking an otherwise valid guilty verdict adequately supported by the evidence; rather, each such verdict or conviction is to be reviewed wholly independently of the others. "While symmetry of results may be intellectually satisfying, it is not required." *Standefer v. United States*, — U.S. at —, 100 S.Ct. at 2009. Thus, there is a serious question as to the logical foundation for the continued application of the basic rule upon which appellant relies and which he seeks here to extend.

United States v. Espinosa-Cerpa, 630 F.2d 328, 331-32 and n. 4 (5th Cir. 1980).

But see, United States v. Phillips, 630 F.2d 1138, 1146–47 (6th Cir. 1980) where the court dismissed the conspiracy charge because the only other conspirator "was mentally ill at the time she [was] alleged to have conspired and therefore was incapable of committing the offense." The court continued:

[I]t is clear that a conspiracy requires at least two participants, and it has repeatedly been said that the acquittal of all but one of the alleged conspirators should operate as an acquittal of that defendant as well.

§ 2.04 The Unilateral Approach

PAGE 2-9

N. 3 The list of states is now longer. See, Garcia v. Indiana, 394 N.E.2d 106 (1979); New York v. Schwimmer, 394 N.E.2d 288 (1979); People v. Berkowitz, 50 N.Y.2d 333, 428 N.Y.S.2d 927, 406 N.E.2d 783 (1980) [ex-

pressly adopting the unilateral approach and rejecting the bilateral approach]; Ohio v. Marian, 405 N.E.2d 267, 271 (1980). The following statutes have also adopted the unilateral approach: Ariz. Rev. Stat. § 13–1003; Ala. Code Title 13A § 13A–4–3; Haw. Rev. Stat. § 705–520; Ind. Code § 35–41–5–2; Maine Rev. Stat. Title 17–A § 151; Mo. Rev. Stat. § 564.016; Neb. Rev. Stat. § 28–202; N.J. Rev. Stat. § 2C:5–2. *Contrast*, Archbold v. State, 397 N.E.2d 1071 (1979) where the Indiana court rejected the conspiracy charge because, under the earlier statute, the named coconspirator was an undercover police officer feigning participation in the criminal endeavor.

PAGE 2-10

N. 9 In strong support of this view is: State v. Happel, 259 N.W.2d 600 (1977); State v. Lavary, 377 A.2d 1255 (1977) [Relying on State v. St. Christopher, N. 5 supra, but casting the question in the form of factual impossibility]. Contrast with: State v. Ambrose, 28 Ill. App. 3d 627, 329 N.E.2d 11 (1975); State v. Mazur, 385 A.2d 878 (1978). Stressing the need for a true agreement was the basis for the court's holding in United States v. Mancillas, 580 F.2d 1301, 1307 (7th Cir. 1978):

Because the crime of conspiracy requires a concert of action among two or more persons for a common purpose, the mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction.

See also, United States v. Grunsfeld, 558 F.2d 1231 (6th Cir. 1977). For a general discussion of the unilateral approach, see, Burgman, "Unilateral Conspiracy: Three Critical Perspectives," 29 DePaul L. Rev. 75 (1979) [containing a detailed analysis and survey of the unilateral approach]; Frey, "Criminal Conspiracy in Arizona," 4 Ariz. St. L. J. 725 (1979); Comment, "The Law of Criminal Conspiracy in Kansas," 26 Kansas L. Rev. 571, 580–82 (1978). Even though its new conspiracy statute is modeled after the MPC approach the court would "not presume a change in a well-established principle of our law merely on the basis of Model Penal Code commentary, the import of which is in no way reflected in the statute as adopted." Commonwealth v. Campbell, 390 A.2d 761, 764 (Pa. App. 1978). The most recent proposed version of the Revised Federal Criminal Code rejects the unilateral approach. See, discussion in Chapter 9, infra.

PAGE 2-13

N. 20 Penn. v. Anderson, 402 A.2d 546 (1979); N.J. v. Carminati, 405 A.2d 456 (1979); United States v. Moss, 591 F.2d 428, 436 (8th Cir. 1979).

§ 2.05 Proof of the Agreement

PAGE 2-15

N. 3 One issue which continues to arise concerns the determination of when the agreement is actually formed. This problem is not terribly common, because in most situations the law enforcement officers will not discover the conspiracy until it has been in existence for a substantial period of time. In some cases, particularly in jurisdictions which have adopted the so-called unilateral approach to conspiracy (see, section 2.04, supra) the issue continues to be raised. The formation of the agreement here is not deemed the same as in civil contract law. "[T]he evidentiary requirement for establishment of an agreement in the conspiracy context is considerably more lax than in the case of an enforceable contract." United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). Many courts take the position taken in a recent Massachusetts case.

