Comments

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Buying into Criminal Liability: Resolving the Circuit Split over the Buyer-Seller Rule in Federal Drug Conspiracy Jurisprudence

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INTRODUCTION

Imagine two similar-sounding stories. In the first, a methamphetamine dealer purchases a half ounce of product, which she gives to her husband to resell to his customers. In the second, a different methamphetamine dealer regularly purchases two ounces of product at a time from his supplier to resell to his customers. Both dealers are ultimately prosecuted for conspiring to distribute a controlled substance under the Controlled Substances Act[1] and are convicted, but the results on appeal are dramatically different. In the first scenario, the defendant's conviction is affirmed, and she is sentenced to twelve years in prison. In the second, the defendant's conviction is overturned because the court determines that the evidence is insufficient to convict for conspiracy, and he gets off completely scot-free.[2]

As it turns out, these scenarios and the disparity in their outcomes are more than just hypothetical—each comes from a real federal case decided during the past three years. The reason for such a dramatic difference in these cases' outcomes is a circuit split in the interpretation of an obscure rule of federal drug conspiracy law: the buyer-seller rule. The buyer-seller rule is the concept in conspiracy jurisprudence that an illegal transaction between a buyer and a seller of controlled substances is insufficient alone to establish that the buyer and seller are members in a conspiracy to distribute drugs. Every circuit has adopted some version of the buyer-seller rule. Where the circuits differ, however, is in what more the government must show beyond a simple buy-sell transaction to establish a conspiratorial relationship. It is this difference

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[1] 21 U.S.C. § 846 (2012).

[2] The first scenario comes from *United States v. Gallegos*, 784 F.3d 1356 (10th Cir. 2015). The second scenario comes from *United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016).

that is producing such a wide disparity in sentencing for similar conduct.

This Comment endeavors first and foremost to shine a spotlight on that issue, making clear the significance of the discrepancy in interpretation and advocating for a uniform national rule. Beyond just the need for a general resolution, however, this Comment will argue that the Ninth and Seventh Circuits' interpretation of the buyer-seller rule is the most appropriate as it more accurately conforms to the historical definition of a conspiracy and more appropriately deters the conduct that makes conspiracies so dangerous. In doing so, this Comment provides a comparison of buyer-seller rule jurisprudence across jurisdictions.

In light of current federal prosecution priorities and resource distribution, robust examination and evaluation of federal drug laws are extremely valuable in clearing up any inconsistency in their administration. According to the most recently available data from the Bureau of Justice Statistics, drug trafficking offenses were the single most-charged type of crime across all federal jurisdictions.[3] Moreover, it is unclear whether this trend will change any time in the near future as the Trump administration has frequently taken a strong antidrug position since assuming office. For example, in January of 2018, Attorney General Jeff Sessions rescinded President Obama's policy on the enforcement of marijuana drug offenses, giving federal prosecutors significantly wider latitude to enforce the federal prohibition on marijuana in states that have legalized it.[4] Additionally, President Trump himself made several comments in March of 2018 suggesting that drug traffickers should be subjected to harsher and more frequent punishment, even alluding to the death penalty at one point.[5] Although the likelihood of the President attempting to follow through on such a remark is unclear, one thing is clear—federal drug law is going to be at

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3 MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2014 – STATISTICAL TABLES 16 (2017), https://www.bjs.gov/content/pub/pdf/fjs14st.pdf.

4 Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan. 4, 2018), https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html?_r=0.

5 Editorial Board, *Trump Wants the Death Penalty for Drug Dealers. Here's What Would Actually Work.*, WASH. POST (Mar. 21, 2018), https://www.washingtonpost.com/opinions/trump-wants-the-death-penalty-for-drug-dealers-heres-what-would-actually-work/2018/03/21/31ad9fb6-2c5a-11e8-b0b0-f706877db618story.html?noredirect=on&utm_term=.4861eb1504b5.

the forefront of our national political discourse for at least the next few years.

In exploring this issue, this Comment is divided into several different parts. Part I explores what a conspiracy is and discusses the doctrine of conspiracy's historical basis. Part II describes and compares in detail the different approaches of the Ninth, Seventh, and Tenth Circuits. Part III makes a case for the adoption of the Ninth and Seventh Circuits' approach and explains the shortcomings in the Tenth Circuit's alternative approach. Finally, part IV addresses some counterarguments to be made in favor of the Tenth Circuit's stricter approach.

I
WHAT IS A CONSPIRACY?

A. A Brief History of Conspiracy

The modern conspiracy doctrine was famously described by Judge Learned Hand as the "darling of the modern prosecutor's nursery" both because of its widespread usage and the utility that it provides to prosecutors.[6] Although modern criminal conspiracy doctrine experiences widespread usage because of its power, the doctrine took quite some time to evolve to where it stands today.

Like many modern crimes and civil causes of action, the doctrine of criminal conspiracy traces its roots all the way back to the ancient English common law.[7] At the time, there were effectively two different ways of prosecuting felonies: trial by battle or a public investigation conducted by a grand jury–like body.[8] This system suffered from a number of headaches, however, not the least of which was the prevalence of false, baseless accusations.[9] In order to curtail this practice, fines were imposed against those who brought frivolous accusations.[10] Unfortunately, these fines only succeeded in forcing those abusing the system to become more creative. Frivolous accusers began gaming the system by using children to bring false claims, in order to insulate themselves from liability because children could

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6 Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925); *see also* Kevin Jon Heller, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111, 111 (1996) (quoting *Harrison*).

7 Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 394 (1922).

8 *Id.*

9 *Id.*

10 *Id.*

neither be fined nor outlawed for bringing false claims.[11] Accordingly, to continue holding abusers of the system accountable, the first statutes were passed criminalizing the actual act of plotting to cause some sort of harm:

> Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite, or cause to be indited [or falsely to acquit people] or falsely to move or maintain Pleas; and also such as cause Children within Age to appeal Men of Felony, whereby they are imprisoned and sore grieved; and such as retain Men with their Liveries or Fees for to maintain their malicious Enterprises; [and to suppress the truth] as well the Takers as the Givers. And Stewards and Bailiffs of great Lords, which, by their Seignory, Office, or Power, undertake to maintain or support [Quarrels, Pleas, or Debates] [for other Matters] than such as touch the Estate of their Lords or themselves.[12]

This was only the beginning for the conspiracy doctrine, however. Over the years, the doctrine evolved from a means of punishing those plotting to interfere with the law's administration to a mechanism of punishing those collaborating to violate the law.[13] In fact, some jurisdictions even took this one step further and started using the conspiracy doctrine as a catchall means of prosecuting those engaging in acts widely considered immoral but not necessarily criminal. This shift is memorialized perhaps most famously in Hawkins's *Pleas of the Crown*, which provides that "all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law."[14]

This particular use is exemplified in some early American cases, like New Hampshire's *State v. Burnham*.[15] In *Burnham*, the defendants were convicted of conspiracy when they issued fraudulent insurance policies to various individuals in order to give those individuals the right to vote in the Rockingham Mutual Fire Insurance Company's election for its board of directors.[16] This, the defendants hoped, would lead to the election of particular board members who would then help

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11 *Id.*

12 *Id.* at 396 (quoting THIRD ORDINANCE OF CONSPIRATORS, 33 Edw. I, st. 2 (1304)).

13 *Id.* at 400.

14 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 190 (6th ed. 1788).

15 15 N.H. 396 (Super. Ct. 1844).

16 *Id.* at 397.

the defendants get jobs.[17] On appeal, the New Hampshire Superior Court of Judicature upheld the defendants' convictions on the grounds that, although the defendants' actions were not explicitly illegal, the aggregation of their immoral acts for a common purpose threatens the peace and order of society and therefore requires their repression.[18]

New Hampshire was not alone in coming to this conclusion. In Alabama's *State v. Murphy*, the defendants were convicted of conspiracy when they plotted to fabricate a marriage license to trick the victim into marrying the defendant.[19] Though the court refused to decide whether this deception was actually illegal under the letter of the law, it was apparently untroubled in affirming the defendants' conviction as the act was "eminently immoral" and therefore merited "the full measure of reprehension with which it is visited by the law."[20]

The era of using the conspiracy doctrine to regulate anything deemed immoral would not last forever, though it took some jurisdictions longer than others to succumb to the tide of change. In New Hampshire, *Burnham* was implicitly overturned seventeen years later in *State v. Straw*.[21] In *Straw*, the court held that two defendants convicted of plotting to commit civil trespass could not be guilty of conspiracy because, although such an act is immoral, the underlying act itself is not criminal if committed by a single person.[22]

Alabama would ultimately come around to this way of thinking as well but not until just over a century later in 1946 in *Mitchell v. State*.[23] In *Mitchell*, the defendants were accused of conspiring to forge evidence falsely indicating that several individuals were residents of wards within the Mobile, Alabama, voting precinct.[24] Oddly enough, this act, though immoral, was not actually considered criminal at the time.[25] Accordingly, the court held that the defendants could not be convicted of conspiracy because "[t]he only code form for conspiracy relates to conspiracy to commit a felony or misdemeanor."[26]

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17 *Id.*

18 *Id.* at 402.

19 6 Ala. 765, 765–66 (1844).

20 *Id.* at 769–70.

21 42 N.H. 393 (Super. Ct. 1861).

22 *Id.* at 397.

23 27 So. 2d 36 (Ala. 1946).

24 *Id.* at 40.

25 *Id.* at 37.

26 *Id.*

The recognition that conspiracy is a doctrine specifically punishing agreements to violate the criminal law, rather than just punishing engagement in immoral acts, in no small part helped give rise to the modern understanding of the crime.

B. Modern Conspiracy

In the modern era, the crime of conspiracy is viewed in the broadest sense as a sort of criminal partnership wherein two people agree to commit one or more crimes.[27] This agreement does not have to be formal in the sense that all the conspiracy's members sat down and agreed on every detail of how to carry out their scheme, but the members must have at least agreed in some way to commit the crimes.[28] In most jurisdictions, this breaks down into two or three elements. First, the conspirators must have come to some sort of "agreement to accomplish an illegal objective."[29] Second, at the time the agreement is made, the conspirators must have the intent to commit the offense about which they are conspiring.[30] Finally, some statutes impose an additional requirement that at least one conspirator takes an overt act in furtherance of their agreement.[31] In practice, because it is incredibly rare that there will ever be direct evidence of the actual agreement between the parties, the prosecution will generally prove its case through circumstantial evidence of conspirators working in concert.[32]

In many ways, conspiracy is similar to the theory of aiding and abetting, which holds a codefendant criminally liable to the same degree as the principal actor if the codefendant knowingly assists with the crime.[33] After all, both conspiracy and aiding and abetting involve a confederation of at least two people acting together to allow for the commission of a crime. Where these doctrines part ways, however, is in the level and scope of commitment to the offense that the other party

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[27] *See, e.g.*, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 8.20 (9TH CIR. JURY INSTRUCTIONS COMM. 2010); Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 228 (1953) [hereinafter *Falcone Revisited*].

[28] *Falcone Revisited*, *supra* note 27.

[29] United States v. Herrera-Gonzalez, 263 F.3d 1092, 1095 (9th Cir. 2001).

[30] Benjamin M. Dooling & Marissa A. Lalli, *Federal Criminal Conspiracy*, 47 AM. CRIM. L. REV. 561, 564 (2010).

[31] United States v. Winslow, 962 F.2d 845, 851 (9th Cir. 1992).

[32] Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946).

[33] Rosemond v. United States, 572 U.S. 65, 70–71 (2014).

has to demonstrate. Under an aiding and abetting theory, the assisting party need only in some way knowingly assist another in the commission of a criminal act.[34] This can even be something as insignificant as providing encouragement to the other party in committing the offense.[35] Conspiracy, by contrast, is a much more involved crime as it requires the collusion of two parties before committing a crime to come to an agreement to assist each other in committing a criminal offense.[36]

The greater level of involvement necessary for participation in a conspiracy is reflected in the severity of the punishment for committing the offense. Though conspiracy statutes on their faces appear to function just like aiding and abetting statutes by punishing conspirators as if they had committed the substantive offense themselves,[37] the statutes really get their teeth through a special, additional form of criminal liability lurking beneath the surface called *Pinkerton* liability. *Pinkerton* liability is derived from the Supreme Court's decision in *Pinkerton v. United States* wherein two brothers, Walter and Daniel Pinkerton, were charged with and convicted of several counts of violating and conspiring to violate the Internal Revenue Code.[38] Unsatisfied with the resolution, Daniel sought review in the Supreme Court, arguing that his conspiracy conviction was improper as it was sustained entirely based on his brother's conduct, not his own.[39] The Court rejected Daniel's argument and instead held that the defendant in a conspiracy case can be held criminally liable not just for acts he committed in furtherance of the conspiracy, but also for the reasonably foreseeable illegal acts of his coconspirators.[40] The doctrine handed down in *Pinkerton* represents a massive expansion of criminal liability for conspirators that makes the determination of whether someone is committing a crime alone or as a part of a conspiracy all the more important.

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34 22 C.J.S. *Criminal Law: Substantive Principles* § 174 (2018).

35 *Id.*

36 *See* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 8.20 (9TH CIR. JURY INSTRUCTIONS COMM. 2010).

37 *See, e.g.*, 18 U.S.C. § 1349 (2012); 18 U.S.C. § 1956(h) (2012); 21 U.S.C. § 846 (2012).

38 328 U.S. 640, 641 (1946).

39 *Id.* at 642, 645.

40 *Id.* at 647–48; *see also* Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 94–95 (2006) (discussing *Pinkerton*, 328 U.S. 640).

Furthermore, the importance of the conspiracy doctrine can hardly be understated, given how prevalent its application has become in criminal law. Congress has applied the conspiracy doctrine either directly to most major federal crimes through individual statutes[41] or indirectly to all federal crimes through the general conspiracy statute.[42] The widespread application of the conspiracy doctrine once prompted Justice Jackson to describe it as "chameleon-like, tak[ing] on a special coloration from each of the many independent offenses on which it may be overlaid."[43] Although many of these different statutes put their own unique spin on the doctrine, the particular statute that this Comment focuses on is the drug-conspiracy statute, 21 U.S.C. § 846, as that is the section that the buyer-seller rule stems from.

C. The Drug Conspiracy Statute and the Development of the Buyer-Seller Rule

The Controlled Substances Act was enacted in 1970.[44] A subsection of the act, 21 U.S.C. § 846, provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[45] Although there are many other sections that § 846 can be applied to, one of the most common is 21 U.S.C. § 841, which effectively prohibits conspiracies to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."[46] Though there is a wide variety of evidence that courts have considered sufficient to prove that the defendant agreed to violate this section, it is subject to one important judicially created limitation: the buyer-seller rule.[47] The buyer-seller rule provides that criminal liability for conspiring to distribute drugs cannot be found solely based on evidence of the sale of drugs from a seller to a buyer.[48]

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41 *See, e.g.*, 18 U.S.C. § 1349; 18 U.S.C. § 1956(h); 21 U.S.C. § 846.