Imminence is not a requirement of a criminal conspiracy, as it is of a criminal attempt. A crime like the Brinks robbery may be in preparation months before it is executed; but the conspiracy exists from the start of the planning because the essence of the conspiracy is the combination for an unlawful purpose. It is immaterial by that definition that the planned crime is not imminent, or that its details are not all worked out, or that time remains for one of the conspirators to withdraw or, indeed, for the whole plan to be scrapped. The crime of conspiracy is complete when the conspirators agree to work in concert for the criminal or corrupt or unlawful purpose.

Commonwealth v. Dellinger, 409 N.E.2d 1337, 1343 (1980).

N. 4 United States v. Barrentine, 591 F.2d 1069 (5th Cir. 1979); United States v. Conway, 632 F.2d 641, 643 (5th Cir. 1980):

Direct proof of a formal agreement is not necessary to establish a conspiracy; rather, the existence of a conspiracy may be proved by inference from the actions of the actors or by circumstantial evidence of a scheme.

The point was clarified in United States v. Caicedo-Asprilla, 632 F.2d 1161, 1166 (5th Cir. 1980):

Although circumstantial evidence may be used to prove a conspiracy without ever showing the existence of any formal agreement, there must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and that he intended to join or associate himself with the objectives of the conspiracy.

See also, United States v. David E. Thompson, Inc. 621 F.2d 1147 (1st Cir. 1980).

PAGE 2-17

N. 13 United States v. Pintar, 630 F.2d 1270, 1275 (8th Cir. 1980).

[1] The Agreement Requirement Staggers

N. 16 Smith v. Alabama, 368 So. 2d 298 (1978) [The agreement can be formed "in a flash or an instant," it may arise "on the spur of the moment."]; Kendrick v. Alabama, 377 So.2d 1112 (1979). But see, Penn. v. Bynum, 401 A.2d 776 (1979); Penn. v. Frey, 399 A.2d 742 (1979).

[2] The Agreement Requirement Prevails

PAGE 2-21

N. 33 See also, United States v. Renfro, 620 F.2d 569, 575 (6th Cir. 1980); United States v. Poitier, 623 F.2d 1017, 1023 (5th Cir. 1980). But see, United States v. Holland, 494 F. Supp. 918 (D. Md. 1980).

PAGE 2-22

N. 42 For recent thoughtful affirmations of the *Bufalino* principle, see, United States v. Rozen, 600 F.2d 494 (5th Cir. 1979); United States v. Melchor-Lopez, 609 F.2d 399 (9th Cir. 1979); United States v. Mora, 598 F.2d 682 (1st Cir. 1979); Beard v. Maryland, 399 A.2d 1383 (1979); United States v. Lopez, 625 F.2d 889 (9th Cir. 1980); United States v. Hartman, 627 F.2d 7 (6th Cir. 1980).

PAGE 2-23

N. 43 United States v. Fuel, 583 F.2d 978, 981–82 (8th Cir. 1978).

§ 2.06 The Object of the Agreement

N. 1 In most states, the planned criminal objective need not take place within the state's boundaries, so long as there is an agreement within the state to commit a crime — State v. LaPlume, 375 A.2d 938 (1977) — and an overt act within the jurisdiction–United States v. Davis, 608 F.2d 555 (5th Cir. 1979).

[2] Constitutional Implications

PAGE 2-28

N. 33 But see, Balthazar v. Superior Court, 573 F.2d 698 (1st Cir. 1978).

PAGE 2-29

N. 34 Minnesota v. Bird, 285 N.W.2d 481 (1979); United States v. Waldron, 590 F.2d 33 (1st Cir. 1979); Cox v. Ala. 367 So. 2d 535 (1978); United States v. Katz, 601 F.2d 66 (2nd Cir. 1979).

§ 2.07 Withdrawal

PAGE 2-31

[Add to text following N. 12]

As the Supreme Court most recently stated "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." ^{12a}

12a United States v. United States Gypsum Co., 438 U.S. 422 (1978). See also, United States v. Jimenez, 622 F.2d 753, 755–56 (5th Cir. 1980); United States v. Castro, 629 F.2d 456, 464 (7th Cir. 1980); United States v. Lowell, 490 F. Supp. 897 (D.N.J. 1980); United States v. Dorn, 561 F.2d 1252 (7th Cir. 1977); Harris v. United States, 377 A.2d 34 (D.C. App. 1977); State v. Lavary, 152 N. J. Super. 413, 377 A.2d 1255 (1977). "The burden of proof of withdrawal rests on the defendant." United States v. James, 609 F.2d 36, 41 (2nd Cir. 1979).