42 18 U.S.C. § 371 (2012).

43 Krulewitch v. United States, 336 U.S. 440, 447 (1949) (Jackson, J., concurring).

44 Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 846).

45 21 U.S.C. § 846.

46 21 U.S.C § 841(a) (2012).

47 *See* United States v. Wexler, 522 F.3d 194, 210–11 (2d Cir. 2008) (Raggi, J., concurring in part and dissenting in part) (discussing the buyer-seller rule).

48 *Id.* at 211.

This rule traces its roots all the way back to the 1940s when the Supreme Court decided *United States v. Falcone*.[49] In *Falcone*, the respondents were wholesalers who sold sugar, yeast, and cans to a number of the principal defendants who used them for the illegal distillation of spirits.[50] The respondents were indicted for conspiracy, although the indictment did not allege that they had any knowledge of the conspiracy itself but rather that they had knowledge that the goods they sold would be used for illegal purposes.[51] The Supreme Court overturned the respondents' convictions, however, holding that knowledge that the materials would be put to illegal use alone was not enough to find that the defendants were participants in a conspiracy.[52] The government would have to go one step further and show that the defendants knew that they were participating in a conspiracy.[53] Although *Falcone* is about the distribution of legal goods as opposed to drugs, it represents the beginning of the idea that selling a good with knowledge that you are contributing to its illegal use is not the same as conspiring to distribute it.[54]

The Court revisited the issue again nine years later in *Direct Sales Co. v. United States* but this time in reference to illicit drugs.[55] In that case, the defendant was a corporation that was charged with conspiring to commit a number of offenses involving the illegal distribution of morphine.[56] The charges included everything from distributing morphine without paying the required tax to ordering morphine for purposes outside of legitimate business.[57] The government alleged that the defendant shipped morphine to a doctor in South Carolina in quantities so inordinately large that no reasonable person could have believed that it was being used for legitimate purposes.[58] Specifically, the government introduced evidence showing that the defendant

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[49] 311 U.S. 205 (1940).

[50] *Id.* at 206–07.

[51] *Id.* at 207.

[52] *Id.* at 210.

[53] *Id.*

[54] *See* Ryan Thomas Grace, *Defining the Sprawling Arms of Conspiracy: The United States Court of Appeals for the Eighth Circuit Correctly Addressed the "Clean Breast" Doctrine as It Affects Withdrawal from a Conspiracy in* United States v. Grimmett, 35 CREIGHTON L. REV. 433, 443 (2002) (discussing *Falcone*, 311 U.S. 205).

[55] 319 U.S. 703, 705 (1943).

[56] *Id.* at 704.

[57] *Id.* at 704–05.

[58] *Id.* at 705.

shipped as many as 5000 to 6000 tablets per month to the doctor—enough for the doctor to prescribe 400 average-sized doses per day.[59] On appeal, the defendant, invoking *Falcone*, argued that it could not be convicted of conspiracy even if it knew that the product it was selling was being used illegally.[60] The Court found that this argument fell short of dispositive, however, explaining that *Falcone* provides that a defendant cannot be convicted of a conspiracy based *solely* on its knowledge that the goods it is selling are being used illegally.[61] Nothing in *Falcone* provides that the defendant cannot be convicted of the conspiracy if the government goes one step further and produces evidence that the defendant sold the illegal goods in knowing support of a conspiracy.[62] Here, there was a whole constellation of other evidence that supported the inference that the defendant knew it was participating in a conspiracy.[63] Particularly important is the fact that morphine, unlike the sugar, yeast, and cans in *Falcone*, has a distinct propensity for illegal use in and of itself.[64] Although this fact is also not enough to support an inference of a conspiracy, it does affect the amount of proof necessary to infer such knowledge.[65] Otherwise innocuous factors like high quantities of sales, high pressure sales methods, or sudden increases in the volume of sales take on a new significance in a situation where the good being sold has such a high propensity for illegal use.[66] These factors can actually support the inference that the defendant knew not only that the goods it was selling were being put to illegal uses but also that it was supplying and benefiting from an illegal enterprise.[67] Thus, the defendant could be held criminally liable for conspiracy.[68]

So, where did *Direct Sales Co.* ultimately leave buyer-seller rule jurisprudence? Distilled down to its essence, this case means that when the good sold is illegal or is prone to illegal use, the defendant can be convicted of conspiracy if the government can prove that the defendant

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[59] *Id.* at 706.
[60] *Id.* at 708.
[61] *Id.* at 709.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 710.
[65] *Id.* at 711.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 714–15.

not only sold the good knowing it would be put to illegal use but also knew it was supporting an illegal enterprise. Unfortunately, however, the opinion is unclear about what the government has to show to prove these things. From this murk, two separate schools of thought have emerged, each with a different interpretation about what is necessary to show that the buyer is knowingly benefitting from an illegal enterprise and thereby convictable of conspiracy. Each school grounds its interpretation in a different conception of the buyer-seller rule's purpose and has been adopted as the controlling law in a different federal circuit as discussed below. Although examining the different conceptions of this rule's purpose might seem on the surface to be unimportant and overly academic, recognizing the divide between these interpretations is critical to understanding why different jurisdictions apply this rule in different ways. After all, it was this inconsistent application of the rule that produced the twelve-year sentencing disparity seen in *Loveland* and *Gallegos*.[69]

II
DIFFERENT APPROACHES IN THE BUYER-SELLER RULE'S ADMINISTRATION

A. The Ninth and Seventh Circuits: Additional Factors Jurisdictions

The first approach to the buyer-seller rule's administration that this Comment will examine is that of the Ninth and Seventh Circuits. These two circuits base their interpretation of the buyer-seller rule on the first of the two major schools of thought on the rule's purpose. This school views the buyer-seller rule not so much as an independent requirement in a conspiracy case, but rather as a check to make sure that the agreement element of the conspiracy is satisfied.[70] Subscribers to this ideology argue that a deal for a seller to sell drugs to a buyer does not involve a meeting of the minds for the common illegal purpose of distributing drugs.[71] Instead, they find that "[i]n such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell."[72] Accordingly, the two parties to the transaction have not come to the

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69 *See supra* note 2.

70 State v. Allan, 83 A.3d 326, 335 (Conn. 2014) (describing the two different approaches of the buyer-seller rule by federal Circuit Courts).

71 *Id.*

72 *Id.* (quoting United States v. Donnell, 596 F.3d 913, 924–25 (8th Cir. 2010)).

necessary agreement required to sustain a conspiracy charge.[73] These courts view the buyer-seller relationship not as an exception to the conspiracy doctrine but rather as "a failure of proof of conspiracy."[74] Accordingly, to overcome the buyer-seller rule's protections, these jurisdictions look for additional factors beyond just the sale itself to prove that the parties had a deeper relationship and a more substantial stake in the venture.[75] The particular factors important to each circuit and the weight attributed to each individual factor, however, can vary even among these "factors jurisdictions." These differences will become apparent by reviewing some of the prominent case law in each jurisdiction.

1. The Ninth Circuit

The Ninth Circuit is particularly clear about the factors relevant to the buyer-seller analysis as it provides a list of the factors that it views as most important in its pattern jury instructions.[76] Pattern jury instruction 9.19A provides that:

> In considering whether the evidence supports the existence of a conspiracy or the existence of a buyer-seller relationship, you should consider all the evidence, including the following factors:
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> (1) whether the sales were made on credit or consignment;
> (2) the frequency of the sales;
> (3) the quantity of the sales;
> (4) the level of trust demonstrated between the buyer and the seller, including the use of codes;
> (5) the length of time during which the sales were ongoing;
> (6) whether the transactions were standardized;
> (7) whether the parties advised each other on the conduct of the other's business;
> (8) whether the buyer assisted the seller by looking for other customers;
> (9) and whether the parties agreed to warn each other of potential threats from competitors or law enforcement.[77]

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[73] *Id.*

[74] United States v. Loveland, 825 F.3d 555, 561 (9th Cir. 2016).

[75] *See, e.g.*, *id.* at 562 (explaining that providing drugs to another on credit or conducting sales on consignment serves as sufficient enough evidence to prove that the seller had a stake in the venture).

[76] MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 9.19A (9TH CIR. JURY INSTRUCTIONS COMM. 2010) (updated 2018).

[77] *Id.*

The Ninth Circuit warns, however, that this is only a list of possible relevant factors and that the presence or absence of any particular factor is not necessarily dispositive as this is a very flexible and highly context-dependent analysis.[78] In order to sort out what combination of these factors indicates a relationship that goes beyond mere buyer-seller dealings, an examination of the case law is in order.

One of the circuit's more illuminating decisions on the matter comes in the case *United States v. Lapier*.[79] In *Lapier*, the defendant was indicted for conspiring to distribute drugs after purchasing a considerable amount of methamphetamine from an associate, intending to redistribute it.[80] The evidence adduced at trial revealed that the two individuals had engaged in a series of transactions over the span of a year during which the defendant purchased somewhere in the range of three to three and a half pounds of methamphetamine.[81] Moreover, there was evidence that many of the transactions were carried out using a "fronting" system wherein the supplier would provide drugs to the defendant without being paid on the expectation that the defendant would sell the drugs and then pay the supplier back later.[82] In analyzing the sufficiency of the evidence in this case, the court focused in particular on the fronting behavior.[83] Fronting the drugs is unique among the factors because it necessitates not only knowledge that the buyer will redistribute the drugs but also the seller's vested stake in the buyer's redistribution on the part of the seller as it is the only way that the seller gets paid.[84] The fronting, taken together with the frequent sales, was enough to show that there was a conspiracy to distribute drugs in play rather than merely an agreement to sell them.[85]

United States v. Moe provides another permutation of factors that is sufficient to support a finding of conspiracy.[86] In *Moe*, the defendant was indicted for conspiring to distribute methamphetamine based on evidence that she purchased roughly 140 grams of methamphetamine in seven different transactions over the course of a year.[87] During these

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78 *Id.*; *see also Loveland*, 825 F.3d at 561 (discussing factors).

79 796 F.3d 1090, 1094 (9th Cir. 2015).

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 1095.

84 *Id.*

85 *Id.*

86 781 F.3d 1120 (9th Cir. 2015).

87 *Id.* at 1123.

transactions, the defendant and her supplier contacted each other by phone at least ninety-four separate times.[88] While making the methamphetamine sales, the defendant and her supplier communicated about the availability of the product through codes, like the supplier telling the defendant that the weather was bad when he had no product for sale.[89] Moreover, the government also introduced evidence that the buyer and seller used the exact same code to warn each other about law enforcement activity on at least one occasion when the supplier's house was being searched.[90] Though the court was not specific about the weight of each individual factor in its calculation, it made clear that in the aggregate, these factors indicated that the parties maintained a relationship of mutual trust.[91] Furthermore, the court explained that when all these factors are taken together along with the fact that the defendant's supplier knew that the defendant was redistributing the drugs, they support the conclusion that the supplier had a vested interest in the defendant's sales.[92] This sort of interest in turn then supports a conviction for conspiracy.[93]

So, all in all, the Ninth Circuit shows us that the key inquiry in determining whether two individuals are engaged in a conspiracy is whether the seller of drugs has a vested stake in the buyer's resale. There are multiple combinations of factors that can support such a conclusion, although the case law is clear that certain factors receive more weight. For example, in *Lapier*, the court made its decision almost entirely based on one factor—the sales on credit—and understandably so. Making sales on credit is unique among the factors because it is the one and only factor that, in and of itself, necessitates the seller having a stake in the buyer's redistribution of the drugs. Otherwise, the seller does not actually get anything out of the agreement. Accordingly, in light of the inquiry the circuit uses, it makes sense that the court assigns this factor so much weight.

By contrast, the larger group of factors seen in *Moe* receive less weight individually as no single one of them necessarily requires that the buyer has a stake in the resale. However, because the agreement in

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88 *Id.*

89 *Id.* at 1123–24.

90 *Id.* at 1126.

91 *Id.*

92 *Id.* at 1126–27.

93 *Id.* at 1127.

conspiracy can be inferred from circumstantial evidence,[94] these factors when taken together can support the inference that the defendant has some sort of stake in the buyer's redistribution. Beyond this general understanding, however, this approach is unclear about when enough of these factors are present to uphold a conspiracy conviction.

2. The Seventh Circuit

The Seventh Circuit takes a similar approach to the Ninth Circuit, though it does not rely on a preset list of factors for consideration. Instead, the Seventh Circuit allows individual courts to weigh whichever factors they find relevant in making their decisions. Pattern jury instruction 5.10(A) provides that "[t]o establish that a [buyer or seller] knowingly became a member of a conspiracy with a [buyer or seller] to [distribute [name of drug] . . . the government must prove that the buyer and seller had the joint criminal objective of distributing [name of drug] to others."[95] At one point, the Seventh Circuit had a similar pattern instruction to the Ninth Circuit that did list factors, but it later revised the instruction over criticism that giving jurors an entire list of factors to consider, many of which do not relate to the case at hand, might lead to juror confusion.[96] Although this change was originally made with the intent of alleviating confusion among jurors, it in some sense muddies the waters as to what sort of conduct demonstrates an enhanced level of trust and investment that merits a conspiracy conviction. This lack of clarity ultimately has to be sorted out in case law.

In *United States v. Colon*, an early case in the new list-free era, the Seventh Circuit made its first attempt to identify what sort of conduct represents something greater than a buyer-seller relationship.[97] There, the defendant was convicted of conspiracy based on his regular business transactions with a cocaine dealer for standardized amounts of cocaine.[98] The Seventh Circuit reversed, however, making the sweeping determination that regular purchases on standard terms can

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94 United States v. Mincoff, 574 F.3d 1186, 1192 (9th Cir. 2009).

95 PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 5.10(A) (COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2012).

96 United States v. Colon, 549 F.3d 565, 570–71 (7th Cir. 2008) (discussing a previous version of the Seventh Circuit's conspiracy instructions).

97 *Id.*

98 *Id.* at 567.

never alone form the basis for a conspiracy.[99] Regular transactions in standard amounts, the court said, suggest no greater level of mutual trust between the buyer and seller than that which is present in an ordinary person's regular and standardized transactions at Walmart.[100] Instead, the court suggested several other factors that are more strongly indicative of a conspiratorial relationship: finding new customers for one another, advising each other on the business, receiving a commission on sales, or warning each other about competitors or law enforcement.[101] Accordingly, it was clear that the Seventh Circuit would also require more to push a defendant's conduct into the realm of conspiracy.