§ 2.08 The Overt Act Requirement

[1] No Requirement

PAGE 2-33

N. 9 United States v. Veltre, 591 F.2d 347 (5th Cir. 1979) (the act need only be taken by one of the conspirators); United States v. Murzyn, 631 F.2d 525, 534 (7th Cir. 1980).

PAGE 2-35

N. 14 See also, United States v. Gonzales, 617 F.2d 1358 (9th Cir. 1980); United States v. Conlon, 481 F. Supp. 654 (D.D.C. 1979).

[2] Is It Constitutionally Required?

PAGE 2–38

N. 25 See also, United States v. Cooper, 606 F.2d 96 (5th Cir. 1979).

PAGE 2-39

N. 32 See also, Kansas v. Taylor, 583 P.2d 1033 (1978).

PAGE 2-40

- N. 34 See also, United States v. McKnight, 439 F. Supp. 536 (E.D. Pa. 1977). For an interesting state court exchange on a comparable statute, contrast, State v. Clark, 121 N.J. Super. 529, 377 A.2d 705 (1977) with State v. Hernandez, 159 N.J. Super. 304, 387 A.2d 1242 (1978).
- N. 36 United States v. Knuckles, 581 F.2d 305 (2nd Cir. 1978); United States v. Gordon, 580 F.2d 827 (5th Cir. 1978); United States v. Marx, 635 F.2d 436, 439 (5th Cir. 1981); United States v. Molina-Garcia, 634 F.2d 217, 219 (5th Cir. 1981); United States v. Heldon, 479 F. Supp. 316 (E.D. Pa. 1979). The Fifth Circuit has held that 21 U.S.C. § 963 also has no overt act requirement. United States v. McLaughlin, 578 F.2d 1180 (5th Cir. 1978); United States v. Michel, 588 F.2d 986 (5th Cir. 1979); United States v. Bates, 600 F.2d 505 (5th Cir. 1979); United States v. Houle, 596 F.2d 696 (5th Cir. 1979). Many prosecutions continue to be successfully brought under the Title 21 drug control statutes. In those prosecutions, the government is normally careful to allege a violation of both substantive and conspiracy provisions of the Title 21 offenses. One recent case holds that the general conspiracy statutes may not be used to charge conspiracy to violate the Title 21 substantive drug statute. United States v. Meacham, 626 F.2d 503 (5th Cir. 1980).

[3] How Substantial An Act?

PAGE 2-41

N. 38 Blaylock v. Okla., 598 P.2d 251 (1979); United States v. Palmeri, 630 F.2d 192, 200 (3rd Cir. 1980).

PAGE 2-44

- N. 55 See, State v. Marion, 62 Ohio St.2d 250, 405 N.E.2d 267 (1980).
- N. 56 Similarly, the government is not required to allege all overt acts. United States v. Cafaro, 480 F. Supp. 511 (S.D.N.Y. 1979).

PAGE 2-45

N. 66 Indeed, in some cases an omission to act in furtherance of the conspiracy may satisfy the overt act requirement. Montana v. Williams, 604 P.2d 1224 (1979).

PAGE 2–46

N. 71 See generally, United States v. Elliott, 571 F.2d 880 (5th Cir. 1978); United States v. Pugh, 437 F. Supp. 944 (E.D. Pa. 1977).

[4] The Acquitted Co-Conspirator

PAGE 2-49

[Add to text following N. 86]

One court has, however, recently held that a jury could consider overt acts of acquitted co-conspirators where they are not the only overt acts alleged.^{86a}

^{86a} Kansas v. Marshall and Brown-Sidorowicz, P.A., 577 P.2d 803, 820 (1978).

§ 2.09 State of Mind

[2] Intent to Agree

PAGE 2-52

N. 8 United States v. Alfrey, 620 F.2d 551, 556 (5th Cir. 1980).

[3] State of Mind Concerning the Object of the Agreement

N. 10 Specific intent is the requirement for conspiracy even if the crime to be committed does not itself require specific intent. Arizona v. Gunnison, 618 P.2d 604 (1980). *See also*, United States v. Provenzano, 615 F.2d 37, 44 (2nd Cir. 1980); United States v. Conlon, 481 F. Supp. 654 (D.D.C. 1979).

PAGE 2-54

N. 18 See also, United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); Calif. v. Backus, 590 P.2d 837 (1979); Leasure v. Delaware, 385 A.2d 730 (1978). For an unusual discussion of the intent question, see, Illinois v. Cramer, 381 N.E.2d 827 (1978).