Another attempt to probe the Seventh Circuit's interpretation of the buyer-seller rule would come in *United States v. Johnson*.[102] In *Johnson*, the government offered a laundry list of evidence about the relationship between the defendant and his supplier, including evidence that the defendant received discounts from the supplier, brought in a friend as a new customer, warned the supplier about law enforcement activity, purchased drugs in standardized quantities, then resold the drugs, and made more than 300 calls to the supplier over a ten-month period.[103] The Seventh Circuit still refused to crack, however, despite previously explaining that warnings about law enforcement activity and bringing in new customers were indications of a relationship going beyond a buyer-seller relationship.[104] The court distinguished the evidence of the relevant factors in this case from what it had envisioned at the time of delineating them by finding that the act of bringing one new customer to the supplier does not truly constitute an agreement to distribute drugs and that any other factors suggesting a deeper relationship were no more than isolated incidents that are alone insufficient.[105] Fine as this may be, it still begs the question: If not this fact pattern, then what will it take for the Seventh Circuit to find that a relationship falls outside the scope of buyer-seller protection?

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99 *Id.*

100 *Id.* at 567–68.

101 *Id.* at 570.

102 United States v. Johnson, 592 F.3d 749 (7th Cir. 2010).

103 *Id.* at 756–57.

104 *Id.* at 755–56.

105 *Id.* at 757.

The Seventh Circuit answered this question in *United States v. Vallar*.[106] In that case, the government presented evidence that the defendant and his supplier had engaged in a standardized series of transactions involving large quantities of cocaine wherein the defendant would take the drugs on credit and not pay his supplier until the drugs had been resold.[107] When the Seventh Circuit reviewed the case, it concluded that the government had presented sufficient evidence to demonstrate a relationship going beyond that of a buyer and seller.[108] That determination was largely predicated on the defendant having received drugs on credit. Such a transaction evidences a sort of mutual trust between the buyer and seller that is not present in an arms-length buyer-seller transaction.[109] Even still, however, the court warns that sales on credit or consignment are not enough if presented alone. Such sales at a minimum have to be accompanied by standardization of transactions or consistent transactions for distribution-level quantities over time.[110] Nonetheless, *Vallar* indicates that in the Seventh Circuit sales on credit carry significant weight when determining whether there is a deep conspiratorial relationship.

Overall, the Seventh Circuit's jurisprudence on the buyer-seller rule, despite not being defined by a limited set of factors, still bears a lot of resemblance to the Ninth Circuit's take on the issue. Both jurisdictions clearly place a lot of weight on the practice of fronting drugs or other credit-based sales schemes, and they consider a number of lesser factors as well, such as the length of ongoing transactions, the amount of drugs transacted for, the warnings made to suppliers about law enforcement, and many others.

Where the two circuits materially diverge, however, is in each circuit's willingness to agree that a conspiratorial relationship can exist in the absence of sales on credit. In the Ninth Circuit's *Moe* case, the court was willing to find a conspiratorial relationship, despite the absence of credit sales, when a number of other factors were present—including making regular transactions, using codes with her supplier, and warning her supplier about law enforcement. By contrast, in the Seventh Circuit's most comparable case, *Johnson*, the court declined

106 635 F.3d 271 (7th Cir. 2011).

107 *Id.* at 287.

108 *Id.* at 287–88.

109 *Id*.

110 *Id*. at 287.

to find such a relationship even though a litany of factors other than credit were present—including making regular and standardized transactions, warning about law enforcement, and bringing in new customers. *Johnson* indicates that the Seventh Circuit places even more weight on credit sales than the Ninth Circuit to the point that credit sales nearly becomes the deciding factor in and of itself.

Another noteworthy distinction is that the weight that the Seventh Circuit assigns to individual factors might not even remain consistent across cases. By the circuit's own admission, the buyer-seller analysis is inconsistent and contradictory when it comes to assigning weight to individual factors.[111] After all, the entire inquiry is very circumstantial, focusing on the specific facts of the case at hand. This approach, the court believes, allows it to stay focused on the big picture of determining whether there is a deep relationship between the individuals instead of unintelligently and mechanically determining the nature of the relationship based on weights preassigned to individual factors in entirely different scenarios.[112]

B. The Tenth Circuit: A Redistribution and Interdependence Jurisdiction

In contrast to the flexible and situational factors-focused test of the Seventh and Ninth Circuits, the Tenth Circuit has adopted a much more rigid but clear-cut interpretation of the buyer-seller rule. This circuit's interpretation is based on the second main school of thought about the policy behind the rule. This school views the buyer-seller rule as an actual exception to what would otherwise be conspiratorial liability.[113] Proponents of this interpretation believe that such an exception is necessary in order to ensure that those who buy drugs for personal use are not swept out into a sea of conspiratorial liability, but still allows greater punishment for street-level, mid-level, and other higher-level dealers.[114] This rule, they argue, reflects a policy judgement: Those who merely purchase drugs in order to feed a personal addiction are less criminally culpable than those involved in a conspiracy.[115] By contrast, those who exploit end users' addictions for their own profit at

111 United States v. Brown, 726 F.3d 993, 1002 (7th Cir. 2013).

112 *Id.*

113 State v. Allan, 83 A.3d 326, 335 (Conn. 2014).

114 United States v. Ivy, 83 F.3d 1266, 1285–86 (10th Cir. 1996).

115 United States v. Parker, 554 F.3d 230, 234 (2d Cir. 2009).

the expense of the users' health and welfare are considered to be substantially more criminally culpable.[116] The Tenth Circuit's pattern jury instructions are actually silent on the subject of the buyer-seller rule, but case law has made clear where the circuit stands in its interpretation.[117]

The definitive explanation of the Tenth Circuit's position comes in the case *United States v. Ivy*.[118] In *Ivy*, the government presented evidence on the number of times that the defendant purchased drugs from various people who were concededly members of a conspiracy and resold them to others for a profit.[119] The defendant argued that this evidence was insufficient to link him to the conspiracy in anything beyond a buyer-seller capacity.[120] The Tenth Circuit rejected his argument, holding that "the purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute the drugs for profit, from street-level, mid-level, and other distributors, who do intend to distribute drugs for profit, thereby furthering the objective of the conspiracy."[121] As the defendant in *Ivy* had clearly distributed drugs for profit, the court held that the buyer-seller rule was no defense to his conspiracy charge.[122] In *Ivy*, the interpretation of the buyer-seller rule is substantially narrower than the one advanced by the Ninth and Seventh Circuits, but this is not even the end of the story.

On top of the rule's already limited scope, the Tenth Circuit narrowed the rule even further in *United States v. Flores*.[123] There, a drug dealer attempted to invoke the buyer-seller rule as a defense to accusations that he—by selling drugs to the conspiracy's members—had participated in a conspiracy.[124] The court was unpersuaded, however, and instead came to exactly the opposite conclusion. Specifically, a seller of drugs falls outside the bounds of the rule's protection per se.[125] This decision was predicated on the same understanding of the rule's purpose that produced the *Ivy* holding—the

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116 *Id.*

117 CRIMINAL PATTERN JURY INSTRUCTIONS § 2.87 (CRIM. PATTERN JURY INSTRUCTION COMM. OF THE TENTH CIRCUIT 2011) (updated 2018).

118 83 F.3d at 1266.

119 *Id.* at 1286.

120 *Id.* at 1284.

121 *Id.* at 1285–86.

122 *Id.* at 1286.

123 149 F.3d 1272 (10th Cir. 1998).

124 *Id.* at 1277.

125 *Id.*

buyer-seller rule is intended to protect the less culpable end users of drugs, not those that sell them for profit.[126] With a scope as wide as this, the natural question becomes just what sort of scenario actually merits protection under the rule?

Another Tenth Circuit case, *United States v. McIntyre*, provides the answer.[127] In *McIntyre*, the defendant was accused of conspiracy after he purchased cocaine from a number of different people in unrelated transactions, which he shared with his friends.[128] The court found that evidence insufficient to support a conspiracy conviction because a series of unrelated drug transactions that the defendant did not intend to redistribute for profit does not indicate the presence of a common purpose to possess and redistribute cocaine.[129] This case, besides showing the outer limit of what is protected under the buyer-seller rule, also speaks again to the circuit's understanding that whether someone redistributed for profit makes or breaks his or her eligibility for the rule's safeguard.

Now here is where things get a little more complicated. Although the Tenth Circuit has interpreted the buyer-seller rule itself extremely narrowly, it is neither fair to the circuit nor legally appropriate to look at this rule's interpretation in isolation. This is because the Tenth Circuit has pioneered the development of a whole new essential element for the crime of conspiracy that helps bridge the gap between its interpretation of the buyer-seller rule and the interpretations of other jurisdictions: interdependence.[130] As case law defines it, interdependence exists where the parties charged "inten[d] to act together for their shared mutual benefit within the scope of the conspiracy."[131] Taken on its face, this element seems to require something similar to the deep relationship of mutual trust and a vested

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126 *Id.*

127 836 F.2d 467 (10th Cir. 1987).

128 *Id.* at 469.

129 *Id.* at 472.

130 *See* CRIMINAL PATTERN JURY INSTRUCTIONS § 2.87 (CRIM. PATTERN JURY INSTRUCTION COMM. OF THE TENTH CIRCUIT 2011); Jeff Van der Veer, Comment, *Varying Declarations of Interdependence: The Tenth Circuit's Inconsistent Analysis of Criminal Conspiracy*, 82 U. COLO. L. REV. 331, 341–42 (2011).

131 United States v. Caldwell, 589 F.3d 1323, 1329 (10th Cir. 2009) (alteration in original) (emphasis omitted) (quoting United States v. Evans, 970 F.2d 663, 671 (10th Cir. 1992)).

interest that the Seventh and Ninth Circuits look for. In practice, however, this element has been interpreted somewhat differently.

In determining whether or not there was an interdependent relationship between coconspirators, the courts are particularly interested in the structure of the alleged conspiracy.[132] The prototypical example of conspiratorial structure is what the court refers to as a chain-and-link conspiracy.[133] In a chain-and-link conspiracy, drugs begin at the top of a vertical chain in the hands of a larger dealer and work down the chain in a series of buyer-seller transactions until they reach the end user at the bottom.[134] A chain-and-link system of distribution is interdependent because "each alleged coconspirator . . . depend[s] on the operation of each link in the chain to achieve the common goal."[135] This interdependence is the same as the kind seen in legitimate business, where a manufacturer successively sells merchandise to a wholesaler, who then sells to a retailer, who then finally sells to a consumer.[136]

In contrast to the chain-and-link model for conspiracy, the Tenth Circuit has identified a second type of conspiracy that spreads more horizontally: the wagon wheel model.[137] In a wagon wheel conspiracy, the whole structure stems from someone in the hub of the metaphorical wheel who supplies a number of alleged conspirators with drugs in independent transactions, which form the spokes.[138] This wagon wheel structure, however, is insufficient to support a conspiracy conviction on its own as each spoke is nothing more than an independent transaction without interdependence with the other spokes.[139] In order to make a viable case out of a hub and spoke system, the spokes must be joined by a shared objective in order to connect each spoke and form

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132 *See id.* (comparing "vertical" or "chain-and-link" conspiracies to "hub-and-spoke" conspiracies).

133 *Id.*

134 *Id.*

135 *Evans*, 970 F.2d at 670 (alteration in original) (quoting United States v. Fox, 902 F.2d 1508, 1514 (10th Cir. 1990)).

136 *Id*. at 668 n.8.

137 *Id.*

138 *Id.*

139 *Id.* at 670.

the full conspiratorial wheel.[140] Only then will the circuit uphold a conspiracy conviction.[141]

Although the interdependence analysis serves a similar function to the other jurisdictions' factors analysis—ensuring that alleged coconspirators all have a significant shared criminal objective—its focus on structure and mechanical chain-like functioning, as opposed to the deeper relationship of mutual trust, can produce very different results.

This phenomenon is exemplified by the Tenth Circuit's decision in *United States v. Cornelius*.[142] In *Cornelius*, the defendant was a gang member who was convicted of conspiracy to distribute crack cocaine.[143] He appealed his sentence, arguing that the government had failed to prove the necessary interdependence element.[144] The court rejected his argument, however, holding that evidence of repeated sales to others who resold the drugs was entirely sufficient to support a jury finding of interdependence, and therefore, conspiracy.[145]

Other cases in the Tenth Circuit further corroborate this understanding of the interdependence requirement. In *United States v. Wright*, the court held that the defendant's repeated sales of drugs to someone who later resold them was interdependent because "the buyer-seller relationship is patently an interdependent one."[146] Similarly, the court in *United States v. Small* held that a defendant who repeatedly purchases drugs from a conspirator for the purposes of resale is interdependent with the conspiracy.[147] This interpretation produces results that contrast starkly with those observed in the Ninth and Seventh Circuits. Applying the Ninth and Seventh Circuits' approach to the rule, courts have repeatedly found that cases of continued sales between a buyer and seller fell well within the rule's protected space.[148]

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140 *Id.* at 670–71; *see also* Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 387, 388 (1957).

141 *Evans*, 970 F.2d at 670–71.

142 696 F.3d 1307, 1318 (10th Cir. 2012).

143 *Id.* at 1313.

144 *Id.* at 1317.

145 *Id.* at 1318.

146 506 F.3d 1293, 1299 (10th Cir. 2007).

147 423 F.3d 1164, 1183 (10th Cir. 2005).

148 *See, e.g.*, United States v. Loveland, 825 F.3d 555 (9th Cir. 2016); United States v. Lapier, 796 F.3d 1090 (9th Cir. 2015); United States v. Johnson, 592 F.3d 749 (7th Cir. 2010); United States v. Colon, 549 F.3d 565, 570–71 (7th Cir. 2008).

Accordingly, the Tenth Circuit's approach to the buyer-seller rule and interdependence requirement is properly characterized as much less protective than that of the other circuits.

III
THE NINTH AND SEVENTH CIRCUITS' INTERPRETATION OF THE BUYER-SELLER RULE SHOULD BE ADOPTED AS A UNIFORM NATIONAL RULE

When it comes right down to it, the Ninth and Seventh Circuits' approach to the buyer-seller rule proves to be the better way of approaching this doctrine for two critical reasons. First, this approach most faithfully adheres to what the doctrine of conspiracy is and targets the conduct that the Supreme Court has identified as the most harmful and worthy of deterrence. The Tenth Circuit's approach, by contrast, fails to most accurately target this same conduct. Second, this narrower approach to determining what sort of conduct is proscribed by the statute seems to square best with Congress's intent as expressed through the existence of other statutes on the same topic.

A. Adherence to the Conspiracy Doctrine and Deterrence of Harmful Conduct

If nothing else, the history of the conspiracy doctrine makes one thing very clear: it is all in the agreement. Since its earliest times, the conspiracy doctrine has focused on punishing the agreement and confederation between two parties who have the goal of violating the law—a focus that endures even into the modern era. In several cases during the past hundred years, the Supreme Court has been very clear that the focus of the law is on preventing the agreement.[149] In fact, the Court has gone so far as to say the act alone of scheming and plotting to subvert the law is sometimes of graver and more dangerous character than the crime conspired to.[150] This, the Court says, is because careful planning and preparation to commit a crime with others both increases the likelihood that the ultimate endeavor will succeed and decreases the likelihood that any of its members will get cold feet and back out before committing the contemplated crime.[151] Given that the Court has put so much emphasis on the harmfulness of the agreement in a conspiracy, it

149 Pinkerton v. United States, 328 U.S. 640, 644 (1946).

150 *Id.* (quoting United States v. Rabinowich, 238 U.S. 78, 88 (1915)).

151 Callanan v. United States, 364 U.S. 587, 593 (1961).

only seems fitting that the conspiracy law itself, and its interpretation in the courts, should be geared toward punishing the agreement itself to commit the crime. Accordingly, the question then becomes how well the buyer-seller rule interpretations respect the ultimate goal of punishing the agreement or scheme to commit a crime.

In this regard, the Ninth and Seventh Circuits' approach—using a list of factors to determine whether there is a deep mutual trust and vested interest in the scheme—is consistent with the Supreme Court's approach. Courts in these jurisdictions consistently take extra care to ensure that the conspiracy statute is applied only to those defendants whose conduct could hardly occur absent some sort of scheme. The most common example that appears in both jurisdictions concerns fronting. In these cases, courts, with good reason, place substantial weight on the presence of a fronting system between two individuals when one is already involved in the conspiracy.[152] Evidence of a drug fronting system is tantamount to direct evidence that the parties have plotted something beyond an arm's length transaction. A fronting system requires an agreement based on trust between the two parties to commit a crime beyond the single sale itself.

Aside from evidence of a fronting system, the other factors that this approach considers, albeit with less weight, are also all relevant in suggesting an agreement beyond just the immediate sale. Take the Ninth Circuit's *Moe* case as an example.[153] There, the factors considered were that the defendant and her supplier made transactions over the course of a year, that they had used special coded language, and that they warned each other about law enforcement activity.[154] All these factors suggest that mutual trust exists between the parties that is deeper than the trust between a separate buyer and seller, which, in turn, indicates that there might be a conspiratorial agreement in play. Further, whether parties use code is particularly relevant to conspiracy cases, as it is extremely unlikely that parties can use code without some sort of pre-planning or coordination.

Overall, it is clear that the factors that the Ninth Circuit has expressly listed and the Seventh Circuit has identified in case law bear on whether the parties had agreed to commit some offense beyond the actual sale

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152 *See, e.g.*, *Lapier*, 796 F.3d at 1094; United States v. Vallar, 635 F.3d 271, 287 (7th Cir. 2011).

153 United States v. Moe, 781 F.3d 1120 (9th Cir. 2015).

154 *Id.* at 1123.

itself. This in no small sense justifies the circuits' interpretations of the buyer-seller rule, as these interpretations are directly probative of what the Supreme Court considers to be the most dangerous part of a conspiracy—the agreement.[155]

Although its additional interdependence requirement is a step in the right direction, the Tenth Circuit's approach to the buyer-seller rule misses the mark. Conspiracy should focus on punishing the agreement to commit a crime. The Tenth Circuit, however, seems much more interested in punishing the sale of the drugs than it is in punishing the agreement to distribute them. Protecting end users has little to do with punishing those who would plot and agree to distribute drugs. In fact, the end-user-only interpretation borders on redundant as the end users that it purports to protect are already virtually impossible to prosecute for conspiring to distribute a controlled substance. This is because one of the essential elements of a conspiracy charge is that the defendant has the requisite mens rea to commit the substantive offense conspired to, in this case, distributing a controlled substance. The problem here is that an end user will virtually never have this necessary mens rea as he or she will intend to use the drugs, not distribute them. The people who remain unprotected by this rule, however, are buyers who make a onetime arm's-length drug purchase for redistribution without any further agreement from the seller. In doing so, the buyer unwittingly makes him or herself into a coconspirator when it turns out that the seller was a member of a much larger conspiracy.

Although the Tenth Circuit has interpreted the buyer-seller rule narrowly, whether it was proper to do so can be viewed fairly only in light of the circuit's unique requirement of interdependence between conspirators. Common sense would suggest that it is difficult for two conspirators to get involved in a chain-link structure for distribution and become interdependent on one another without agreeing to what is at the heart of the crime. The fact of the matter is, however, that substantial likelihood is not the same as certainty. If a drug dealer buys drugs several times from someone higher up the chain with the intent of redistributing, but does not agree to or discuss anything beyond the sale or meet any other members in the chain, the circuit has suggested that such evidence is sufficient to satisfy the interdependence requirement. Even if the courts find a conspiracy because neither party could accomplish their objective without the operation of the other link

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155 *Pinkerton*, 328 U.S. at 644 (quoting *Rabinowich*, 238 U.S. at 88).

in the chain, there is still no big picture agreement between the parties in this scenario. Though the parties are certainly criminally culpable in some sense, the Tenth Circuit's interpretation punishes those who have not actually caused the harm that the conspiracy statute was intended to prevent.

B. Conformance with Congress's Intent for the Statute

In addition to ensuring that drug conspiracy prosecutions target the proper conduct, the Ninth and Seventh Circuits' narrower interpretation of the buyer-seller rule seems to most accurately conform to Congress's intent for who the statute was meant to punish. Although the legislative history of the provision is not particularly revealing, Congress's intent is apparent from the statutory scheme of the federal drug laws. The conspiracy statute is hardly the only show in town when it comes to federal drug laws to prosecute under. In addition to the conspiracy statute, 21 U.S.C. § 841[156] prevents the substantive offense of manufacturing or distributing controlled substances and 21 U.S.C. § 844[157] prohibits the simple possession of a controlled substance. Yet another section of 21 U.S.C. § 846 provides the same penalty for attempting to distribute or possess a controlled substance.[158] At a minimum, it is clear that Congress carefully considered a wide variety of conduct and the varying degree of harm that it can cause when Congress created the offenses under this chapter and assigned specific penalties to each, making it difficult to argue that Congress intended for one particular section to be read more broadly than it appears on its face.

On that point, it is worth discussing in more detail the attempt prong of § 846. In many ways, the attempt prong is very similar to the conspiracy prong because it also punishes the inchoate offense of manufacturing and distributing a controlled substance. However, unlike with conspiracy, an attempt conviction does not require an actual agreement between the parties. Instead, it only requires the possessing and distributing parties to take a substantial step toward completing a crime, something the review of case law shows that defendants often do in conspiracies.[159] This is a less demanding requirement. In light of

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156 21 U.S.C. § 841 (2012).

157 21 U.S.C. § 844 (2012).

158 21 U.S.C. § 846.

159 United States v. Ramirez, 348 F.3d 1175, 1180 (10th Cir. 2003).

this fact, it makes little sense to take the position that Congress intended the conspiracy statute to be interpreted broadly and encroach into the realm of attempt when there is another prong of the same statute right beside it to catch defendants and cases that fall short of conspiracy.

In fact, there is likely another principled reason for arguing that Congress intended a sharper distinction between conspiracy and other drug crimes—the *Pinkerton* liability that comes attached to a conspiracy conviction. Liability for all the reasonably foreseeable offenses committed by coconspirators in furtherance of the conspiracy can make a huge difference in terms of punishment. It can be the difference between a sentence of years on a lesser drug offense and decades in prison when you include *Pinkerton*. Given how powerful of a tool this is, Congress likely wanted to limit its applicability both to avoid punishing lesser offenders too harshly, and to avoid obliterating the distinction between the penalties for less severe offenses and for conspiracies.

Overall, there are several important reasons why the Ninth and Seventh Circuits' narrow interpretation of buyer-seller rule liability is the more appropriate interpretation for the court system as a whole.

IV
OBJECTIONS AND THE COUNTERARGUMENT FOR THE TENTH CIRCUIT'S APPROACH

Although several reasons support the adoption of the Ninth and Seventh Circuits' interpretation of the buyer-seller rule, there is still a valid counterargument in favor of the Tenth Circuit's interpretation. The Tenth Circuit's interpretation provides much clearer notice of what sort of conduct is prohibited and of the penalty affixed to it.

In our criminal justice system, a cornerstone concept of justice is the idea of notice, which is inherent in the Due Process Clause. A defendant has to have had notice both of the nature of prohibited conduct and of the penalties that he or she will incur for engaging in it.[160] When it comes to statutory analysis, the idea that notice is so essential lives in the judicially developed "void for vagueness" doctrine.[161] Under this doctrine, the courts will invalidate a statute that fails to give an ordinary person notice of the conduct that it punishes

[160] Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015).

[161] *Id.*

and of the range of available sentences for the conduct.[162] The idea behind the notice requirement is that punishing someone for something is fair only if he or she had warning that there was a particular punishment attached to that conduct.[163] The vagueness doctrine itself, has generally been used to evaluate statutes.[164] Nonetheless, that does not mean that the principle of notice that underlies the doctrine cannot be used as an important metric to informally evaluate other facets of the criminal justice system. After all, there is hardly a salient difference in fairness between an individual being punished based on an unclear judicial interpretation of a statute and an individual being punished based on an unclear statute itself. Accordingly, applying the vagueness test informally to the different circuits' interpretations of the buyer-seller rule could make for a valid critique regarding the fairness of each method. In fact, such an analysis might even prove necessary in the context of the conspiracy statute. Even though the conduct that the statute prohibits (the agreement) is seemingly clear, the parties might not realize they formed an agreement. Accordingly, a potential defendant must have adequate notice of the conduct that might be interpreted as indicating an agreement.

The Ninth and Seventh Circuits' factors-based analysis, though flexible, proves problematic in the face of a vagueness analysis. The issue with using a factors test is that it is rarely ever clear how many of the factors a defendant has to check off before coming within the bounds of the statute or what weight is given to each individual factor. Moreover, as the Seventh Circuit even pointed out, the difficulties in weighing these factors are often compounded by the inconsistency of judicial decisions on the subject.[165]

These problems are apparent in both the Seventh and Ninth Circuits. In the Seventh Circuit, for example, the court has made a decision like *Johnson*, where the court ruled that the evidence was insufficient to

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162 *E.g.*, Beckles v. United States, 137 S. Ct. 886, 892 (2017); Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2052 (2015).

163 San Filippo v. Bongiovanni, 961 F.2d 1125, 1135 (3d Cir. 1992).

164 *See* Skilling v. United States, 561 U.S. 358, 402–03 (2010) ("[A] penal *statute* [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." (first alteration not in original) (emphasis added) (citation omitted)).

165 United States v. Brown, 726 F.3d 993, 1002 (7th Cir. 2013).

support a conspiracy conviction, even though it found evidence that the parties (1) engaged in repeated sales, (2) engaged in these sales over a ten-month period, (3) dealt in standardized quantities, (4) had a prolonged relationship of mutual trust, and (5) warned each other about law enforcement activity.[166] However, the court has then gone and made a decision like *Vallar*, where it held that evidence of suppliers fronting drugs to the defendant on two or three occasions alone was sufficient to sustain a conspiracy conviction.[167] I bring up these examples not to criticize the court's decision in either case as incorrect, but rather to point out how, despite identifying all these as relevant factors, the invisible weight attached to certain factors can produce results that are not intuitively apparent to someone unfamiliar with case law.

Likewise, in the Ninth Circuit, the court has made decisions like *Lapier*, where it also held that a fronting deal alone was sufficient to sustain a conviction. However, the same court also made the *Moe* decision, wherein the defendant and supplier had to (1) coordinate closely to indicate mutual trust, (2) engage in a year's worth of transactions, (3) use codes to communicate, and (4) warn each other about law enforcement in order to support a conspiracy conviction. Again, these decisions are not necessarily incorrect, just unpredictable, which does not sit well with the notice requirement of the Due Process Clause.

By contrast, the Tenth Circuit's interpretation for determining whether two parties have made an agreement is much clearer and more consistent. First and foremost, the Tenth Circuit's interpretation of the buyer-seller rule is supremely clear as to when the rule applies. If an individual is an end user of drugs, that person is protected. All others are not. Whether you agree with this interpretation or not, it is undeniable that this system is predictable and easy to understand. Now when you toss in the additional requirement of interdependence the water muddies a bit, but is far from unnavigable. The circuit's relatively literal interpretation of the word "interdependent" has led to a pretty clear definition. If the defendant depended on a conspirator or a conspirator depended on the defendant such that neither would achieve their goal if the other failed to perform, then you have interdependence.

166 United States v. Johnson, 592 F.3d 749, 756–57 (7th Cir. 2010).

167 United States v. Vallar, 635 F.3d 271, 287 (7th Cir. 2011).

Again, like it or not, this method of determination is certainly straightforward.

Overall, given that our criminal law system, and even legal system at large, aspires to achieve predictability when it comes to an individual's liability and what sort of conduct will be penalized, the Tenth Circuit's approach has to be praised for its consistency. Likewise, the Ninth and Seventh Circuits' factors system are vulnerable to some criticism because they can produce inconsistent and confusing rulings. Notably, this sort of reliability and predictability is all the more important in the context of conspiracy law because the stakes are often higher here than in other criminal law due to *Pinkerton* liability. The court's determination of whether someone does or does not fall within the scope of a conspiracy is often the difference between escaping liability and being held responsible for a whole litany of offenses committed by coconspirators.

CONCLUSION

If you take one thing away from this Comment, let it be this: the incongruity in conspiracy law needs to be resolved. One defendant losing twelve years of her life while the other walks away scot-free despite engaging in substantially the same conduct is simply too significant of a disparity to ignore. In terms of how to resolve it, the factors-focused interpretation of the buyer-seller rule advanced by the Ninth and Seventh Circuits seems to be the best way, because it most accurately targets the conduct the conspiracy is supposed to deter. It also most closely aligns with what all indicators suggest was Congress's intent in passing the statute. In order to actually resolve this disparity, the matter will likely have to be taken up again by the Supreme Court. The Court has not addressed the buyer-seller rule in nearly seventy years; in no small sense the doctrine is due for a refresh. Moreover, as the number of cases illustrating the same sort of disparity in results grows, the pressure to address the question will only grow along with it, making it more and more likely that this topic will receive the final edict it needs to remedy the divide. Until that day, however, we will just have to make do with what we have, trying our best to work with what the courts have given us.